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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

1809-1815,

5, 6, 7, 8, 9 Cranch,

BOOK 3,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

WITH

"NOTES ON U. S. REPORTS"

BY

WALTER MALINS ROSE.

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PREFACE TO SECOND EDITION.

THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

At the end of each volume of reports, several of which are bound in every book of this set, will be found Rose's Notes for that volume. These volumes are separated by colored sheets.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States.

IN FEBRUARY TERM, 1809.

VOL. V.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. 1.

Supreme Court of the United States.

FEBRUARY TERM, 1809.

THE UNITED STATES *v.* WEEKS.

A writ of error does not lie directly from the Supreme Court of the United States to the District Court of the District of Maine, although the latter has all the original jurisdiction of a circuit court.

THE writ of error in this case was dismissed by the assent of the Attorney General, it having been issued from this court directly to the District Court for Maine district; whereas by the 10th sect. of the judiciary act of 1789 (vol. 1, p. 55), writs of error lie from decisions in that court to the Circuit Court of Massachusetts in the same manner as from other district courts to their respective circuit courts; notwithstanding that the District Court of Maine has all the original jurisdiction of a circuit court.

CHARLES ALEXANDER
v.
THE MAYOR AND COMMONALTY OF ALEXANDRIA.

The corporation of Alexandria has power to tax the lots and lands of non-residents. It is not necessary that the lots should be half-acre lots.
Those taxes cannot be recovered by motion, unless in the case of a person holding land, who has no other property in the town.

ERROR to the Circuit Court of the District of Columbia, sitting at Alexandria, to reverse a judgment of that court rendered against the plaintiff in error on motion, for taxes due to the defendant in error for paving the streets in Alexandria.

2*] *A bill of exceptions stated that the plaintiff below produced and read to the court the following acts of the general assembly of Virginia, viz., "An act for incorporating the town of Alexandria in the county of Fairfax, and the town of Winchester in the county of Frederick," passed October 4th, 1779, by which it is enacted that "The mayor, recorder, aldermen and common councilmen shall have power to erect and repair workhouses, houses of correction, and prisons and other public buildings for the benefit of the said town; and to make by-laws and ordinances for the regulation and good government of the said town," not repugnant, &c. ("and to assess the inhabitants for the charge of repairing the streets and highways,) to be observed and performed by all manner of persons residing within the same, under reasonable penalties and forfeitures, to be levied by distress and sale of the goods of the offenders for the public benefit of the said town."

Also the act of 1786, "To extend the limits of the town of Alexandria," by which it is enacted that the limits of that town "shall extend to and include as well the lots formerly composing the said town as those adjoining thereto which have been and are improved."

Also the act of December 16th, 1796, "Concerning the town of Alexandria," by which it is enacted "That it shall and may be lawful for the mayor and commonalty of the town of Alexandria to recover of and from all and every person or persons holding land within the limits of the said town, and who have no other property within the said town on which the taxes or assessments imposed on such property for paving the streets therein can be levied, the amount of such taxes or assessments, by motion in the court of the county or corporation where such person or persons reside; provided that such person or persons have ten days' previous notice of such motion, and the amount of the taxes or assessments due from him, her or them. And provided also that nothing herein contained shall be so construed as to empower the court to give judgment against any person or persons residing out of the limits of the corporation *of Alexandria, and owning [*3 ground therein, having no house on it, where the service (to compensate which the tax or assessment has been or may be imposed) has been or may be performed before the last day of February, 1797; but for the collection of such taxes, the same means may be used which would have been lawful before the passage of this act."

Also the act of 13th of December, 1796, "Adding to the town of Alexandria certain lots contiguous thereto, and for other purposes therein mentioned," the preamble of which recites, that "Whereas several additions of lots contiguous to the town of Alexandria have been laid off by the proprietors of the land, in lots of half an acre each, extending to the north, to a range of lots upon the north side of a street called Montgomery; upon the south, to the line of the District of Columbia; upon the west, to a range of lots upon the west side of West street; and upon the east, to the river Potomac; that many of the lots in these additions have already been built upon, and many more will soon be improved; and whereas it has been represented to the general assembly that the inhabitants, residing on the said lots, are not subject to the regulations made and established for the orderly government of the town, and for the preservation of the health of the inhabitants, by the prevention and removal of nuisances, upon which their prosperity and well being do very much depend,"

Be it therefore enacted, that each and every lot or part of a lot within the limits aforesaid, on which at this time is built a dwelling house

of at least sixteen feet square, or equal thereto in size, with a brick or stone chimney, and that each and every lot within said limits which shall hereafter be built upon, shall be incorporated with the said town of Alexandria, and be considered as part thereof."

Also an act "Extending the jurisdiction of the mayor and commonalty of the town of Alexandria, and for other purposes," the preamble whereof recites, that "Whereas by an act of assembly passed in the year 1796, entitled, an act adding to the town of Alexandria certain lots contiguous thereto, and for other purposes **4***] therein mentioned, *it is enacted that certain improved lots, and all others as they become so improved, within the bounds in the said act mentioned, be added to, and made part of, the said town of Alexandria, thereby leaving out of the jurisdiction of the mayor and commonalty of the said town, the unimproved lots within the limits aforesaid, as long as they shall so remain unimproved; by which means the prosperity of the said town is in a great degree prevented,

Sect. 1. "Be it therefore enacted, That the unimproved lots within the limits aforesaid shall be and are hereby incorporated with and considered as a part of the said town of Alexandria, and subject to the same regulations as the other parts thereof.

Sect. 2. "The mayor and commonalty of the said town are hereby authorized and empowered, whenever they may deem it proper, to open, extend, regulate, pave and improve the streets of the said town; provided, however, that they shall make to every person or persons injured by the extension of any of the said streets, such compensation, out of the funds of the corporation, as to the said mayor and commonalty shall appear to be just."

The plaintiffs produced also the necessary by-laws and documents to show the regularity and amount of the assessment.

On the part of the defendant it was proved that he never was an inhabitant of the town of Alexandria—that the property assessed was not within the original limits of the town, but lies within the limits described by the act "Adding to the town of Alexandria certain lots contiguous thereto, and for other purposes."

It was not proved that the defendant had ever laid off any part of the property into lots of half an acre each, or in any other manner, or that he had ever built any dwelling house thereon. But it was proved that always after the assessment the defendant had personal property **5***] within the town, on which *the assessments could have been levied (but it did not appear that the personal property had been on any of the lots assessed); and that the sergeant of the town informed the mayor and common council that he could make distress on the defendant's personal property in the town of Alexandria, for the assessments.

The property assessed was part of a tract of land which the defendant holds in the neighborhood of the town. The commissioner of the streets of the town had been directed by the mayor to make a plan of the town, and had applied to the defendant to know whether he did not wish to have the plan extended on his land which lay adjoining the town on the north, to which the defendant replied that he wished to have four streets and four ranges of squares laid off through his land; and being requested to name the streets, he called them Pendleton, Wythe, Madison and Montgomery, by which names they were designated on the plan; and the defendant had sold or let lots agreeably to the plan, and designated as bounded by those streets. Some of those streets were actually laid out, and the corners designated by stakes and stones at the request of individuals. On the plan the defendant did not designate any smaller quantity of ground than regular squares of two acres each, agreeably to the manner in which the town was laid off by the act for establishing the same.

The property assessed laid within the four new ranges of squares above mentioned, and the defendant had by several deeds sold and conveyed several squares and parcels of land less than two acres within those four ranges of squares.

C. Simms, for plaintiff in error, contended,

1st. That the land was not liable to be taxed until it was laid off into half-acre lots, and that it had never been so laid off, although it had been laid off into two-acre squares.

2d. That the corporation had power to assess inhabitants only; and,

*3d. That there cannot be a judgment upon [***6** motion, because there was always personal property of Mr. Alexander in the town which might have been distrained for the taxes.

Swann, contra.

The corporation has power to make all by-laws for the good government of the town, and not repugnant to the general laws of the state. This included the power to order and provide for the pavement of the streets, and to raise taxes for that purpose, by assessments on the persons and property within the town.

The acts of the 13th and 16th December, 1796, clearly recognize the power to tax the property of non-residents.

It was unnecessary to lay out the half-acre lots. The squares were regularly divided into four lots each by ideal lines.

The mode of collecting the taxes by distress and sale of personal property, was only a cumulative remedy. The corporation was not bound to resort to it. It was a more severe and harsh manner of proceeding than that by notice and motion, especially as the principal object of both parties was to try the right of the corporation to tax the property.

February 8. MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows, viz.:

In the proceedings in this cause two errors are assigned by the plaintiff.

1st. That the corporation had no power to assess the tax for which the judgment was rendered.

2d. That the judgment is irregular, because rendered on motion.

*Both these points are to be decided by [***7** the several acts of the legislature of Virginia respecting the town of Alexandria.

In support of the first it is contended,

1st. That the corporation has no power to tax property not belonging to an inhabitant of the town; and Charles Alexander was not an inhabitant.

2d. That the property, on which this tax was assessed, was not within the corporation.

The words of the act of 1779, which is the first act shown to the court that confers the power of taxation, are these: "The mayor, recorder, aldermen and common councilmen shall have power to erect and repair workhouses, houses of correction and prisons, or other public buildings, for the benefit of the said town; and to make by-laws and ordinances for the regulation and good government of the said town; provided such by-laws or ordinances shall not be repugnant to, or inconsistent with, the laws and constitution of this commonwealth, and to assess the inhabitants for the charge of repairing the streets and highways."

For the plaintiff it is contended that the power of taxation, here given, is, in terms, confined to assessments made on the inhabitants. On the part of the defendants it is urged that the express power to assess the inhabitants is for the sole purpose of improving their streets, and that an express power is also given to make expensive establishments, the means of erecting which could be furnished only by taxes; that the power to make by-laws must therefore necessarily be construed to involve the power of taxing, at least for these objects.

Without deciding this question as depending merely on the original law, it is to be observed that acts *in pari materia* are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced **8***] which show *the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.

The act of the 16th of December, 1796, contains this clause: "It shall and may be lawful for the mayor and commonalty of the town of Alexandria to recover, of and from all and every person or persons holding land within the limits of the said town, and who have no other property within the said town on which the taxes or assessments imposed on such property for paving the streets therein can be levied, the amount of such taxes or assessments, by motion in the court of the county or corporation where such person or persons reside."

This clause most obviously contemplates a full right to assess taxes on property lying within the town and belonging to non-residents; for it gives a right to recover such assessment in the court of any county or corporation in which the owner of such property may reside. It is either a legislative exposition of a power formerly granted, or the grant of a new power.

If the words of the enacting clause could admit of doubt, the proviso would remove that doubt. It is that the clause which has been recited should not "be so construed as to empower the court to give judgment against any person or persons residing out of the limits of the corporation of Alexandria, and owning ground therein, having no house on it, where the service, to compensate which the tax or assessment has been or may be imposed, has been or may be performed before the last day of February, 1797; but for the collection of such tax the same means may be used which would have been lawful before the passage of this act."

*This proviso shows, as clearly as words [***9** can show, the sense of the legislature in favor of taxing the land of non-residents.

The same act appears to the court to remove any doubt, which might otherwise exist, respecting the second branch of this question.

Upon a critical examination of the act of the 13th of December, 1796, the court would feel much difficulty in declaring that it comprehended in the corporation of Alexandria only that ground which was actually divided into half-acre lots, and the court would be the less inclined to take this distinction, because no inducement for making it is to be found in the nature of the thing, or could have existed with the legislature.

The preamble states the lots, represented as contiguous to the town of Alexandria, to have been laid off by the proprietors, in lots of half an acre each, within certain limits which are described by the law. The enacting clause drops the quantity of which a lot is to consist, and declares that every lot, or part of a lot, within the limits described, which had been or should be improved, should be made part of the town of Alexandria. The act of 1798 annexes to the town all the unimproved lots within those limits. The case finds that the property on which the tax for which the judgment is rendered was imposed, is within those limits, and was laid off as part of the town in squares of two acres, but these squares were not actually subdivided into half-acre lots.

The term half-acre used in the preamble of the act of 1796 is a description of a circumstance probably contained in the representation on which the law was founded. But it is impossible to consider that part of the representation as material to the law. If the squares were regularly laid out, the subdivisions of those squares were unimportant, for that subdivision would always depend on the caprice of purchasers and sellers. Lots and parts of lots might *be separated, or annexed to each [***10** other, at will. The enacting clause, therefore, of the first act, comprehends every lot, or part of a lot, within the described limits, which had been or should be improved; and the enacting clause of the act of 1798 comprehends every lot within those limits. That a square comprehended in those limits, laid off as part of the town, and containing precisely four half-acre lots, should be considered as excluded from the town, and not liable to taxation for the improvement of the streets, for the single reason that the proprietor had not marked thereon the lines of subdivision, would not be readily conceded.

But if a doubt respecting the sense of the legislature could otherwise be entertained, that doubt is removed by the act of the 16th of December, 1796, already recited, which particularly respects the power of taxation, and gives the remedy by motion.

That act drops the term "lot," and uses the term "land." It authorizes the corporation to recover by motion against any person "holding *land* within the *limits* of the town," "the taxes

or assessments imposed thereon." The proviso, which has been also recited, uses the term "ground," and considers every person owning *ground* within those limits as liable to be taxed. The 3d section of the same act declares, "that when the proprietor of any lot or *ground* within the said town shall fail to fill up any pond of water, or remove any nusiance," as directed by the corporation, the mayor and commonalty may exercise corporate powers in the case. If the squares in question do not consist of lots, because the subdivisions have not been actually marked, yet they consist of *land*, they consist of *ground*, and being within the limits of the town, they are, in the opinion of the court, within the corporation, and subject to taxation.

But the remedy in the actual case is not by motion. The act affording this remedy gives it only in a specified case. It is given only in the case of "a person or persons holding land **11***] within the limits of *the said town, and who have no other property within the said town." This is not, as has been said, a direction to the officer of the corporation, but is a description of the precise case in which alone the remedy by motion is allowed. It being found that Charles Alexander had property in the town from which the officer could have levied the tax assessed on him, a motion for that tax was not sustainable. If the corporation did not choose to risk levying the tax by seizure, they might have instituted a suit to determine their right.

This court is unanimously of opinion that the Circuit Court erred in giving judgment for the plaintiff on motion, and therefore directs that the said judgment be reversed and annulled.

HENDERSON *v.* MOORE.

The refusal of the court below to grant a new trial is not error.

Upon the plea of payment to an action of debt upon a bond conditioned to pay 500 dollars, evidence may be received of the payment of a smaller sum with an acknowledgment by the plaintiff that it was in full of all demands; and from such evidence, if uncontradicted, the jury may and ought to infer payment of the whole.

ERROR to the Circuit Court of the District of Columbia.

On the plea of payment to an action of debt upon a bond, for 500 dollars, dated in 1781, the defendant offered evidence to prove that in the year 1797 the plaintiff acknowledged that he had received of the money of the defendant to the amount of about 1,000 dollars, of one Willoughby Tibbs, out of the amount of a decree which the defendant had obtained against him for 3,000 dollars, and that the money which he so received was in full of all his claims against the defendant, the plaintiff having paid for the defendant several sums of money. There was no settlement made, nor any receipt given. "Whereupon the plaintiff prayed the court to instruct the jury, that if from the evidence they should be satisfied that the bond had not been fully paid off, no declaration of the plaintiff's 'that his claims against the defendant were all satisfied' would be a bar to his recovery in **12***] this action; which instruction *the court refused to give as prayed, but directed the jury that if they should be satisfied by the evidence that the defendant, in the year of 1797, paid the plaintiff a sum of money less than the amount mentioned in the condition of the bond, which the plaintiff at that time acknowledged to be in full satisfaction of all his claims against the defendant, such payment and such acknowledgment are competent evidence upon the plea of payment, and that the jury may and ought to presume therefrom that the whole sum mentioned in the condition of the said bond has been paid to the plaintiff, unless such presumption be repelled by other evidence in the cause; to which refusal and instruction the plaintiff excepted."

The verdict being for the defendant, the plaintiff's counsel moved the court for a new trial, and grounded his motion upon sundry affidavits tending to prove that the whole amount of the bond remained due to the plaintiff, and that he was surprised by unexpected testimony at the trial. But the court refused to grant a new trial.

Two errors were assigned.

1. That the court below refused a new trial.

2. That the court ought to have given the instruction to the jury as prayed by the plaintiff; and ought not to have given the direction which they did.

MARSHALL, *Ch. J.*, said that this court had decided at the last term, that a refusal by the court below to grant a new trial was not error.

The case being submitted upon the other point, without argument,

MARSHALL, *Ch. J.*, delivered the opinion of the court,

That there was no error in the opinion of the court below. A part of the money due on the bond *might have been paid before; and [***13** such an acknowledgment, upon receipt of a sum smaller than the amount of the condition of the bond, was good evidence upon the plea of payment.

Judgment affirmed with costs.

Cited—9 Wheat. 578; 1 Pet. 169; 5 How. 191; 1 Wall. 598; 3 Id. 105; 7 Wall. 502; 13 Wall. 604; 3 Otto 301; 2 Wood. & M. 3.

COOKE AND OTHERS *v.* WOODROW.

In an action of trover, if the judgment below be in favor of the original defendant, the value of the matter in dispute upon the writ of error in the Supreme Court of the United States, is the sum claimed as damages in the declaration. Due diligence must be used to obtain the testimony of the subscribing witness.

If inquiry be made at the place where the witness was last heard of, and he cannot be found, evidence of his handwriting may be admitted.

ERROR to the Circuit Court of the District of Columbia, in an action of trover brought by the plaintiffs in error for sundry household goods.

A bill of exceptions stated that the plaintiffs on the trial produced in evidence to support their title to the goods, a certain paper writing signed by one John Withers, to which one John Pierson had subscribed his name as a witness, and offered parol evidence to prove that

the subscribing witness "had upwards of a year ago left the District of Columbia, and that before he left the said district he declared that he should go to the northward, that is to say, to Philadelphia or New York, and said he had a wife in New York. That the said subscribing witness went from the said district to Norfolk, and that when he got there he declared that he should go on further to the south, but where was not known, and that he has not been heard of by the witness for the last twelve months. It appeared that a subpœna had been issued in this case, for the said subscribing witness, directed to the marshal of the District of Columbia, but he could not be found in the said district by the said marshal. The plaintiff then offered to prove the handwriting of the subscribing witness and of the said John Withers to the said writing, but the court refused to permit the plaintiffs to produce evidence of the handwriting of the said subscribing witness, and refused to permit the plaintiffs to prove the handwriting of the said John Withers, otherwise than by the testimony of the said **14***] *subscribing witness; to which refusal the plaintiffs excepted."

C. Simms, for the plaintiffs in error, suggested that this court must be satisfied by evidence (other than the declaration) that the sum in demand exceeded 100 dollars, exclusive of costs; and cited the rule made in the case of *Course* v. *Stead's Executors* (ante, vol. 1, p. 17).

But MARSHALL, *Ch. J.*, said, that that rule applied only to cases where the property itself (and not damages) was the matter in dispute—such as actions of *detinue*, &c.

If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but where the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value.

The point arising upon the bill of exceptions was submitted without argument.

MARSHALL, *Ch. J.*, after stating the case as it appeared in the bill of exceptions, observed, That the court had some difficulty upon the point. The general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party. In consequence of that rule, the testimony of the subscribing witness must be had if possible. But if it appear that the testimony of the subscribing witness cannot be had, the next best evidence is proof of his handwriting. In the present case it does not appear to the court that the testimony of the subscribing witness could not have been obtained if proper diligence had been used for that purpose. It does not appear that the witness had ever left Norfolk. It is not stated that any inquiry concerning him had been made there. If such inquiry had been made, and he could not be found, evidence of his handwriting might have been permitted. But **15***] *as the case appears in the bill of exceptions, the court below has not erred.

Judgment affirmed with costs.

Aff'g—1 Cranch, 437.
Distinguished—9 Wheat. 528; 3 Pet. 34, 35.
Cited—4 Wall. 164; 16 Pet. 332; Crabb. 66.

MANDEVILLE AND JAMESSON *v.* WILSON.

Amendments are within the discretion of the court below.

Quære, whether the court ought to permit amendments after judgment upon demurrer.

In the statute of limitations, the exception in favor of merchants' accounts applies as well to actions of *assumpsit* as to actions of account.

It extends to all accounts current which concern the trade of merchandise.

An account closed, by the cessation of dealings between the parties, is not an account stated.

It is not necessary that any of the items should have been charged within the five years, nor that the declaration should aver the money to be due upon an open account between merchants.

ERROR to the Circuit Court of the District of Columbia, sitting at Alexandria, in an action of *assumpsit* brought by the defendant in error for goods sold and delivered, and for the hire of a slave.

The defendants below pleaded *non assumpserunt*, and the statute of limitations.

To the latter plea the plaintiff replied, "that the said money in the several promises and undertakings aforesaid above mentioned in the declaration, at the time of the making of the promises and undertakings aforesaid, became due and payable on an account current of trade and merchandise had between the said plaintiff and the said defendants as merchants, and wholly concerned the trade of merchandise, to-wit, at Alexandria aforesaid, in the county aforesaid, and this he is ready to verify."

To which the defendants rejoined, "that in the month of January, 1799, the partnership of Mandeville and Jamesson was dissolved, and public notice given of such dissolution, of which the said plaintiff had a knowledge at the time, and that at the time of the said dissolution of the partnership aforesaid, all accounts between the said plaintiff and the said Mandeville and Jamesson ceased, and since which time no accounts have existed, or been continued, between the plaintiff and the said defendants, which the said defendants are ready to verify."

The plaintiff surrejoined, "that the goods, wares *and merchandise in the said dec- [***16** laration mentioned, were by the said plaintiff sold and delivered to the said defendants, and the said negro in the said declaration mentioned was hired by the plaintiff to the defendants before the month of January, in the year 1799, the time when the said defendants in their said rejoinder state their said copartnership was dissolved, and this the plaintiff is ready to verify."

To this surrejoinder the defendants demurred, and assigned for cause of demurrer, that "the surrejoinder is a departure in this, that it is no answer to the defendants' rejoinder."

Upon joinder in demurrer, the court below gave judgment for the plaintiff.

A bill of exceptions stated, that on the day on which the cause was called for trial, the court permitted the plaintiff to withdraw his general replication to the plea of the statute of limitations, and to file the above special replication. And that after the court had given judgment upon the demurrer, it refused to permit the defendants to withdraw their demur-

rer, and their rejoinder, and to file a general rejoinder to the plaintiff's replication.

Youngs, for the plaintiffs in error.

1. The plaintiff below ought not to have been permitted to withdraw his general replication, and to reply specially.

LIVINGSTON, *J.* Is that a proper subject for a writ of error?

Youngs. There are other points; but I suppose it is good ground for a writ of error. It creates delay; and although amendments may be matter of discretion with the court, yet the court is bound to exercise its discretion soundly and legally; it is a discretion which this court will control.

2. The exception in the statute of limitations in favor of merchants' accounts, applies only **17***] to accounts *current, where there have been mutual dealings, and where some of the items are more and some less than five years' standing. In such cases the last item shall draw all the rest out of the statute. But if all dealings between the parties have ceased for more than five years next before the commencement of the suit, the whole account is barred. An account which has ceased to run is an account closed. An account closed is an account stated; and it is expressly decided that an account stated is not excepted from the general operation of the statute. Besides, the exception of the statute is only in favor of actions of account, and not actions of *assumpsit*. (2 Ves. 400, *Welford* v. *Liddel;* 4 Mod. 105, *Chievly* v. *Bond;* 2 Saund. 124, *Weber* v. *Tivill.*)[1]

The replication is repugnant to the declaration; for money due for the hire of a negro cannot be "money due on an account current of trade and merchandise."

The declaration ought to have stated the money to be due upon such an account.

3. The court below ought to have permitted the defendant to withdraw his demurrer and his rejoinder, and rejoin generally to the replication

E. J. Lee, contra, having cited 3 Wooddeson, 83, 85, as to the principal question, was stopped by the court, as to the error alleged in the permission given by the court below to the plaintiff to amend before trial, and the refusal to allow the defendants after judgment upon the demurrer to withdraw it and take issue on the fact.

MARSHALL, *Ch. J.*, observed that the permitting amendments is a matter of discretion. He did not mean to say that a court may in all cases **18***] permit or *refuse amendments without control. A case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other party to amend also before trial. But that is not this case. After the parties have gone to trial upon a set of pleadings, and the judgment has been pronounced, it may be doubted whether the court can permit the demurrer to be withdrawn. It would not be right in all cases, after the party had taken issue upon the law, and it has been decided against him, to suffer him also to take issue upon the fact. If it be permitted, it is a matter of great indulgence.

There is no ground for the objection taken to the declaration in this case, that it ought to have averred that the money was due on an account concerning the trade of merchandise.

A declaration need not set forth the circumstances which take the case out of the statute of limitations.

Youngs cited 6 T. R. 691, *Holt* v. *Scholefield*, to show that when general damages are given, if there be one bad count in the declaration, the court will arrest the judgment.

MARSHALL, *Ch. J.* But by the statute of jeofails in Virginia, under whose laws this case was tried, the judgment shall be rendered for the plaintiff, upon a general verdict, if there be one good count in the declaration.

On a subsequent day

MARSHALL, *Ch. J.*, delivered the opinion of the court,

That the exception in the statute applied to actions of *assumpsit*, as well as to actions of account. That it extended to all accounts current which concern the trade of merchandise between merchant and merchant. That an account closed by the cessation of dealings between the parties is not an account *stated, [***19** ed, and that it is not necessary that any of the items should come within the five years. That the replication was good, and not repugnant to the declaration; and that the rejoinder was bad.

Judgment affirmed with costs.

Cited—5 Cranch 358; 6 Pet. 167; 11 Wall. 676; 5 Mason, 524, 527; 5 Sawy. 593.

FAIRFAX'S EXECUTOR
v.
ANN FAIRFAX.

Upon the issue of *plene administravit* the jury must find specially the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict.

If the defendant below intermarries after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an action of *assumpsit* brought by the defendant in error against the plaintiff in error, as executor.

Upon the issues of *non assumpsit* and *plene administravit*, the jury found a general verdict, which was recorded in this form: "We of the jury find the issues for the plaintiff, and assess the damages to two hundred and twenty dollars and ninety-five cents." Upon which verdict the judgment of the court was "that the plaintiff recover against the defendant her damages aforesaid in form aforesaid assessed, and also her costs by her about her suit in this behalf expended, to be levied of the goods and chattels of the said Bryan Fairfax, deceased, at the time of his death, in the hands of the said defendant to be administered, if so much, &c., but if he hath not so much, then the costs aforesaid to be levied of the proper goods and chattels of the said defendant; and the said defendant in mercy," &c.

1.—But see *Sergeant Williams's* note to that case in his edition of Saunder's Reports. The statute of Virginia, so far as it relates to the questions in this case, is precisely like the British statute of 21 Jac. c. 16, s. 3.

The error relied upon by the plaintiff in error was, that the jury had not found the amount of assets in his hands to be administered.

Swann, for the plaintiff in error, having cited Esp. N. P. 263, and the case of *Booth's Executors* v. *Armstrong* (2 Wash. 301), was stopped by the court, who requested to hear Mr. E. J. Lee on the other side.

20*] **E. J. Lee*, contra.

There was no necessity for the jury to find specially the amount of the assets, for if ever so small a sum had been found, the judgment would have been the same as if assets had been found to the whole amount of the plaintiff's claim. The sum found by the jury would not alter the judgment. It would still have been for the whole debt *de bonis testatoris si, &c.*, and *si non*, then the costs *de bonis propriis*.

But here the jury have in substance found that the defendant had assets more than sufficient to satisfy the debt due to the plaintiff; for that is the allegation of the plaintiff in her replication, and the jury have found the issue for the plaintiff upon that replication.

It is not more necessary to find specially upon this issue than upon *non assumpsit* or *nil debet*.

There is a difference between this case and that of *Booth's Executors* v. *Armstrong* (2 Wash. 301), for there the finding was not, as here, generally, "we find the issues for the plaintiff;" but "we find for the plaintiff the debt in the declaration mentioned, and one penny damages." The finding there was special, and could not be construed to be a finding of the matter of the plaintiff's replication as the finding in the present case may and ought to be.

The cases cited to show that the amount of assets found could not alter the judgment were, 8 Co. 34, *Mary Shipley's* case; Cro. Eliz. 592, *Waterhouse* v. *Woodstreet;* Styles, 38, *Gaudy* v. *Ingham;* Freem. 351, *Oxendan* v. *Hobdy;* Bro. Execution, pl. 34, pl. 82; Godbolt, 178, *Newman* v. *Babington;* Cro. Car. 373, *Dorchester* v. *Webb*, Lex Test. 414.

February 21. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

21*] *The verdict ought to have found the amount of the assets in the hands of the defendant to be administered.

The cases cited to show that the judgment must be for the whole sum, if the verdict find any assets, have been overruled. This is declared by Lord Mansfield, in a case cited in Gwillim's edition of Bac. Abr. and the law is now well understood to be, that the executor is only liable for the amount of assets found by the jury. In Virginia the law has been so settled. The case cited from 2 Wash. Rep. is precisely in point. The counsel for the defendant in error attempted to show a distinction arising from the difference of form in which the verdicts were rendered. But the two verdicts appear to the court to be precisely alike in substance.

The defendant in error relies on the form of the issue. She contends that as the replication alleges that the defendant has assets more than sufficient to satisfy the debt, the finding of that issue for the plaintiff below, is in effect finding that the defendant has assets more than sufficient to satisfy the debt; and if so, it is wholly immaterial what the real amount of assets is. But if this were the issue, and the demand were 500 dollars, if the jury should find that the defendant had assets to the amount of 499 dollars, the judgment must be for the defendant.

But the law is not so. An executor is liable for the amount of assets in his hands, and not more.

The issue really is, whether the defendant has any, and what amount of assets in his hands.

Judgment reversed.[1]

Rev'g—1 Cranch C. C. 292.
Cited—8 Wheat. 679; 14 Pet. 169; 3 Otto 43.

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*M'KEEN *v.* DELANCY'S LESSEE. [*22

Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it had been the long-established practice before the year 1775 to acknowledge deeds before a justice of the Supreme Court of the province of Pennsylvania. And although the act of 1715 does not authorize such a practice, yet as it has prevailed it is to be considered as a correct exposition of the statute.

Under the same statute, if a deed conveyed lands in several counties, and was recorded in one of those counties, an exemplification of it was good evidence as to the lands in the other counties.

ERROR to the Circuit Court for the District of Pennsylvania, in an action of ejectment.

The only question was, whether the exemplification of a deed from Allen to Delancy, could be lawfully read in evidence at the trial.

This question arose upon the following case:

William Allen, on the 27th of December, 1771, being seized in fee of the land in controversy, lying in Northampton county, by deed of bargain and sale of that date, conveyed the same to James Delancy and Margaret, his wife, in fee. The deed also conveyed real estate in the counties of Philadelphia and Bucks, and was acknowledged by the bargainor in the city of Philadelphia, on the 7th of December, 1772, before John Lawrence, one of the justices of the Supreme Court of the province of Pennsylvania, and recorded on the 11th of May, 1773, in the office of the recorder of deeds for the city and county of Philadelphia; but not recorded in the county of Northampton, nor in the county of Bucks, nor in any other county in Pennsylvania; offices for recording deeds being established in the said counties of Northamption and Bucks, according to law, from the date of the said deed to the present time.

The Circuit Court admitted the exemplification to be read in evidence; and the verdict and judgment were for the plaintiff below

**Rodney*, Attorney-General for the [*23 plaintiff in error.

By the laws originally agreed upon and adopted by William Penn and his followers, before they left England, in May, 1682, section 20,

1.—*Vide*, 3 T. R. 688, 689, *Harrison* v. *Beecles*.
E. J. Lee had previously moved this court to quash the writ of error, because the citation was not served on Ann Fairfax, the defendant in error; but on her husband Charles I. Catlett, with whom she had intermarried since the judgment below.
But the court overruled the motion, saying,
That the act of Congress (vol. 1, p. 62, § 22), does not designate the person upon whom the citation shall be served, but only directs that the adverse party shall have at least thirty days' notice.
The citation served on the husband is well. The service is sufficient.

(Appendix to laws of Pennsylvania, p. 4), it was declared, that "to prevent frauds and vexations within the said province," "all conveyances of land made in the said province" "shall be enrolled or registered in the public enrollment office of the said province, within the space of two months next after the making thereof, else to be void in law." Deeds made out of the province were to be enrolled in like manner within six months.

This shows that it was the prevailing sentiment among them that means should be taken to prevent clandestine conveyances; and from thence it may be inferred that such was the intention and end of all their laws requiring the enrollment of deeds.

By the act of 1683, c. 79, (Appendix, p. 9), it is enacted, "that all deeds of sale, mortgages, settlements, conveyances (except leases for a year), shall be declared and acknowledged in open court."

In 1688, a temporary law, to continue one year only, confirmed deeds theretofore made and not properly recorded, and allowed twelve months for recording deeds made out of the province, and six months for those made in the province; otherwise they were to be void. The same act permits the recording of bills, bonds and specialties, for safe keeping, but expressly declares that such recording is not necessary as to those writings.

In 1693 it was enacted that deeds were good and valid, although never recorded; and it was declared that no deeds or other writings shall be required to be recorded; but that such deeds and writings as shall be enrolled or registered in the Roll's Office, and the exemplification of [*24 the records of the same, *in all courts of judicature, shall be allowed and judged as valid as the original.

Then came the act of 1715, c. 9, (Laws of Pennsylvania, p. 78), the first section of which enacts, "that there shall be an office of record in each county in this province, which shall be called and styled the office for recording of deeds," and that the recorder "shall record, in a fair and legible hand, all deeds and conveyances that shall be brought to him for that purpose, according to the true intent and meaning of this act." The 2d and 3d sections provide that all conveyances of land in the province "may be recorded in the said office," but before the same could be recorded they were to be acknowleged or proved "before one of the justices of the peace of the proper county or city where the lands lie."

The 4th section enacts, "that all deeds and conveyances made and granted out of this province, and brought hither and recorded in the county where the lands lie, (the execution thereof being first proved by the oath or affirmation of one or more of the witnesses thereunto, before one or more of the justices of the peace of this province," or before any mayor, &c., of the place where executed, certified, &c.) "shall be as valid as if the same had been made, acknowledged or proved in the proper county where the lands lie in this province."

The 5th section enacts, "that all deeds made, or to be made, and proved or acknowledged and recorded as aforesaid, which shall appear so to be, by indorsement made thereon, according to the true intent and meaning of this act, shall be of the same force and effect here, for the giving possession and seizin, and making good the title and assurance of the said lands, tenements and hereditaments, as deeds of feoffment with livery and seizin, or deeds enrolled in any of the King's courts of record at Westminster, are or shall be in the kingdom of Great Britain: and the copies or exemplifications of all deeds so enrolled, being examined by the recorder, and certified under the seal of the proper office (which the *recorder or [*25 keeper thereof is hereby required to affix thereto), shall be allowed in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law, as the original deeds themselves, or as bargains and sales enrolled in the said courts at Westminster, and copies thereof, can be, and that the same may be showed, pleaded and made use of accordingly.

The 6th section declares the force and effect of the words "grant, bargain and sell."

The 7th section declares the punishment for forging certificates of acknowledging and recording.

The 8th section enacts, "that no deed or mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life, or years, unless such deed be acknowledged or proved, and recorded within six months after the date thereof, where such lands lie as herein before directed for other deeds."

The 9th and 10th sections prescribe the mode of acknowledging satisfaction of mortgages.

The 11th section appoints recorders for the respective counties of Philadelphia, Bucks and Chester, which were then the only counties in the province.

By this act no power was given to a judge of the Supreme Court. Indeed, no such court then existed. The Supreme Court was established by the act of May 22, 1722, section 11, but no such power is given thereby to the justices of that court.

The act of 1775 expressly gives the power to the justices of that court, from whence a strong inference is drawn that they had not the power before. The expressions of the second section of that act are, "that all such deeds and conveyances, which shall be made and executed out of this province, after the *publication of this [*26 act, and acknowledged or proved in manner as directed by the laws heretofore for that purpose made, or proved by one or more of the subscribing witnesses before any supreme judge of this province, shall be recorded," &c. It is clear from this mode of expression, that a deed acknowledged or proved before a supreme judge, was not acknowledged or proved in manner as directed by the laws therefore for that purpose made. Such an acknowledgment, therefore, prior to the year 1775, was not legal, and did not, under any existing law, authorize the recording of the deed; and the exemplification of a deed from the records, not legally recorded, cannot be evidence.

This deed was acknowledged before a supreme judge prior to the year 1775, and not before any justice of peace of the province.

Again, it is clear from the purview of the act of 1715, that the proper office for recording

deeds of lands was the office in the county where the lands lie.

These lands lie in Northampton county, but the deed was recorded only in the office of the county of Philadelphia. This objection is as fatal as that respecting the acknowledgment.

Lewis, contra.

There was a Supreme Court in Pennsylvania long before the act of 1715. It is mentioned in the 9th section of the act of March 27, 1713, (*c. 3.*) where an appeal from the sentence of the Orphans' Court is given to the Supreme Court.

1. As to the place of record.

Part of the lands conveyed by this deed lie in the county of Philadelphia, in which county the deed was recorded. It was therefore within the strict letter of the law recorded in the county where the lands lie. It was not **27***] necessary by the act that the *deed should be recorded in every county in which any part of the land should lie. It was sufficient if recorded in the county where any part of the lands lie.

But it was not necessary that it should be recorded in the county where the lands or any part of them lie.

The object of the act was not noticed but safe keeping of the deeds. It does not require that any deed should be recorded. It was intended merely for the benefit of the grantee, and for that purpose it was immaterial in what public office the deed was recorded. Before the act of 1715, the Roll's Office in Philadelphia was the only place of record. That act simply provided that there should be such an office in every county, to which people might with convenience resort to put their deeds on record for safe keeping.

By the first section of the law, the recorder in each county is bound to record all deeds which shall be brought to him for that purpose, whether the lands lie within or without the county. "The said office," in the second section, means either of the said offices. No time is limited within which the deed must be recorded.

The whole tenor of the act shows that the purpose of recording was merely for safe keeping.

Thus stood the law till the act of 1775 declared, that unless deeds and mortgages should be acknowledged, or proved and recorded, within a certain time, in the counties where the lands lie, such deeds or mortgages should be void as to creditors and subsequent purchasers.

The provisions of this act show that no such provisions existed before. The evil complained of in the preamble of the act, was the frauds upon creditors and subsequent purchasers by **28***] means of secret deeds *and mortgages. This evil could not have existed if the object of the act of 1715 was to give notice.

The object of that act, therefore, was safe keeping. The recording or the omission to record the deed did not affect the title. It was therefore perfectly immaterial in which of the offices the deed should be recorded. It was perfectly optional with the grantee whether he would have his deed recorded at all; and if he did choose to have it recorded, it was equally optional with him in which of the offices it should be recorded.

2. As to the acknowledgment.

It had been the cotemporaneous and uniform practice from the year 1715 to the date of this deed, to acknowledge deeds before a judge of the Supreme Court of Pennsylvania. That practice had never been questioned. The grantor in the present deed was the chief justice of that court and had been so for 40 years before. He and the judge who received the acknowledgment must have been perfectly satisfied of the practice, and that it had been unquestioned. Judge Peters, who sat in the trial of this cause in the court below, stated, and the whole bar admitted, the practice to be so. No person could be better acquainted with this practice than Judge Peters, whose father was secretary of the land office, and who was himself a large landholder.

There never was a doubt suggested upon this subject until the present case. If the practice be now decided to be incorrect, it will cut deep into the titles of Pennsylvania.

LIVINGSTON, *J.* I doubt whether this court can take notice of such a practice unless it be spread upon the record by a bill of exceptions, or found by a special verdict. If we can, and if the practice be so, I think it puts an end to the question.

Lewis. The evidence of the practice was offered, not to the jury as a fact, but to the judge, to inform him what had been the construction uniformly put *upon the law by courts, [***29** judges and legislators, and by the whole people of the state.

MARSHALL, *Ch. J.* I do not know how this court can take notice of it as a practice or custom, without the consent of the parties; but I consider it as an exposition or construction of the law. If decisions of the courts of Pennsylvania had been made upon the question, they might be produced. If no cases are reported, the court will take other information as to the construction given to the law by the courts of Pennsylvania.

If such have been the uniform decisions of their courts at the time, as there are no reports of cases, if the counsel agree as to the construction given by the courts, this court can receive it as evidence of those decisions. But if gentlemen differ in their statements, the court would not be willing to decide as to the credit to be given to the one statement or the other.

Ingersoll, for the plaintiff in error, said he could not admit any statement admitting that it had been the practice to admit in evidence exemplifications of deeds not recorded in the county where the lands lie.

Lewis named 27 cases in which he had been concerned as counsel, and in which such exemplifications had been used in evidence, and no objection ever taken.

MARSHALL, *Ch. J.* That part of the argument may be omitted for the present, and if the court should not be able to decide the case without evidence of the practice, we will decide whether we will hear the statements on that subject.

Lewis. Part of the lands lie in Philadelphia county, where the deed was recorded. An exemplification would be good evidence in a contest respecting those lands, and if good evidence

for one purpose, it will be good as to the other. **30***] *If the law authorizes a deed to be recorded in a particular office, an exemplification from that office is good evidence in all cases. It would have been good evidence in an action of covenant upon the deed; and there can be no difference in an action of ejectment. (Gilb. Ev. 97, 99, 100; 2 Vin. Abr. 598; 12 Vin. 105, 107; 2 Eq. Cas. Abr. 413.)

Ingersoll, in reply.

The common law did not require any deed to be recorded. Before the act of 1715, the English register acts, and the acts for enrollment of deeds, were well known in Pennsylvania: and they were for the purpose of notice. The evil to be remedied was the frequency of clandestine conveyances.

The 1st section of the act does not require the recorder to record "all deeds and convcyances which shall be brought to him for that purpose," but "all deeds and conveyances which shall be brought to him for that purpose according to the true intent and meaning of this act;" that is, all deeds and conveyances of land lying in his county.

The 2d and 3d sections require the acknowledgment or proof to be before one of the justices of the peace of the proper county or city where the lands lie. The power to certify acknowledgments was not given to a judge of the Supreme Court until 1775, when the express grant of the power was strong evidence that they did not already possess it.

There is no more reason that a foreign deed should be proved and recorded in the county where the lands lie than that a domestic deed should be so proved and recorded. Yet the 4th section of the act is explicit with regard to foreign deeds, that they shall be so proved and recorded; and in order to show that they meant the same thing in the case of domestic deeds, the legislature say that a foreign deed, so proved and recorded, shall be as valid "as if the same had been made, acknowledged, or proved, in the proper county where the lands lie;" thereby **31***] *intimating that the acknowledgment or proof in the county where the lands lie was the proper mode in all other cases.

The 5th section immediately follows, and declares that all deeds "proved or acknowledged and recorded as aforesaid," shall transfer the possession, and that exemplifications thereof shall be evidence.

Here the words "as aforesaid" refer to the description last antecedent, that is, in the county where the lands lie. Again in the 8th section it is declared that no mortgage shall be good unless acknowledged or proved and recorded where the lands lie "as herein before directed for other deeds." This expression clearly shows that the legislature had before directed that other deeds should be recorded where the lands lie.

They had mentioned before but two other kinds of deeds, viz., foreign and domestic. With regard to foreign deeds they had been as explicit as in the case of mortgages; and if any doubt could be raised as to their expressions relative to domestic deeds, that doubt must be removed by the expressions in the 4th and 8th sections.

March 11. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

This case depends entirely on the acts of the legislature of Pennsylvania, respecting the registering of deeds.

The law of Pennsylvania, on this subject, had varied at different times; but as it stood in 1715, when the act passed which must decide this controversy, the recording of a deed was not necessary to its validity; but deeds might be enrolled, and an exemplification was testimony in all courts.

The act of 1715 established an office of record in *each county in which deeds were to [***32** be recorded, and declared an exemplification from the record to be as good evidence as the original. This act, however, does not make the recording of a deed essential to its validity.

To entitle a deed to be recorded, the act requires that it shall be acknowledged or proved "before one of the justices of the peace of the proper county or city where the lands lie."

In this case the lands lie in different counties; and the deed was acknowledged before John Lawrence, one of the justices of the Supreme Court of Pennsylvania; and was recorded in the office for the city and county of Philadelphia, in which a part of the lands lie. The land, however, for which this suit was brought, lies in a different county.

The first question which presents itself in this cause is, was this deed properly proved?

Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be that the deed was not regularly proved. A justice of the Supreme Court would not be deemed a justice of the county, and the decision would be that the deed was not properly proved, and therefore not legally recorded.

But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act.

It is of some weight that this deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the Supreme Court. It is also recollected *that [***33** the gentlemen of the bar, who supported the conveyance, spoke positively as to the universal understanding of the state, on this point, and that those who controverted the usage on other points, did not controvert it on this. But what is decisive with the court is, that the judge who presides in the Circuit Court for the District of Pennsylvania, reports to us that this construction was universally received.

On this evidence the court yields the construction which would be put on the words of the act, to that which the courts of the state have put on it, and on which many titles may probably depend.

The next question is, was this deed recorded in such an office as to make the exemplification evidence?

Without reviewing all the arguments which have been urged from the bar, or all the sections of the act, it may be sufficient to observe, that this court is satisfied that, where a single tract of land is conveyed, the law requires the deed to be recorded in the office of the county

in which the land lies; but if several tracts be conveyed, it appears to this court that neither the letter nor the spirit of the act requires that the deed should be recorded in each county.

It is material in the construction of this act, that the validity of the deed is not affected by omitting to record it. Though not recorded, it is still binding to every intent and purpose whatsoever. The only legal effect produced by recording it is its preservation, by making a copy equal to the original. The principle motive, then, for requiring that it should be proved before a justice of the particular county in which the land lies, and recorded in that county, is that which has been assigned at the bar. It is the additional security given by those provisions, that a deed, never executed, might not be imposed on the recorder. This object is as completely obtained by placing the deed on the records of that county in which **34***] *one of the tracts of land lies, as it could be if the deed conveyed no other tract. The verity of the deed is as completely secured in the one case as in the other.

It appears to the court also to be within the letter of the law. This deed was unquestionably properly admitted to record in the office of the city and county of Philadelphia. It conveyed lands lying within that city and county, and, on any construction of the act, might be there recorded. The act then proceeds to say, "that the copies of all deeds, so enrolled, shall be allowed in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law as the original deeds themselves."

The whole deed, then, is evidence by the letter of the act. The whole is a copy from the record. If the validity of the conveyance depended on its being recorded in the county where the land lies, then a deed might be good as to one tract, and bad as to another. But the deed is valid, though not recorded; and the question is, whether the copy is evidence as to everything it contains. The execution of the deed is one entire thing, and is proved so as to admit the instrument to record. The copy, if true in part, is true in the whole; and if evidence in part, must, under the act, and on the general principle that it is the copy of a record, be evidence in the whole.

There is no error in the judgment of the Circuit Court; and it is affirmed with costs.

Cited—12 Wheat, 168; 6 Pet. 296; Id. 715; 4 How. 51, 54; 14 How. 504; 18 Wall. 82; Abb. Adm. 441; 1 Bald. 284; 1 Blatchf. 223; 1 Cliff. 290; Id. 439; 1 Wash. 29.

JOHN AND JAMES TUCKER

v.

OXLEY, ASSIGNEE OF T. MOORE, A BANKRUPT.

Under the bankrupt law of the United States a joint debt may be set off against the separate claim of the assignee of one of the partners. But such offset could not have been made, at law, independent of the bankrupt law.

A joint debt may be proved under a separate commission, and a full dividend received. It is equity alone which can restrain the joint creditor from receiving his full dividend until the joint effects are exhausted.

ERROR to the Circuit Court of the District of Columbia, sitting at Alexandria, in an action of *assumpsit* for goods sold and delivered, brought by Oxley, *assignee of Thomas [***35** Moore, a bankrupt, against the plaintiffs in error. Upon the general issue, the jury found a verdict for the plaintiff below for 143 dollars and 33 cents, subject to the opinion of the court upon the following case:

Thomas Moore, the bankrupt, carried on the trade and business of a vendue master in copartnership with one Henry Moore, which copartnership was on the 31st of March, 1802, dissolved on the terms that Thomas Moore should collect the balances due to, and pay the debts due from the joint concern as far as the joint property would extend. Thomas Moore carried on the trade and business of a vendue master on his separate account from that time until the 2d of September following, when he became bankrupt, and a commission being duly awarded and issued against him, he was duly declared a bankrupt according to the laws of the United States then in force concerning bankrupts; under which the plaintiff was duly appointed assignee.

While Henry and Thomas Moore carried on the business of vendue master in partnership, they became jointly indebted to the defendants, John and James Tucker, in the sum of 106 dollars and 49 cents, being the balance of account due to the defendants, for their goods sold by H. and T. Moore, at vendue. After the dissolution of the partnership, and while Thomas Moore carried on business on his separate account, the defendants, the Tuckers, at different times, from the 19th of April to the 22d of July, 1802, knowing that the partnership was dissolved, and that Thomas Moore carried on business on his separate account, purchased of him at vendue, goods to the amount of 113 dollars and 12 cents, which goods were charged to the defendants, the Tuckers, in the separate books of Thomas Moore, without credit being given to the defendants for the joint debt due to them from Henry and Thomas Moore. Thomas Moore being examined as a witness, proved that he intended, at the time of selling the goods to the defendants, to give them credit for the joint debt due to them from Henry and *Thomas Moore, but nothing was said or [***36** agreed on the subject, between him and the defendants, nor was any such credit ever given before his bankruptcy. This action is brought for the price of the goods so sold and delivered by Thomas Moore in his separate capacity. If the court should be of opinion, upon the case stated, that the defendants are entitled to have the joint debt due to them by Henry and Thomas Moore deducted from the sum claimed in this action, the verdict was to be reduced to 16 dollars and 63 cents, and judgment to be entered accordingly.

The opinion of the court below being that the joint debt could not be set off against the separate claim of the bankrupt, judgment was rendered for the plaintiff for the larger sum; whereupon the defendants brought a writ of error.

C. Simms, for the plaintiff in error.

All contracts with partners are joint and several; and every partner is liable to pay the whole. In what proportion the others are to

contribute is a matter merely among themselves. The plaintiff may bring his action at law against any one of the partners, and can only be compelled by plea in abatement to join them all. (5 Burr. 2613; 1 Esp. 117.)

By the 42d section of the bankrupt law, (vol. 5, p. 74), it is declared that where there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them, the assignee shall state the account between them, and one debt shall be set off against the other, and the balance of such account, after such set-off, and no more, shall be claimed or paid on either side respectively.

Lord Chancellor Hardwicke, in *Edwards's* case, (1 Atk. 100,) doubted whether, under the statute relating to mutual debts, a debt due from A. to B. could be set off against a debt due from B. to A. and C. In that case C. was not in any manner liable to B. for the debt due from A. to B.

37*] *But in the present case, Thomas Moore was liable to the Tuckers for the debt due to them from Henry and Thomas Moore, and the Tuckers might have compelled payment from Thomas alone.

The clause in the act of parliament (5 Geo. II.), relating to mutual credits, and which is the same as the 42d section of our bankrupt law, has received a very liberal construction. (1 Atk. 228, *Ex parte Deeze;* 1 Atk. 230, *Ex parte Charles Prescot.*)

By the 34th section of the bankrupt law it appears that a partnership debt may be proved on a separate commission against one of the partners. By that section it is declared that the "bankrupt shall be discharged from all debts by him due or owing at the time he became bankrupt, and all which were or might have been proved under the commission;" with this proviso, "that no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt, at the time he became bankrupt, or who was then jointly held or bound with such bankrupt, for the same debt or debts from which such bankrupt was discharged as aforesaid."

And it may be laid down as a general rule, that a debtor of a bankrupt may be allowed to set off any debt due from the bankrupt which he could have proved under the commission. (Coop. B. L. 247.)

Jones, contra.

The debt for which this action was brought against the Tuckers, was contracted long after the dissolution of the partnership of Henry and Thomas Mooore. It was, and yet stands, charged against them on the separate books of Thomas Moore.

It is neither a mutual debt, nor a mutual credit. They are claims in different rights.

It is a general principle, in cases of bankruptcy, that the joint funds are to be applied to the discharge of the joint debts, and the **38***] separate funds to the discharge *of the separate debts. The separate creditors can only come upon the joint fund for their debtor's share of the surplus, after paying the joint creditors; and the joint creditors can only come upon the separate fund for the surplus after payment of the separate creditors.

A joint creditor can only prove under the separate commission for the chance of that surplus, and to assent to or dissent from the allowance of the certificate. (Cooke's B. L. (4th edit.) 237, 244, 250; 3 Vez. Jun. 238, *Ex parte Elton*; 4 Vez. Jun. 837, *Ex parte Abell.*)

There is no statute in Virginia which authorizes set-off. The question depends entirely upon the 42d section of the bankrupt law of the United States, which is precisely like the 28th section of the act of parliament of 5 Geo. II. c. 30; Cooke's B. L. 541, 544.

It is clear that the separate creditors cannot come upon the joint fund until all the joint creditors are paid; it is unreasonable that the joint creditors should take the whole separate estate without looking at all to the joint estate. In the present case it is not stated that the joint funds were exhausted. It does not appear but that the other partner is solvent. The assignee of Thomas Moore cannot collect the debts due to Thomas and Henry Moore, and it is inequitable that he should be obliged to pay their debts.

In order to be set off under the bankrupt law, it must be a plain mutual credit. (Cooke's B. L. 568.) If due in different rights, it cannot be set off. A separate claim against one partner cannot be set off against a joint demand. (1 Wash. 77, *Scott* v. *Trent.*)

Simms, in reply.

The defendants below might have proved their debt under the commission against Thomas Moore.

The 34th section of the bankrupt law provides, *that a discharge under a com- [***39** mission against one partner shall not discharge the other partner; which provision would be wholly unnecessary, if a joint debt could not be proved under that commission.

It is true that there is no statute in Virginia authorizing set-off; but under the equity of the statute respecting the action of debt by the assignees of promissory notes and bonds, set-off has been allowed in that state.

But the assignee of T. Moore, if he had an equitable right to the joint debts, might bring an action in the joint name, and a court of law would protect his equity.

LIVINGSTON, *J.* I do not recollect any particular authority, but I have always considered it as one of the clearest principles of law, that a joint debt cannot, at law, be set off against a separate claim.

February 15. MARSHALL, *Ch. J.*, delivered the opinion of the court, as follows:

In this case the plaintiffs in error, who were defendants in the Circuit Court, claimed to set off against a debt due from them to Thomas Moore, the bankrupt, a debt previously due to them from the firm of H. and T. Moore, which firm was dissolved, and the partnership fund had passed to T. Moore. This offset was not allowed; and its rejection is the error alleged in the proceedings of the Circuit Court.

At law, independent of the statute of bankruptcy, the court is of opinion that this discount could not have been made in a suit instituted by Thomas Moore against the Tuckers; and if the words of the act of Congress allowing set-off in the case of mutual debts and credits were to be expounded without regard to the provisions of that act in other respects, it is probable that they would not be extended beyond that technical operation, to which has

40*] been *allowed the term "mutual debts," in ordinary cases. But the bankrupt law changes essentially the relative situation of the parties; and the provisions making that change are thought, by a majority of the court, to have a material influeuce on the words of the 42d section of the act, which provide for the case of mutual debts and credits.

It is the opinion of the court that this is a debt, which might have been proved under the 6th section of the act. It is a debt, which, by a suit against both the partners, might have been recovered against either of them, and either might have been compelled to pay the whole. Although due from the company, yet it is also due from each member of the company; and the claim of the creditor for its satisfaction extended, previous to the act of bankruptcy, to the whole property of each member of the firm, as well as to the joint property of the firm. It would be certainly impairing that claim to apply, by the operation of law, the whole particular fund to other creditors, who, at the time of the bankruptcy, had not a better legal claim on that fund than the Tuckers, without allowing them to participate in it. The court, therefore, would be much inclined to consider the creditors of the partnership as having a right, under the general description of creditors of the bankrupt, to prove their debts before the commissioners. But all doubt on this subject seems to be removed by the proviso to the 34th section. That section declares, that the bankrupt shall be discharged from all debts which were due from him at the date of the bankruptcy, and all which were or might have been proved under the said commission, "Provided that no such discharge of a bankrupt shall release or discharge any person, who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts, from which such bankrupt was discharged as aforesaid."

Thomas Moore, then, is discharged from the debt due from Henry and Thomas Moore to the Tuckers; and if he is discharged therefrom, it 41*] would seem to *be an infraction of their pre-existing rights not to allow them a share of his property. It is deemed by the court material in the construction of this statute, that, as the proviso shows the joint creditors to be within the descriptiou of the terms creditors of the bankrupt, so as to enable them to prove their debts under the commission, they are of necessity comprehended within the same terms in those sections which direct to whom the dividends are to be made. The words of the 29th and 30th sections are imperative. They command the commissioners to divide the estate of the bankrupt among such of his creditors as shall have made due proof of their debts, in proportion to the amount of their claims. Consequently, every creditor who proves his debt is entitled to a dividend.

But, although the creditors of H. and T. Moore might have proved their debt before the commissioners, and have received a dividend out of the estate of the bankrupt, it may be contended that, having failed to do so, they are not entitled to set off their whole claim.

The 42d section of the act directs, that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other; and what shall appear to be due on either side, on the balance of such account, after such set-off, and no more, shall be claimed or paid on either side respectively.

The term "debt," as used in this section, is fairly to be construed to mean any debt for which the act provides. A debt which may be proved before the commissioners, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section.

*Were this doubtful, it cannot be de- [*42 nied that the advantage given by the section is reciprocal, and in any case where the set-off would be allowed, if the balance was against the bankrupt, it must be allowed if in his favor. It has already been stated that the Tuckers might have proved their claim before the commissioners. Can it be doubted that the whole of the debt due to the bankrupt would, under this section, have been deducted from that claim? We think it cannot be doubted. Then, the terms applying alike to each party, the debt due to the Tuckers must be set off from that which they owe the bankrupt.

If the "assignee of the estate ought to have stated the account," and have only claimed the balance, his omitting so to do cannot enlarge his rights; he can only recover what he ought to have claimed.

This, which seems to be the naked law of the case, is not unreasonable. It is fair to conclude that the Tuckers forbore to recover the money due to them from H. and T. Moore, in consideration of their dealings with T. Moore, after he traded on his separate account.

This exposition of the bankrupt act appears to the court to conform to that which is given in England. As the bankrupt law of the United States, so far as respects this case, is almost, if not completely, copied from that of England, the decisions which have been made on that law by the English judges may be considered as having been adopted with the text they expounded.

In England, it has never been doubted that a man, having a claim on two persons, might become a petitioning creditor for the bankruptcy of one of them. Such petitioning creditor has always been admitted to prove his debt before the commissioners, and to receive his dividends, in proportion, with the other creditors. He is, then, in contemplation of the act, a creditor of the bankrupt; and, consequently, all the *provisions of the act apply to him, as [*43 to other creditors. This would seem to prove that, under the legal operatiou of the act, a creditor of a firm, of which the bankrupt was one, and a creditor of the bankrupt singly, were equally creditors of the bankrupt, in contemplation of the law, and were construed to come equally within the meaning of the term, as used in the act. If this position be correct, the rules which we find laid down by the chancellor, for marshalling the respective funds, are to be considered merely as equitable restraints on the legal rights of parties, obliging them to exercise

those rights in such manner as not to do injustice to others. This is the peculiar province of a court of chancery. It is the same, in principle, with the common case of marshalling assets, where specialty creditors, who have a right to satisfaction out of lands, exhaust the personal estate, to the injury of simple contract creditors.

It is undoubtedly unjust that the Tuckers, having a claim on H. and T. Moore, and being able to obtain payment from H. Moore, should satisfy that claim entirely out of the separate estate of T. Moore, to the exclusion of other creditors, who had no resort to Henry; and it is probable that a court of chancery might restrain this use of his legal rights within equitable limits. But suppose H. Moore, also, to be a bankrupt; or to be insolvent, and unable to pay the debt; would it not be equally unjust to apply the estate of each individual to the discharge of the several debts, to the entire exclusion of their joint creditors, who, previous to their bankruptcy, had a legal and equitable right to satisfaction out of the separate estate of each?

Mr. Cooke has made a very good collection of the decisions in England, on this question. It will be found that a creditor of the partnership was first permitted by consent to prove his debt before the commissioners of the individual bankrupt, and to receive dividends from the separate fund. It was afterwards decided by **44***] the chancellor that he had a right *so to do: and in conformity with this decision was the regular course of the court, until the year 1796. During this time, however, the chancellor, sitting, as chancellor, on a bill suggesting equitable considerations for restraining the order he had made, was accustomed to enjoin the dividends which he had ordered, sitting in bankruptcy. This would seem to prove that, at law, the creditor of the partnership had a right to his dividends from the separate fund, but that equity would compel him first to exhaust the joint fund.

In 1796 this whole subject was reviewed in the case *Ex parte Elton*, reported in 3 Ves. Jun. This case has been considered as overruling former decisions; but, in the opinion of the court, it confirms the principle already stated. After stating his objection to the prevailing practice, because each order carried in its bosom a suit in chancery, the chancellor took time to consider the subject; and finally determined that the petitioner should be permitted to prove his debt, and that his dividend should be set apart, but not paid to him until an account should be taken of the joint fund.

It is perfectly clear that, in this case, the chancellor, for convenience, exercised, at the same time, his common law and equitable jurisdiction. In conformity with the uniform exposition of the act, he permitted the partnership creditor to prove his debt before the commissioners of the bankrupt, and directed the dividend to be allotted to him out of the separate fund; and then, without the expense of a bill, exercising his equitable powers, he suspended the payment of this dividend, until it should be ascertained how much of it a court of equity would permit the creditor to receive. This does not negative, but affirms, the legal right of a partnership creditor to come on the separate fund.

It appears also to be admitted, that if the particular creditors should be satisfied without exhausting the fund, the residue might be paid to the partnership *creditors. This seems [***45** to admit the legal right of those creditors to prove their debts, and to receive their dividends. It is equity, not law, which can postpone them.

It is the opinion of a majority of the court, that the Circuit Court erred in rendering a judgment on this special verdict for the sum of 143 dollars and 33 cents, instead of the sum of 16 dollars and 63 cents; which was the balance after deducting the debt due from H. and T. Moore to the defendants in that court. It is therefore considered by the court, that the said judgment be reversed and annulled; and that judgment be rendered for the plaintiffs in the Circuit Court for the sum of .16 dollars and 63 cents, and the costs in the Circuit Court.

Judgment reversed.

Distinguished—18 Wall. 633; 9 Bank. Reg. 349, 341.
Cited—16 Pet. 301; 4 How. 427; 3 Biss. 287; 5 Mason 206; 4 Bank. Reg. 26; 9 Id. 376; 6 Blatchf. 187; 1 Cliff. 433.

YOUNG
v.
THE BANK OF ALEXANDRIA.

Suits brought by the bank of Alexandria upon promissory notes, made negotiable in that bank, are entitled to trial at the return term of the writ.

ERROR to the Circuit Court of the District of Columbia, sitting in Alexandria, in an action of debt upon a promissory note, negotiable in the bank of Alexandria, made by Young to Yeaton, and by him indorsed to the bank.

The only question now argued, was whether the court below erred in ruling the plaintiff in error into a trial at the return term of the writ.

The bill of exceptions set forth the *capias ad respondendum* issued by the Circuit Court of the District of Columbia, on the 10th of November, 1807, returnable "at the next court." The defendant below was taken on the 12th of November. The next court was holden by law on the 4th Monday of November, 1807.

*It further stated, that the counsel for [***46** the plaintiffs below, having filed his declaration at the return term, prayed the court to fix a day for the trial of the cause during the present term, and also to rule the defendant to plead at a short day during the term, and offered to consent that the defendant should plead the general issue, and under that plea give in evidence any special matter which he could plead either in bar or abatement; to which the defendant objected; but the court ruled him to plead the next day, and upon the general issue being joined, ruled him to trial immediately.

By the general rules of practice established by the Circuit Court it is ordered, that all process issuing from that court, except executions, be made returnable before the court in term time; and that rules be held in the clerk's office on the day after the rising of the court in each term, and on the same day in each month thereafter during the vacation; and that all proceedings and orders taken at the rules shall conform as near as may be to the rules of proceeding directed by an act of the assembly of Virginia,

entitled "An act reducing into one the several acts concerning the establishment, jurisdiction and powers of district courts," and the several acts amending the same. By that act, which was passed December 12, 1792, it is ordered, that "one month after the plaintiff hath filed his declaration he may give a rule to plead with the clerk, and if the defendant shall not plead accordingly at the expiration of such rule, the plaintiff may enter judgment for his debt or damages and costs." "All rules to declare, plead, reply, rejoin, or for other proceedings, shall be given regularly from month to month, shall be entered in a book to be kept for that purpose, and shall expire on the succeeding rule day." By the 25th section of that act, it is provided that in certain cases the sheriff may take the engagement of an attorney of the court, indorsed on the writ, that he will appear for the defendant, "and such appearance shall be entered with the clerk in the office, on the first day after the end of the court to which such **47***] process is returnable, which *is hereby declared to be the appearance day in all process returnable to any day of the court next preceding."

By the act of Congress of 27th of February, 1801, it is declared that the laws of Virginia, as they then existed, should be and remain in force in that part of the District of Columbia which was ceded by Virginia to the United States.

By the act of Congress of the 3d of March, 1801, § 3, it is enacted, that the Circuit Court for the county of Alexandria, shall possess and exercise the same powers and jurisdiction civil and criminal as was then possessed and exercised by the district courts of Virginia.

By the act of assembly of Virginia, passed on the 23d of November, 1792, and which incorporated the bank, it is ordered, that in suits brought by the bank upon notes made negotiable therein, an issue shall be made up, and trial had at the return term of the writ.

Youngs, for the plaintiff in error.

The act of 27th of February, 1801, conferred on the Circuit Court for the District of Columbia, no other powers than those which had been given generally to the circuit courts of the United States, by the act passed in the same session (vol. 5, p. 237, § 11), and by that act no such power is given to those courts in respect to the debts due to the bank.

The 3d section of the act of the 3d of March, 1801, relates to criminal jurisdiction only, or if it relates to the civil jurisdiction, it is not clear that the district courts of Virginia could exercise the power, because those courts were established after the act incorporating the bank.

When this case was before this court at the last term, upon the motion to quash the writ of **48***] error, *this court decided that so much of the charter as took away the right of appeal from the debtors to the bank, in the courts of Virginia, did not apply to the courts of the United States; and a distinction was taken between the rights which the bank had as a body corporate and its remedies derived from particular provisions in its charter. The summary trial is nothing more than a form of remedy given by its charter, and cannot be binding upon the courts of the United States. The proviso in the 16th section of the act of the 27th of February, 1801, only saves the rights, not the remedies, of the corporation.

Simms and *Swann*, contra.

The act incorporating the bank of Alexandria is a public act, and obligatory upon all the courts of Virginia. By the act of Congress of the 27th of February, 1801, it is adopted, together with all the other laws of Virginia, as the law within the county of Alexandria; and is therefore as binding upon the Circuit Court of the District of Columbia as it was upon the courts of Virginia; but lest any doubt should exist on the subject, the act of Congress of the 3d of March, 1801, declares, that the Circuit Court of that District "shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the district courts of Virginia." There has never been a doubt but that the district courts of Virginia had jurisdiction in cases in which the bank was plaintiff, and was bound, if requested, to compel the defendant to go to trial at the return term.

The clause in the charter of the bank is an exception to the general law upon the subject of judicial proceedings; but the exception is equally valid with the general rule.

Jones, in reply.

The bank has not brought the case within the act. The writ is not returnable until the return day, and the return day is not until after the rising of the *court; so that [***49** the bank is not entitled to a trial until the second term after issuing the writ. The writ is returnable to the next court; but the officer has the whole term to return it in, and may delay it until the very last moment of the session.

March 10. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The writ being returnable to the court, is returnable the first day of the court. It was known to the legislature of Virginia that the appearance day for all process was the day after the term. When, therefore, they directed that a trial should be had at the return term, they must have intended that this case should be an exception to the general rule.

Judgment affirmed.

Cited—8 Cranch 252; 4 Cranch C. C. 149; 4 Wheat. 245; 1 Bald. 91; 19 Wall. 64.

YEATON
v.
THE BANK OF ALEXANDRIA.

The bank of Alexandria may maintain an action against the indorser of a promissory note made negotiable in that bank, without first suing the maker, or proving him insolvent, although the indorsement was for the accommodation of the maker, and notwithstanding that in Virginia the implied contract of the indorser of a promissory note, by the general understanding of the country, is, that he will pay the debt, if by due diligence it cannot be obtained from the maker.

Perhaps the undertaking of the indorser of a note to a bank may be different.

It is no objection that the indorsement was for the accommodation of the maker. The consideration moving from the bank to the maker of the note, on the credit of the indorser, charges both the maker and indorser.

ERROR to the Circuit Court of the District of Columbia, in an action of *assumpsit* brought by the defendants in error against the plaintiff in error as indorser of a promissory note for the accommodation of R. Young, the maker.

The declaration contained two counts. One upon the indorsement of the note, in the usual form, and without any averment of the insolveney of the maker, or of any steps taken to enforce payment from him. The other was for money had and received.

The same questions arose in this case as in the preceding case of *Young* v. *The Bank of Alexandria*, but the only question argued in this cause, was, whether an indorser of a promis-**50***] sory note to the bank *of Alexandria, for the accommodation of the maker, was liable in an action by the bank, until after a suit, judgment and execution against the maker had proved fruitless, or the maker was otherwise proved to be insolvent.

Upon the opening of the point, MARSHALL, *Ch. J.*, observed that it had been decided by this court in the cases of *French* v. *The Bank of Columbia* (ante, vol. 4, p. 141), and *Violet* v. *Patton*, at this term, that the circumstance of its being for the accommodation of the maker makes no difference. The indorser is as much liable as if he had himself received the money.

Youngs, for the plaintiff in error.

The general law of Virginia, upon the subject of promissory notes, is, that the indorser is not liable until a suit has been brought against the maker, and judgment recovered; and the execution has proved fruitless, or the maker is otherwise proved to be insolvent. If there be any exception in favor of the bank it must be a privilege granted by its charter. The only words under which such a privilege can be supposed to exist are these: "And whereas it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that when any person or persons indebted to the said bank on bonds, bills or notes, given or indorsed by them, with an express consent in writing that they may be negotiable at the said bank, shall refuse or neglect to make payment at the time the same may become due, and a suit shall be thereupon commenced against such defaulter, and a *capias ad respondendum* returned executed, or a copy left at the usual place of residence of such defaulter, at least ten days before the return day of such writ, the court shall" order the proceedings to be made up, and the cause tried at the first court.

51*] *But according to this act, the person to be sued must be a person indebted to the bank by indorsement; and under the general law of Virginia no person is indebted by indorsement of a note until the maker be insolvent, or the plaintiff shall have failed to obtain payment from the maker by suit, judgment, and execution.

Swann, contra, admitted the general law of Virginia respecting promissory notes to be as stated, but contended that by the words of the act of incorporation, an indorser of a note is to be considered as indebted to the bank upon failure to pay the note when it becomes due. The preamble shows that punctuality in payment was the object in view; which would be entirely defeated if the bank could not compel payment from an indorser until they had pursued the maker through all the tedious delays of the law. If the note be not paid when it becomes due, the act calls the indorser a defaulter, and directs judgment to be entered up against him at the first court thereafter.

March 10. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

The question in this case is, whether the indorser of a note negotiable in the bank of Alexandria, if such indorsement be for accommodation, may be sued by the bank, before a suit shall be instituted against the maker, if the maker be solvent.

In Virginia, the indorser of a promissory note was not, when the town of Alexandria was separated from that state, liable to the holder by any express statute. He was only liable under the implied contract created by his indorsement. This implied contract, by the general understanding of the country, was, that he would pay the debt, if by due diligence it could not be obtained from the maker. This condition, however, was not expressed. Yet *it was just, because it was consistent [***52** with general usage, and, therefore, was the real understanding with which such an indorsement was made and received.

But in banks, this is probably not the usage; and if it be not, then the same reason does not exist for annexing such a condition to the contract created by indorsement. If banks are understood to receive notes made negotiable with them, as subject to the law which governs inland bills of exchange, then it would seem reasonable, in the case of notes actually negotiated with them, to imply, from the act of indorsement, an undertaking conformable to that usage. If, then, the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties.

But the incorporating act removes any doubt which might otherwise exist on this point.

The 20th section of that act declares, "that whenever any person or persons indebted to the said bank on bonds, bills, or notes, given or indorsed by them, with an express consent, in writing, that they may be negotiable at the said bank, and shall refuse or neglect to make payment at the time the same may become due, and a suit shall thereupon be commenced, &c., judgment is to be rendered in a summary manner.

A person, then, may become indebted to the bank on a note indorsed by him, as well as on a note made by him; and the question is, when does he become indebted? The act appears to answer this question in the succeeding member of the sentence. The words are, "and shall refuse or neglect to make payment at the time the same may become due." To what antecedent does the word "same" refer? Most obviously to the words "bond, bill or note." When the bond, bill or note becomes *due, the maker or indorser, who shall [***53** refuse or neglect to make payment, is within

the description of the act. No man can be said to refuse or neglect to make payment before the money is demandable from him, and till then no action can be brought. But the law proceeds to say, "and a suit shall thereupon be commenced." The word "thereupon" must refer to the note, or to the circumstances previously stated. Give it the one meaning or the other, and the law obviously contemplates a suit against the maker or indorser, on his refusing or neglecting to pay such note, when it shall become due. The act then proceeds to say, that, when this suit shall be so commenced, the court shall render judgment thereon in a summary way.

It is alleged that the preceding part of the section is all recital, and cannot, therefore, be construed to give a right to sue, where that right did not before exist: that the enacting clause gives no remedy where one did not before exist; but substitutes a summary mode of proceeding, for that more tedious action which the previous laws had given.

It is true that the first part of this section is recital; but it describes the precise case in which judgment shall be rendered in a summary way. That precise case is, where a person indebted, by making or indorsing a note negotiable and negotiated in the bank, shall refuse or neglect to make payment thereof, when such note shall become due. The time when he becomes indebted is declared to be when the note becomes due.

It is alleged that an accommodation indorser cannot then become indebted. This distinction was completely overruled in the case of Violet and Patton. The consideration moving from the bank to the maker of the note, on the credit of the indorser, charges both the maker and indorser. The indorser is, in this respect, as liable, both in reason and in law, to the claim of the bank, as if he had placed his name on the face instead of the back of the note.

Judgment affirmed with costs.

54*] *JOHNSON, *J.* Both the questions,[1] argued in this case, arise out of the act of Virginia incorporating the bank of Alexandria.

On the point of the summary jurisdiction, I concur with my brethren, and think this opinion perfectly consistent with the decision, at the last term, relative to the right of appeal. I remember that my opinion in that case was founded on the idea that the provisions of that act, relative to the summary recovery of debts, was entirely a judicial regulation. That the judicial power was unalienable from the sovereignty of a country, and must, therefore, in all its modifications, remain subject to the will of succeeding legislatures. That it was, in fact, a subject in which a peculiar, indefeasible right could not be vested in an individual. I thought it, therefore, from its nature, unaffected by the clause of the act of acceptance reserving to the bank its corporate rights, and of course affected by the law which gives an appeal, generally, from the courts of this district to the Supreme Court, above a certain amount. I have no doubt of the power of Congress to deprive them also of their summary remedy; but it has not yet legislated to that effect.

On the other question, I entertain a very strong opinion in opposition to that of the court.

The doctrine has been repeatedly sanctioned in this court, that, in the state of Virginia, the holder of a promissory note cannot recover against an indorser without proving the insolvency of the drawer. But it is contended that the act, incorporating this bank, has placed the notes negotiable therein on a different footing; and that an indorser of such a note may be sued as soon as it is dishonored, without any evidence of the insolvency of the drawer. The following are the words of the clause, so far as they are material to this case: "And whereas it is *absolutely necessary that debts due [***55** to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that whenever any person or persons indebted to the said bank on bonds, bills, or notes, given or indorsed by them, with an express consent in writing that they may be negotiable at the said bank, and shall refuse or neglect to make payment at the time the same may become due, and a suit shall be thereupon commenced against such defaulter, and a *capias ad respondendum* returned and executed, or a copy left at the usual place of residence of such defaulter, at least ten days before the return day of such writ, the court shall," &c. It then goes on and enacts, that, in such case, "the court shall order the proceedings to be made up, and the cause tried at the first court." This bare recital, or preamble, without one enacting word, is what is supposed to have effected this important change in the law of Virginia, relative to the liability of an indorser. Much stress was laid, in the argument, upon the use of the word "indebted," as applied to the indorser, the words "negotiable at the said bank," and words which suppose the commencement of a suit, as soon as a note "becomes due." I positively deny the correctness of maintaining any repeal or alteration in the principle of a law, upon an implication drawn from a mere preamble or recital to an act. Enacting words will undoubtedly often produce a repeal by implication, but a recital or preamble sets forth merely the motives or inducements of the legislator, and, whether founded in error or truth, serves no other purpose than to justify him to those for whom he is legislating, or, at times, to assist in developing the meaning of doubtful enacting words. Admit the principle, that a preamble may have the effect of enacting words, and there is no necessity for dilating on the inextricable absurdities in which a court may be involved. In the case before us, it is possible that the legislature may have supposed that the law of Virginia would sanction an immediate suit against the indorser, without evidence of the drawer's insolvency; *but their courts [***56** of justice have decided otherwise; and it would be singular if an erroneous opinion, entertained by that body, should have all the effects of a law passed by it. But there is not a word contained in this preamble which may not be fully satisfied, without producing any necessary implication against the general law of Virginia, relative to the liability of the indorser.

When the legislature speaks of a person in-

1.—This case was argued in connection with that of *Young* v. *The Bank of Alexandria*, as one case. This opinion, therefore, applies to both cases.

debted by indorsement, it can only be understood to speak of one indebted according to the legal liability of an indorser; which is only, by the laws of Virginia, in case of the insolvency of the drawer.

When it speaks of a consent in writing, that it may be negotiable at the said bank, it can only mean what it expresses; and intends it for the purpose of subjecting the individual to the summary recovery given in such a case; for, as to his general liability as indorser, such a consent was in no wise necessary; that liability existed in its full extent without it.

And as to the supposition of the indorser's liability to be sued when the note becomes due, this also is strictly and literally true, if the drawer should then be insolvent, or (I suppose) if he should become so at any time before the trial of the issue.

Upon the whole, therefore, it appears to me that there is no possible difference between the liability of an indorser generally, and an indorser of a note negotiable in the bank of Alexandria; that the legislature intended to make no distinction; and, if it had expressly declared such to be its intent, no such change would have been produced, without following up that intention with sufficient enacting words; but that in fact, its sole object was to do that which it professes to intend, and alone has effected, viz., to give a summary remedy against all persons becoming indebted to that bank, whenever their legal liability is incurred. In fact it may, with **57***] the utmost correctness, *be affirmed of an indorser that he is indebted, and that he may be sued when the note becomes due, without at all interfering with the laws of Virginia on this subject: for a thing may be *debitum in presenti*, and yet no cause of action exist against him; he may lie under a present obligation to pay a sum of money, upon some contingency or future event. And, with regard to his liability to be sued when the note becomes due, it may be very correctly affirmed that it is not due from him until the insolvency of the drawer can be shown. As to the drawer, the note is due when it is made payable; but the principles of the Virginia law add a contingency to the liability of the indorser, so that, in fact, his undertaking is collateral and contingent, and the amount is not legally due from him until after the day of payment, and provided the drawer should prove insolvent.

Cited—3 Cranch. C. C. 310; 9 Wheat. 592; 6 Pet. 715; 3 How. 533.

THE HOPE INSURANCE COMPANY OF PROVIDENCE

v.

BOARDMAN, *et al.*

A corporation aggregate cannot be a citizen—and cannot litigate in the courts of the United States, unless in consequence of the character of the individuals who compose the body politic, which character must appear by proper averments upon the record.

ERROR to the Circuit Court for the District of Rhode Island, in an action upon a policy of insurance.

The only question decided in this court was that relative to the jurisdiction of the courts of the United States.

The parties were described in the declaration as follows: "William Henderson Boardman, and Pascal Paoli Pope, both of Boston, in the District of Massachusetts, merchants and citizens of the state of Massachusetts, complain of The Hope Insurance Company of Providence, a company legally incorporated by the legislature of the state of Rhode Island and Providence Plantations, and established at Providence in said district."

*The question of jurisdiction was not [***58** made in the court below.

Ingersoll, for the plaintiffs in error, contended, that the jurisdiction must appear upon the face of the proceedings, according to the decision in the case of *Bingham* v. *Cabot* (3 Dal., 382). And that it does not appear upon this record that the parties are citizens of different states; a corporation aggregate cannot be a citizen of any state; and here is no averment of citizenship of the individuals who compose the corporation.

Adams, contra.

The whole argument against us depends upon the single case of *Bingham* v. *Cabot;* for although in other cases the same point has been decided,

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NOTE.—All the stockholders of a corporation, are, in a suit by or against a corporation, in a United States court, for the purposes of jurisdiction, conclusively presumed to be citizens of the state which created the corporation.

Muller v. Dows, 4 Otto, 444.

The U. S. Circuit Court has jurisdiction of a suit against a foreign insurance company doing business within the state, under leave conditioned upon its filing a stipulation that process may be served on its agent with like effect as if service were actually made on the company within the state.

Ex parte Schollenberger, 6 Otto, 369; See *Pomeroy* v. *N. Y. R. Co.*, 4 Blatchf., 420, *contra.*

Citizens of a state holding bonds of a corporation of another state, secured by mortgage on lands in the latter state, may bring an action against the trustee, the corporation, and other bond and coupon holders, all citizens of the latter state, to compel the trustee to foreclose the mortgage, although some of the persons were made defendants solely on the ground that they had refused to join as plaintiffs in the action.

Hotel Co. v. *Wade*, 7 Otto, 13.

Where a company is incorporated by two states, a citizen of one of the states may sue it in a United States court in the other state in which it is incorporated.

City of Wheeling v. *Mayor* of Baltimore, 1 Hugh, 90; *Minor* v. *Phil.* R. Co. 2 Abb., U. S., 323.

In the case of a mere collective body, associated by voluntary articles, a joint stock association, the presumption that all its members are citizens of the state does not arise, and if it be not alleged in the bill that it is a corporation, or that the members thereof are citizens of the state, a demurrer will be sustained.

Dinsmore v. *Phil. & Co.*, 1 L. & Eq. Reporter, 351.

A corporation that has appeared and answered generally cannot insist upon want of jurisdiction on the ground that it is not an inhabitant of the district.

Kelsey v. *Penn.* R. Co., 14 Blatchf., 89.

A corporation created by the laws of a state, is, in suits in a federal court of that state, to be considered a citizen of such state, whatever its citizenship in other states may be by legislation of those states.

Railway Co. v. *Whitton*, 13 Wall., 270; *Marshall* v. *Railroad Co.*, 16 How., 314; *Louisville R. Co.* v. *Letson*, 2 How., 497; *Vallette* v. *Whitewater C. Co.* 4 McLean, 192; *N. Y. R. Co.* v. *Shepard*, 5 McLean, 455; *Bk. of U. S* v. *Deveaux*, 5 Cranch, 61.

yet the subsequent decisions are all founded upon that case. The effect of that decision has been to exclude many cases upon nice questions of pleading, which would otherwise have been clearly within the jurisdiction of the courts of the United States. No exception was taken to the jurisdiction in the court below; and this court would not willingly turn us out of court, after encountering all the risk, expense, delay and labor of a jury trial, upon an exception, which, if taken in the first instance, might have prevented all that risk, expense and delay. In the case of *Abercrombie* v. *Dupuis* (ante, vol. 1, p. 343), the present Chief Justice (Marshall) intimated a doubt how the question would then have been decided if it were a new case, and if the court was not bound by the case of *Bingham* v. *Cabot*. This doubt shows that the court was not then inclined to extend the principle farther than that case warrants. At the time the court decided the case of *Bingham* v. *Cabot*, the jurisdiction of the courts of the United States was an object of jealousy, and there was probably a desire on the part of the court to remove all ground of suspicion, by deciding doubtful cases against the jurisdiction. This circumstance probably induced them to be over scrupulous **59***] upon that *subject. But it is as much the duty of this court to exercise jurisdiction in cases where it is given by the constitution and laws of the United States, as to refuse to assume it where it is not given.

The person who drew the declaration in the present case seems to have been aware of the decision in the case of *Bingham* v. *Cabot*, and to have intended to describe the parties in such a manner as to give the court jurisdiction. The defendant is described as "a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence in the said district."

The term citizen could not with propriety be applied to a corporation aggregate. It could only be a citizen by intendment of law. It is only a moral person; but it may be a citizen *quoad hoc, i. e.*, in the sense in which the term citizen is used in that part of the constitution which speaks of the jurisdiction of the judicial power of the United States. The term is indeterminate in its signification. It has different meanings in different parts of the constitution. When it says "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," the term citizens has a meaning different from that in which it is used in describing the jurisdiction of the courts.

To say that all the individual members of a body corporate must be citizens of a certain description, destroys the idea of a body politic. It is the body politic, the moral person, that sues, and not the individuals who compose the corporation. Its powers, its duties and capacities are different from those of the individuals of whom it is composed. It can neither derive benefit from the privileges, nor suffer injury by the incapacities, of any of those individuals.

Thus the infancy of any or even of all the members of a body corporate does not affect the validity of its acts. Nor does the alienage of **60***] the members *prevent the body politic from holding lands. A majority of the members of the Bank of the United States are aliens.

The objection goes to exclude all corporations aggregate from the federal courts. For if a corporation cannot be a citizen it cannot be an alien. And as the individual members are constantly changing by the transfer of stock, it is impossible to ascertain at any precise moment who are the individuals who constitute the corporate body; and it would at any time be in the power of a corporation defendant to evade the jurisdiction of the court, by taking in a new member who should be of the same state with the plaintiff.

At all events it is an objection which ought to be pleaded in abatement according to the course of the common law, so that the plaintiff may have a better declaration; and by that means much expense, time and labor would be saved.

The reason of giving jurisdiction to the courts of the United States in cases between citizens of different states, applies with the greatest force to the case of a powerful moneyed corporation erected within, and under the laws of a particular state. If there was a probability that an individual citizen of a state could influence the state courts in his favor, how much stronger is the probability that they could be influenced in favor of a powerful moneyed institution which might be composed of the most influential characters in the state. What chance for justice could a plaintiff have against such a powerful association in the courts of a small state whose judges perhaps were annually elected, or held their offices at the will of the legislature?

If the jurisdiction of the federal courts is limited by the letter of the constitution, they have no jurisdiction in a case between a citizen of one state and a citizen of another state; because the constitution speaks of *citizens*, in the plural, so that there must *be more [***61** than one plaintiff, and more than one defendant. So also there could be no jurisdiction if one of the parties was a woman, because a woman cannot be a *citizen*; which is a term applicable only to a *male*.

It is not necessary that a person should be a citizen to commit treason: it may be committed by an alien.

Judge Jay, as an argument in favor of the suability of the states, urged that a corporation could undoubtedly be sued in the courts of the United States.[1]

THE COURT having, in the case of *The Bank of the United States* v. *Deveaux et al.*, decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members which compose the body corporate, and that a body corporate as such cannot be a citizen, within the meaning of the constitution, reversed the judgment, for want of jurisdiction in the court below.

Modified—8 Wall. 178.
Cited—2 How. 22; 16 How. 348, 350; 18 How. 348; 18 How. 364; 20 How. 233; 3 Sum. 473; 4 Biss. 126; 4 Wash. 597; Hemp. 424, 425.

1.—A similar question of jurisdiction being involved in the case of *The Bank of the United States* v. *Deveaux et al.*, and the counsel in that case expressing a wish to be heard before this case should be decided, the court agreed to hear both cases at the same time; the further arguments in this case were consequently blended with those in the other.

THE BANK OF THE UNITED STATES v. DEVEAUX *et al.*

A corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the Circuit Court of the United States.

Where the jurisdiction of the courts of the United States depends, not on the character of the parties, but upon the nature of the case, the circuit courts derive no jurisdiction from the judiciary act, except in the case of a controversy between citizens of the same state claiming lands under grants from different states.

No right is conferred on the bank, by its act of incorporation, to sue in the federal courts.

A corporation aggregate cannot, in its corporate capacity, be a citizen.

ERROR to the Circuit Court for the District of Georgia.

The declaration, or petition, as it is there called, was as follows:

District of Georgia.

To the Honorable the Judges of the Sixth **62*]** Circuit *Court of the United States, in and for the district aforesaid.

The petition of the president, directors and company of the Bank of the United States, which said bank was established under an act of Congress entitled "An act to incorporate the subscribers to the Bank of the United States," passed the 25th day of February, 1791, showeth;

That Peter Deveaux and Thomas Robertson, both of the city of Savannah, Esquires, have endamaged your petitioners in the sum of three thousand dollars, for this, to wit, that the said Thomas Robertson, then acting under authority from the said Peter Deveaux, on the 20th day of April, 1807, at Savannah, in the district aforesaid, and within the jurisdiction of this honorable court, with force and arms entered into the house and premises of your petitioners, at Savannah aforesaid, and then and there seized, took, and detained, two boxes (the goods and chattels of your petitioners), containing each one thousand dollars in silver, then and there found in the possession of your petitioners, and being of the value of two thousand and four dollars, and carried the same away, and converted and disposed thereof to their own use, and other wrongs to your petitioners then and there did against the peace of the district, and to the great damage of your petitioners, therefore your petitioners say they are injured, and have sustained damage to the value of three thousand dollars, and therefore they bring suit. And your petitioners aver that they are citizens of the state of Pennsylvania, and the said Peter Deveaux and Thomas Robertson are citizens of the State of Georgia. Wherefore your petitioners pray process, &c.

And the said Peter and Thomas, by R. L., their attorney, come and defend the force and injury, when, &c., and pray judgment of the declaration aforesaid, because they say that the sixth Circuit Court of the United States ought **63*]** not to have and *entertain jurisdiction of the said declaration, and the matters therein contained, for that the said president, directors and company of the Bank of the United States aver themselves to be a body politic and corporate, and that in that capacity these defendants say they cannot sue or be sued, plead or be impleaded in this honorable court, by anything contained in the constitution or laws of the same United States, and this they are ready to verify; wherefore, for want of jurisdiction in this behalf, they pray judgment, and their costs, &c.

To this plea there was a demurrer and joinder, and judgment in favor of the defendants upon the demurrer.

Binney, for the plaintiffs in error.

In the year 1805 the state of Georgia passed a law to tax the Branch Bank of the United States, at Savannah. The bank having refused to pay the tax, the state officers entered their office of discount and deposit, and took and carried away two thousand dollars, for which the Bank of the United States brought their action of trespass in the Circuit Court of the United States for the District of Georgia. The plea to the jurisdiction does not deny that the plaintiffs were citizens of the state of Pennsylvania, but relies upon the fact that the plaintiffs sue as a body corporate.

The record presents two questions.

1. Whether a body politic, composed exclusively of citizens of one state, can sue a citizen of another state in the Circuit Court of the United States.

2. Whether the Bank of the United States has not a peculiar right to sue in that court.

The objections to this right are two.

1. That the individual character of the members *is so wholly lost in that of the [***64** corporation, that the court cannot take notice of it.

2. That the suit being in a corporate capacity, it is impossible by the pleadings to bring into question the fact of citizenship of the individual members.

The answer to the first objection embraces three propositions.

1. That in many instances, the character, situation and attributes of the members of a corporation, are brought into notice in judicial proceedings against the corporate body.

2. That even if it were otherwise, still the spirit of the federal constitution and laws demands that the citizenship of the members should be noticed, as well to affect the question of jurisdiction as for other purposes.

3. That the constant practice in the circuit courts, and the tacit approbation of this court, have sanctioned their jurisdiction in such cases.

1. What is a corporation aggregate? It is a collection of many individuals united into one body, under a special name, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting in several respects as an individual. (1 Kyd. on Corp., 13). To say that it is an "*ens civile*, a *jus habendi et agendi*, an *ens rationis*, a mere metaphysical being, and that it rests only in consideration and intendment of law," are terms calculated to mislead the understanding.

A corporation is composed of natural persons; it is a visible, tangible body; and although the whole collectively have faculties in law which the individuals have not, yet it does not follow that the whole body may not be seen, examined, sifted and contemplated, as any other body of individuals having *col- [***65** lectively a particular faculty. (11 Co., 98, b). The individuals hold their rights as members

NOTE.—See ante page 57.

in their natural, and not in a politic capacity. A corporation is a mere collection of men having collectively certain faculties.

When the president, directors and company of a bank are assembled, the corporation is visible. If all the members should die, or surrender their charter to the King, the corporation would be extinct. A corporation must exist by means of natural persons; and the law will examine whether the natural persons claiming to be members have all the necessary qualifications according to their charter. If any individual member does not possess them, he is to be disfranchised.

If a suit were brought against a corporation it would be a decisive bar that all the members were dead.

A corporation as a "faculty" has no "local habitation," though it has a "name." If it is an *ens rationis* only, it cannot be said to reside anywhere; and it certainly occupies nothing; yet habitancy, residence and occupation may be predicated of a corporation aggregate. The residence and inhabitancy of the particular members have been taken into consideration, and have been deemed to impart these characters to the corporation.

Lord Coke, in his exposition of the statute of 22 Hen. VIII. c. 5, concerning the repairing of decayed bridges in highways (2 Inst., 697, 703), says, "the persons to be charged by this act are comprehended under this only word "inhabitants." "Every corporation and body politic residing in any county," &c., "or having any lands or tenements in any shire," &c., "*quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there within the purview of this statute." In the case of *Rex* v. *Gardner* (Cowp., 83), it was decided that a corporation aggregate was an inhabitant or **66*** occupier of *certain lands, and therefore liable to be taxed for them under the act of 43 Eliz., c. 2.

It must be an inhabitant or resident where its members or officers inhabit or reside. If an action be brought against the corporation in respect of its residence or occupation, it must be competent to the corporation to show that it does not so reside or occupy, which can only be done by showing that this is not true of its members or officers.

But the characters of individual members are in many cases examined for the purpose of settling the very question of jurisdiction.

The division of corporations into ecclesiastical and lay, is familiar. There is nothing in the name or patent to distinguish them. (1 Bla. Com., 470.) An ecclesiastical corporation is subject to the ordinary alone. His court alone has jurisdiction of proceedings by or against the corporation. (1 Bla. Com., 480.) A lay corporation is visited by the founder. The King is the founder of all civil corporations, and he visits them in the King's bench.

By ascertaining the characters of the members of the corporation alone can it be decided whether the corporation be lay or ecclesiastical; and, consequently, whether the King's bench or the ordinary has jurisdiction. Blackstone says, that an ecclesiastical corporation is where the members that compose it are entirely spiritual persons; and that the universities of Oxford and Cambridge are not ecclesiastical corporations, "being composed of more laymen than clergy." In this question of jurisdiction, therefore, is always involved the character of the individual members who compose the body.

The members of a corporation are further noticed in chancery, and are compelled as individuals to execute a trust, which at common law they were not bound to do. (Gilb. Uses, 5, 174; 1 Kyd., 73; 2 Leon., 122.) A corporation trustee is the same in chancery *as [***67** an individual, or number of individuals. (2 Ves. Jun., 46. *Attorney General* v. *Foundling Hospital.*)

The rule seems to be, not that the individuals confer their private privileges upon the body corporate, but that as often as justice or convenience require that the corporation should be considered as composed of natural persons, the individuals are disclosed, and their character becomes the subject of legal contemplation.

2. The spirit of the constitution and laws of the United States demands that the citizenship of the members of a corporation should be noticed in order to decide the question of jurisdiction, as well as for other purposes.

The constitution has conferred on the courts of the United States jurisdiction in two classes of cases.

1. Where the peace of the confederacy might be involved.

2. Where the state tribunals could not be supposed to be impartial.

The one upon the ground that the Union was answerable for the misconduct of its members, who, by unjust decisions against aliens, might furnish a just ground of war.

The other to preserve the real equality of citizens throughout the Union, by guarding against fraudulent laws and local prejudices, in particular states.

The design of the constitution was to retain jurisdiction in those cases where substantially these great interests were to be affected. It cannot be supposed that it was to be retained only where there was a nominal character, alien or citizen, and abandoned where substantially aliens or citizens were concerned, but whose names did not appear. It is unimportant by what name citizens are by the laws *of their own state permitted to sue, they [***68** are still citizens, and entitled to that substantial justice, and the benefit of those independent tribunals which were intended to be secured by the federal constitution. The constitution does not speak of the name on record; of the nominal party; it speaks of "controversies" "between citizens of different states." The question is not, what names appear upon the record, but between whom is the controversy; who are the real litigants.

In conformity with the spirit of the constitution, the federal courts have always inquired after the real parties. Although the nominal parties are really persons competent to sue in those courts, yet they will inquire into the character of the real litigants, and if they find them unable to sue there, they will dismiss the suit. (4 Dal., 330, *Mansfield's Lessee* v. *Lery.*) They will allow no fiction to give jurisdiction to the court where the substance is wanting. Can it be admitted then that they will allow the jurisdiction to be excluded by a name, if the substance exists which gives jurisdiction?

If a state be substantially a party, is the jurisdiction cut off if her agent brings a suit? The case of *Fowler* v. *Lindsey* (3 Dal., 412), clearly implies the contrary.

It is the privilege of citizens of one state to have their controversies with citizens of another state tried in the federal courts. The constitution guaranties it to them. It cannot be taken away, because they are authorized to bring one joint suit in a particular name, instead of bringing it in the names of each individual. Their corporate name is given them as a benefit, and ought not to be converted into an injury. Besides, if the bank cannot sue, they cannot be sued in the federal courts; nor any other corporation. The consequence is, that if a citizen of Georgia would sue the bank of the United States, at Philadelphia, he must go into the state courts. If he would sue the corporation of Philadelphia, **69***] he must *sue in the state courts; nay, even in the County Court of Philadelphia itself.

But it is not more a question of jurisdiction than of right. If you cannot inquire who are the members of a corporation, whenever a right depends upon the question of citizenship, that right cannot be enjoyed by a corporation.

If citizenship of the members cannot give jurisdiction, neither can their alienage. A corporation composed of aliens cannot sue in the federal courts. Neither the East India Company, the Bank of England, nor even a sole corporation, such as the Chamberlain of London, can sue in those courts; for in his corporate capacity he is not an alien.

An alien cannot sue a domestic corporation unless in the state courts. Although you permit an obscure alien to sue a citizen in the federal courts, yet you deny that privilege to a corporation consisting of a great number of aliens.

Again: by the constitution, the jurisdiction of the federal courts is to extend to "controveries between citizens of the same state, claiming lands under grants of different states;" yet a corporation of Pennsylvania claiming lands under Virginia, against a citizen of Pennsylvania claiming the same lands under Pennsylvania, must go into the courts of Pennsylvania, and cannot get into the federal courts.

This would be a result clearly contrary to the intention and spirit of the constitution, which meant that no man claiming land by title adverse to a state should be obliged to resort to the courts of that state to try his title.

The argument from inconvenience is very strong. Lord Coke says *plurimum valet*. When other reasoning is nearly on an equipoise it ought to turn the scale.

70*] *The court cannot consider the individual members as citizens for any purpose, if it cannot for that of jurisdiction.

How is it under the act of Congress for registering vessels? (Laws of the U. S., vol. 2, p. 147.) A corporation cannot hold an American registered vessel. An insurance company to whom an American vessel is abandoned must forfeit her register, although every member of that corporation be an American citizen. A foreign corporation, although composed entirely of aliens, may yet hold lands in this country, although an alien cannot.

3. The practice of the courts of the United States has been uniform and never questioned. This court has decided a great number of cases in which a corporation has been a party. It is no answer to these to say that there was no plea to the jurisdiction; for none was necessary. Whenever the court sees that it has not jurisdiction, or that its jurisdiction does not appear upon the record, it dismisses the suit. And in every case where a corporation is a party, the title of the suit alone was sufficient to give the court information.

But this point may be considered as almost, if not quite, decided by the case of *The Bank of North America* v. *Turner* (4 Dal., 98), where the plaintiffs were described in the same manner as the present plaintiffs, and Ch. J. Ellsworth, in delivering the opinion of the court, says, "the plaintiffs are well described as citizens of Pennsylvania."

The second objection is, that by no form of pleadings can the citizenship of the members be put in issue.

But if the citizenship be material, it may be averred; and if averred, it may be put in issue. The materiality of the averment is indeed the only question.

*2. The second question upon this record [***71** is, whether the bank of the United States has not a peculiar right to sue in the federal courts?

This right depends upon two questions;

1. Whether Congress could, under the constitution, give such a jurisdiction to the circuit courts? And,

2. Whether Congress has given it?

1. The judicial power of the United States is co-extensive with the legislative. It extends to all cases arising under the laws of the United States. Every case in which the bank of the United States is a party must be a case arising under those laws; for the only capacity which the bank has to sue or be sued is derived from a law of the United States. No contract can be made with the bank, no trespass can be committed upon its property, without involving the question of its existence as a corporate body, and of its rights, powers and duties, all of which depend upon the laws of the United States.

Congress, therefore, had a right to give to the circuit courts of the United States cognizance of all cases in which the bank should be a party.

2. Have they done it?

The 3d section of the act of Congress which incorporated the bank, gave them the power and capacity "to sue" "in courts of record, or any other place whatsoever."

If they had a right to sue in courts of record, can it be presumed that Congress meant to exclude them from the courts of the United States? the only courts over whom Congress could exercise any control, and to whom alone they could imperatively impart jurisdiction. If the bank has a capacity to sue in the circuit courts, the circuit courts are bound to take cognizance of their suits.

*The presumption that Congress meant [***72** to give such jurisdiction to the circuit courts is fortified by the reasonableness of the jurisdiction, the extensiveness of the institution, and its character as an agent in the fiscal operations of the United States; by the danger of an attack from some of the states; by the jealousies of state banks; by the inconvenience of dis-

cordant decisions upon the construction of their charter, and the certainty that all cases in which the bank is a party must involve questions arising under the laws of the United States.

P. B. Key, contra.

Two questions arise in this case.

1. Whether a body politic, a corporation aggregate, created by a law of the United States, is competent to sue in the circuit courts of the United States.

2. Does the averment of citizenship give jurisdiction to those courts?

1. The first point depends upon the constitution and laws of the United States.

The 2d section of the 3d article of the constitution designates the limits of judicial authority which Congress could confer on the several courts of the United States, but it confers no powers on the circuit courts. It defines the limits which neither Congress, nor the courts erected by Congress, can transcend. It was within the discretion of Congress to organize courts, and grant them powers to the whole extent of the constitution; but they were under no obligation to do it.

The question, then, is not what powers might Congress give to the circuit courts, but what have they given.

By the judiciary law of 1789 (vol. 1, p. 55, § 10), the Circuit Court has original cognizance of [*73 civil *suits, in three cases only. 1. Where the United States is plaintiff; 2. Where an alien is a party; and, 3. Where the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

The president, directors and company of the bank of the United States do not answer to either of those cases. They are neither the United States, nor an alien, nor a citizen of a state.

They are a corporation aggregate, consisting of many natural persons, created by the act of Congress of the 25th of February, 1791 (vol. 1, p. 283), under the name and style of "The President, Directors and Company of the Bank of the United States," and by that name only can they sue and be sued. The present suit is brought by them in their corporate name and capacity.

A corporation aggregate is an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person. It has no organ but its seal. It cannot sue, or be sued, for any personal injury. It cannot be outlawed. It is not subject to an attachment of contempt. It never dies. It cannot be a citizen of any state, because it cannot owe allegiance. It cannot commit treason nor felony. It can have no residence, because it is an artificial, invisible, intangible body. It cannot appear in person, but must appear by attorney. For all these reasons it cannot come within the description of those who are entitled to sue in the circuit courts of the United States. Neither residence nor inhabitancy is sufficient to give jurisdiction. It must be a citizen, possessing political rights, and owing allegiance to some state.

The bank has mistaken its proper course. Wherever the only ground of jurisdiction is a question upon the construction of the constitution, or of a law or treaty of the United States, the only remedy is by writ of error from this court to the highest *state tribunal having [*74 cognizance of the cause, agreeably to the provisions of the 25th section of the judiciary act of 1789. (Vol. 1, p. 63.)

If an act of Congress could authorize any person to sue in the federal courts, on the ground of its being a case arising under a law of the United States, it would be in the power of Congress to give unlimited jurisdiction to its courts. But it is only when the state courts disregard or misconstrue the constitution, laws, or treaties, of the United States, that the federal courts have cognizance under that clause of the constitution which declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

It is supposed to be absurd to say that the United States have erected a body corporate, and given it a power to sue and be sued in any courts but those of the power creating the corporation. But there is nothing absurd in the idea. Persons are daily becoming citizens of the United States, under an act of Congress, and yet they have no right to sue in the federal courts except in particular cases, and under special circumstances; if the bank can bring itself within one of those cases, and clothe itself with those special circumstances, it may sue in those courts.

But it is contended that it has brought itself within one of those cases, by the averment that the president, directors and company of the bank of the United States are citizens of the state of Pennsylvania, and the defendants citizens of the state of Georgia.

This averment cannot give jurisdiction; because,

1. It is repugnant and void; and,

2. It is contrary to their own showing on the face of the declaration.

1. It is repugnant because the suit is brought in the corporate name. The corporation is the plaintiff, *and it is absurd and impossible [*75 to say that a corporation aggregate is a citizen or citizens. The body politic is the plaintiff, and not the individual stockholders.

2. It is contrary to their own showing, because they have in the declaration expressly averred themselves to be a body corporate, and to sue in that capacity; and an averment relative to the individual characters of the stockholders is in contradiction to the corporate character in which they sue. No corporation aggregate can derive aid from the personal character of its members; nor does it incur any disability from the disabilities of the individuals who compose the society. Neither the infancy, coverture, nor outlawry of the individuals can affect the body corporate.

It is laid down in the books that "an averment contrary to that which appears to the court, shall not avail." (Com. Dig. tit. Pleader.)

But it is said that you may raise the veil which the corporate name interposes, and see who stand behind it. You may strip them of the corporate capacity in which they sue, to give the court a jurisdiction which they cannot claim in their corporate capacity.

But the name of a corporation is not a mere accident. It is substance. It is the knot of its combination. It is its essence. It is the thing itself. (1 Tuck. Bl., 474, 475).

As to the case of ejectment from 4 Dal., 333, the nominal plaintiff must have the same character, as to citizenship, as his lessor; and the court will be astute to see that no deception be practiced upon them to give them a jurisdiction which they could not otherwise exercise.

The authority from 2 Inst., 697, only proves that a corporation aggregate may be adjudged [*76] to be an *inhabitant in respect to its holding of lands, and so as to render those lands liable to taxes for the repair of bridges and highways under the statute of 22 H. VIII., c. 5.

In the case of *The King* v. *The Inhabitants of St. Bartholomews*, in 4 Burr., 2435, Lord Mansfield said the corporation were not occupiers. And in *Rex* v. *Gardner* (Cowp., 84), the question was, whether a corporation, seized in fee for its own profit, was ratable to the poor, under a law which taxed all inhabitants. The court decided that inasmuch as persons seized in fee were always assessed as inhabitants of the land, if there was no other tenant upon it, a corporation seized in fee should, *pro hac vice*, be deemed an inhabitant within the meaning of that statute. But this goes but a little way towards proving that a corporation aggregate may be a citizen for the purpose of giving jurisdiction to the federal courts; or towards establishing the point that the court will inquire into the individual circumstances of the members of a corporation, for the same purpose.

Of still less weight is the doctrine respecting the visitatorial power in England. That power is given for the express purpose of examining the qualifications of the members, to see whether the charter of the corporation has been adhered to in the election of members, and whether the corporation has acted consistently with the purposes of its creation. It is not a power to examine the character of the individuals to ascertain whether the corporation has a right to sue in a certain court.

At law, a corporation cannot be a trustee. And a court of equity acts *in personas* to compel the members to perform their corporate functions; but even this doctrine depends upon the mere *dictum* of a lord chancellor.

In the case cited from 4 Dal., 8, the question respecting the averment of citizenship was not raised. The gentlemen of the bar were not [*77] very *desirous of raising questions as to the jurisdiction of the federal courts.

If denial of justice be a cause of war, as is alleged, the person who claims it must preserve an entirety of character; he must not associate himself with others who have no right to claim it in that form. Foreign nations have no right to prescribe the mode of administering justice to their subjects in this country. If they have the same resort to the same courts which our own citizens enjoy, they cannot complain.

But it is said that the death of all the members of a corporation is a fact which may be pleaded; that cannot be pleaded unless you can go into the question who were the last members of the corporation. And if you can plead anything respecting the individual members, you may plead their citizenship. But if this be true, it must be pleaded in a different manner. The name of each individual must be set forth, and his death averred. And it may well be doubted whether even such a plea would be good; and whether the only remedy would not be by *quo warranto;* or a rule to show cause.

If the averment in the declaration relate to the body politic, it is repugnant. If to the individual members, it is immaterial. No issue could have been taken upon it. It does not name a single individual member of the corporation. If they had named every individual, it would have appeared that some of them were citizens of Georgia. If the defendant had pleaded that A. B., one of the members, was a citizen of Georgia, it would have been a bad plea, because immaterial and argumentative.

Jones, on the same side, cited (Co. Litt. 66, b; 10 Co., 32, b; 1 Ld. Raym., 80; 2 Cranch, 445; 2 Burr., 1054; 1 Bl. Com., 497, 512; 10 Co., 30; 1 Bl. Com., 502; 1 Leach's Cr. Law, 287).

This cause being argued in connection with the * cases of *The Hope Insurance Com-* [*78] *pany of Providence* against *Boardman et al.* (ante, p. 57), and *The Maryland Insurance Company* against *Wood, post*, in the latter of which Mr. Harper was counsel for the defendant in error, he was permitted to reply to the arguments of the plaintiffs in error in this case.

Harper, in reply.

The point of jurisdiction gives rise to two questions.

1. As to the form of the averment.

2. As to the effect of the incorporation on the original character of the members.

1. In the case of *The Maryland Insurance Company* against *Wood*, the averment is. "The Marylaud Insurance Company, citizens of the state of Maryland."

This does not mean that the corporation, as such, is a citizen of Maryland, but that the individuals who compose it are citizens. It is the same thing in substance as to say, "The Maryland Insurance Company, a corporate body composed of persons who are citizens of Maryland."

It is objected that such an averment cannot be true; but it is surely possible that all the members of a corporate body may be citizens of one state; and with regard to insurance companies it is almost always true. But if not true, the contrary may be shown.

It is also objected that the averment is defective, because it does not name the individuals who are affirmed to be citizens.

But it may be answered that they need not be named, because they have authority to join in the *suit in their corporate name, and [*79] therefore in that name may make the averment. There is no uncertainty, because it is averred that they are all citizens. But if it were necessary to aver that some were citizens, in that case it would be necessary to show who they were. If the fact be not as averred, it may be pleaded, and the plea may state that A, B and C are members of the corporation, and are citizens of another state.

2. As to the effect of the incorporation.

The question is not whether a corporation can be a citizen in its corporate capacity.

But whether, by becoming members of the corporation, the individuals who compose it lose, in their corporate affairs, those privileges which as individuals they possessed before.

This leads us to inquire into the nature and objects of an incorporation.

1. Of its nature.

It is a privilege conferred on a number of individuals. The corporate body is the form under which the privilege is enjoyed and exercised. The individuals are the substance. It is a fiction of law; the individuals are the real parties. It is a trustee; the individuals are the *cestui que trusts*.

It is a privilege conferred and accepted. But neither the grant nor the acceptance deprives the party accepting it of other privileges which he before possessed, unless they be incompatible with each other.

Thus the law confers on infants the privilege of being free from the obligation of their contracts; and it takes from them the privilege of acquiring rights under those contracts, because these two privileges are incompatible; but it **80*]** does not take *from them the privilege of suing for rights derived otherwise than from their contracts.

So a woman, by entering into wedlock, acquires the privilege of being free from arrest for debt. And she renounces the privilege of making contracts, because that would be incompatible; but she does not renounce the privilege of taking land by descent, gift or devise.

So a man, by entering into civil society, acquires the privilege of being protected by the society; and he renounces the privilege of seeking, by his own force, redress for his wrongs, because incompatible. But he does not renounce the privilege of defending himself against personal violence.

The privileges of a corporation are,

1. To sue and be sued by a corporate name.

2. To have perpetual succession by the transfer or transmission of the shares, &c.

3. To make contracts by which the separate property or persons of the individuals shall not be bound.

These privileges are not incompatible with that now claimed.

But an incorporation is not only a privilege, but it is a privilege conferred on individuals. Individuals are the basis and essence of the corporation. It cannot subsist without them. The law must take notice of them. It must take notice of their character and privileges as individuals. The existence of the corporate body cannot be known without taking notice of the individuals. The most important of its privileges, that of perpetual succession, depends upon it.

If the law cannot notice the privileges of individuals, *neither can it notice their [***81** obligations or disabilities.

It may happen that all the members of a corporation may be infants or *femes covert*. Suppose in an action brought by this corporation the statute of limitations should be pleaded, could not the plaintiff reply the infancy or coverture?

Again, suppose a corporation to have existed and made a contract in Pennsylvania with a citizen of Maryland; suppose that all the members came into Maryland, and after remaining there some time returned to Pennsylvania; and that three years afterwards the corporation brought suit in Maryland, on the contract; could not the statute of limitations be pleaded? And if the plaintiffs should reply absence from the state, might not the defendant rejoin the special matter?

Suppose all the members of a corporation to be outlawed, could not the outlawry be pleaded to an action brought by the corporation?

Suppose the corporation to hold land, and all the members to be attainted of treason, would not the land be forfeited?

Suppose a corporation to be composed entirely of alien enemies, could such a corporation sue? Might not the special matter be pleaded?

The corporate body is the form; the individuals are the substance. The purpose of the incorporation is to enable individuals to transact business more conveniently for their mutual benefit. Individual benefit is the object. The incorporation is the instrument and means, like the fictitious lessee, and casual ejector, in ejectment.

The construction contended for would sacrifice the *substance to the form, and would [***82** make the means defeat the end.

The corporation is a fiction of law; the individual members are the real parties. But fictions of law are introduced for the benefit of the real parties, not for their injury; and they are to be so moulded as to answer the purpose. Fictions of law never must shut out the truth. But the construction contended for would set up a fiction against the truth. The parties here are in fact citizens of different states; but this fiction, it is said, must preclude them from averring the fact.

The corporate body is a trustee. The individual members are the *cestui que trusts*. It is like infant and *prochein ami*.

Suppose a man, seized in fee of lands in Pennsylvania, mortgages it to a citizen of that state, and then devises it in fee to a citizen of Maryland in trust for a *feme covert* also a citizen of Maryland and her heirs. The trustee dies, and his heir, on whom the trust descends, is a citizen of Pennsylvania. The *feme covert* dies, leaving issue citizens of Maryland, upon whom the trust estate descends.

Cannot the issue, joining the heir of the trustee, bring a bill to redeem in the Circuit Court of Pennsylvania? Would not the court look to the real parties?

Again, suppose an infant citizen of Maryland sues in the Circuit Court of Pennsylvania, by a *prochein ami* who is a citizen of Pennsylvania, has not that court jurisdiction of the case?

2. Of the object of the incorporation.

It is to confer additional privileges and advantages, not to take away those formerly held. To the privilege of suing in the federal courts in their individual *capacity, was superadded [***83** the privilege of so suing in their corporate capacity.

The true construction is, that they should sue and be sued in their corporate capacity, to the whole extent, and in as beneficial a manner, as in their individual capacity.

The construction contended for would restrict the privilege of suing; and would take away one of its most important properties.

One great object in allowing citizens of different states to sue in the federal courts, was to obtain a uniformity of decision in cases of a commercial nature. The most numerous and important class of those cases, and the class in which it is most important to have uniform rules and principles, is that of insurance cases. They are almost wholly confined to corpora-

tions, though most frequently, in fact, between citizens of different states.

Ingersoll, on the same side, and also in reply to the argument of Mr. Adams, in the case of *The Hope Insurance Company* v. *Boardman, et al.*

The character of the corporation must follow the character of its members. The averment of the citizenship of its members is sufficient. But it is clear that a corporation aggregate cannot be a citizen. An avermeut of residence is not sufficient. (1 Cranch, 343, *Abercrombie* v. *Dupuis*.) The place of its establishment does not make it a citizen. It is not necessary, under its charter, that all the members of The Hope Insurance Compauy of Provideuce should be citizens of the state of Rhode Island. The declaration in that case does not even aver either the corporation or its members to be citizens of any state whatever. If any one of the members be a citizen of the state in which the suit is brought, the federal court has no jurisdiction. (3 Cranch, 267, *Strawbridge* v. *Curtiss*.)

84*] *It is a bold proposition to say that no corporation can sue in the federal courts. It would be in hostility to the spirit of the constitution, and would deprive the citizens of one state of that chance of justice in their contests with citizens of another state, which the coustitution intended to secure to all; and this merely because they have been enabled to sue under a fictitious name.

Every corporation aggregate must be composed of uatural persons, and courts of law will take notice of them as members of the corporate body. If a suit be brought by or agaiust the inhabitants of an incorporated town, the court will inquire whether any of the jurors or wituesses are inhabitants. So a corporate body may own an American registered ship, and one of the corporation may take the necessary oaths.

Numerous cases have already been decided in the federal courts, in which a corporation has been a party, involving the right of property to the amount of millions. What will become of all these cases? In all the cases within the last five years writs of error will be brought.

In ejectmeut, the court, on a question of jurisdiction, always inquires who are the real parties.

The constitution declares that the judicial power shall extend to "controversies" "between citizens of different states." It is necessary, therefore, that the court should inquire between whom the real controversy exists.

March 15. MARSHALL, *Ch. J.*, delivered the opiuion of the court as follows:

Two points have been made in this cause.

1. That a corporation, composed of citizens

85*] of *one state, may sue a citizen of another state, in the federal courts.

2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered.

The judicial power of the United States, as defined in the constitutiou, is dependent, 1st. On the nature of the case; and, 2d. On the character of the parties.

By the judicial act, the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded, in the courts of the Union, depends ou the character of the parties; but where that right depends on the uature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state, claiming lands under grants from differeut states.

Unless, then, jurisdiction over this cause has been given to the Circuit Court by some other than the judicial act, the bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the Uuited States.

The plaiutiffs contend that the incorporating act confers this jurisdiction.

That act creates the corporation, gives it a capacity to make coutracts and to acquire property, and enables it "to sue aud be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever."

This power, if not iucident to a corporatiou, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to *appear, as a corpora- [***86** tion, in any court which would, by law, have cognizance of the cause, if brought by iudividuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdictiou, and for all sums however small they may be.

But the 9th article of the 7th seetion of the act furnishes a conclusive argument against the construction for which the plaiutiffs coutend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or state courts.

This evinces the opinion of Congress, that the right to sue does not imply a right to sue in the courts of the Union unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognizes the right of the patentee to sue in the circuit courts of the United States.

The court, then, is of opiuion, that no right is conferred on the bauk, by the act of incorporation, to sue in the federal courts.

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of differeut states," both parties must be citizens, to come within the description.

That invisible, intangible, and artificial beiug, that mere legal entity, a corporatiou aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued iu the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation *be [***87** considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the

law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be **88***] instituted. Substantially *and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

The statute of Henry VIII. concerning bridges and highways, enacts, that bridges and highways shall be made and repaired by the "inhabitants of the city, shire, or riding," and that the justices shall have power to tax every "inhabitant of such city," &c., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods and chattels."

Under this statute those have been construed inhabitants who hold lands within the city where the *bridge to be repaired lies, [***89** although they reside elsewhere.

Lord Coke says, "every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute."

The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself, and, consequently, this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it.

In the case of the *King* v. *Gardner*, reported by Cowper, a corporation was decided, by the Court of King's bench, to come within the description of "occupiers or inhabitants." In that case the poor rates to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be, that the poor rates on vacant ground belonging to a corporation, may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate *dictum* of Justice Yates, that a corporation could not be an inhabitant or occupier.

These opinions are not precisely in point; but they serve to show that, for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.

It is true that as far as these cases go they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation *itself as endowed [***90** for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name of the corporation, for the purpose of asserting their corporate rights. Still the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially.

There is a case, however, reported in 12 Mod. which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the Mayor's Court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the Court of King's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection, that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of

the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle and fortify the decision.

The case of *The Mayor and Commonalty* v. *Wood*, is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the Congress of the United States had, in terms, enacted that incorporated aliens **91***] might sue *a citizen, or that the incorporated citizens of one state might sue a citizen of another state, in the federal courts, by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one state, suing by a corporate name, and those of another state. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize Congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the judicial act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized by the case in 12 Mod., on a question of jurisdiction, to **92***] look to *the character of the individuals who compose the corporation, and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed; plea in abatement overruled, and cause remanded.

Judge Livingston, having an interest in the question, gave no opinion.

Distinguished—13 Pet. 586.
Cited—5 Cranch 61; 8 Wheat. 491; 9 Wheat. 817; Id. 877; Id. 911; 13 Pet. 586; 14 Pet. 64; 2 How. 554; 14 How. 100, 102; 15 How. 249, 251; 16 How. 348; Id. 326, 340, 344; 18 How. 364, 485; 20 How. 233, 234; 21 How. 215; 1 Black 295; 8 Wall. 179; 3 Otto 135, 205; 4 Biss. 350; 2 Brock. 400, 401; 7 Biss. 453; 3 Dill. 410; 2 Dill. 235; 2 Gall. 133; 3 Mason 159; 4 McLean 226; 1 Woods 74; 4 Wash. 482; 1 Wood. & M. 431, 438; Id. 455; 2 Wood. & M. 231; 3 Wood. & M. 336, 337; 3 Sum. 473; 11 Blatchf. 111; 17 Nat. Bank Reg. 248.

MATTHEWS *v.* ZANE'S LESSEE.

The lands included within the Zaneville district by the act of the 3d March, 1803, could not, after that date, be sold at the Marietta land-office.

ERROR to the Supreme Court of the State of Ohio for the county of Muskingum, in an action of ejectment brought by Zane's Lessee against Matthews, in which both parties claimed title under the laws of the United States. The question of jurisdiction in this case was settled at last term. (Ante. vol. 4, p. 382.)

The remaining question was, whether the plaintiff in error, or the defendant, had the title to the west fraction of section No. 15, in township No. 12, in range No. 13, in the state of Ohio.

This question arose upon a special verdict, which stated the following facts.

On the 7th of February, 1804, the office of receiver *of public moneys at Marietta [***93** then being vacant, Matthews applied to the register of the land-office at Marietta, for the purchase of that fraction, who received the application, and gave Matthews a certificate thereof.

On the 26th of March, 1804, a register and receiver were appointed for the Zaneville district, and also a receiver of public moneys for the Marietta district, who commenced the duties of his office on the first of May, in that year.

After the 12th of May, in the same year, Matthews purchased the land at the Marietta land-office, by making such payments, and receiving such certificates, as are prescribed by law.

On the 21st of May, 1804, the land-office was first opened at Zaneville, and the sales of land commenced therein.

On the 17th of the same May, a schedule was forwarded from the Surveyor General, purporting to be a complete list of the lands lying within the Zaneville district, which had been before sold at the Marietta land-office, and in which the land in controversy was not included.

Subsequent to the passage of the law for the erection of the Zaneville district, and prior to the time when the office of receiver of public moneys for the Marietta district became vacant, two entries were made in the Marietta land-office, of land lying within the Zaneville district,

which entries and sales were acknowledged as good and valid by the government of he United States, who considered Matthews's entry as void, and the Secretary of the Treasury has directed his purchase money to be repaid to him. The two tracts, the sales of which were confirmed by the government of the United States, were in the Surveyor General's schedule returned as sold at Marietta; but the land in controversy was not included in that schedule, because **94***] *the register of the land-office at Marietta had not made his return, as by law directed, to the Surveyor General, who had no guide by which to make out the schedule, but the returns of the register. The officers of the Zaneville land-office were directed by the Secretary of the Treasury to receive the schedule as the only evidence of what land had been sold at Marietta.

On the 26th of May, 1804, Zane purchased, at the Zaneville land-office, the land in controversy, by making such payments, and receiving such a certificate, as by law are prescribed, at which time Matthews produced his certificate from the register of the Marietta land-office, and gave notice of his having purchased the same land.

Zane's purchase was confirmed by the Secretary of the Treasury.

P. B. Key, for the plaintiff in error, contended,

1. That the purchase made by Matthews was legal and valid. And,

2. That the defendant in error was not entitled to recover.

That this subject may be distinctly understood, it may be necessary concisely to state the land system of the United States.

In 1785, the old Congress passed an ordinance for the survey and sale of public lands in the north-western territory. Seven ranges of townships were laid off, and sales made at New York, to a considerable extent. The Indian wars that soon followed, closed the sales. But after General Wayne's treaty at Greeneville, in 1795, Congress took up the subject again, and in May, 1796, passed an act for appointing a surveyor general, and directing surveys and sales. (Vol. 3, p. 293.) These surveys could not be completed till the end of the year 1799. The act **95***] *of the 10th of May, 1800, (vol. 5, p. 174), established the present system, by which four land-offices were to be opened, viz., at Cincinnati, Chilicothe, Marietta and Steubenville. That at Marietta was for the lands lying east of the sixteenth range of townships, south of the military lands, and south of a line drawn due west from the north-west corner of the first township of the second range to the military lands. A register of the land-office, and a receiver of public moneys, was to be appointed for each of the offices. A person wishing to purchase any of the lands was to pay to the Treasurer of the United States, or the receiver of public moneys, one-twentieth part of the purchase money besides certain fees, and take his receipt therefor, which he was to carry to the register, who was to enter his application in a book, stating the date of the application, the date of the receipt, and the number of the section, or half section, township and range applied for. No lands were to be sold at less than two dollars an acre, one-fourth, including the one-twentieth, in forty days, one-fourth in two years, one-fourth in three years, and the residue in four years, with interest. A discount of 8 per cent. per annum was to be allowed for prompt payment. Upon payment of the whole purchase money, a patent was to be issued by the President of the United States.

Thus stood the land system, and the mode of purchasing and acquiring title until Congress, desirous of bringing more lands into the market, passed an act on the 3d of March, 1803 (vol. 6, p. 291), by the 6th section of which a new district was created called the Zaneville district, which covered part of the lands in Marietta district, and, among others, the lands in controversy, and certain lands in the military tract which had not been surveyed. This act did not prescribe the time when the land-office should be opened at Zaneville, nor when the officers should be appointed.

The first question which presents itself under this law is, did it prevent a continuance of sales at Marietta, *of the lands which had been [***96** surveyed in that district, and now included in the Zaneville district?

We contend it did not.

All these laws are to be construed together as forming one system. The two great principles of the system are,

Settlement of the western frontier, and revenue to be derived from the sales of the lands.

The importance of the first, and the policy of settling the western frontier, are too obvious for illustration. It has been an object of anxiety at all times from the first organization of the Union.

As an object of revenue it has been the incessant subject of attention, and of primary importance. The proceeds of the sales were in 1790 assigned to the sinking fund. With a view to facilitate sales, the lands have been divided into sections and half sections. Discounts and abatement of interest have been allowed on prompt payment. The sale of the western lands, therefore, being a leading object of national policy, it is to be presumed that they were not to cease unless by positive law.

There is nothing in the act creating the Zaneville district to prevent a sale at Marietta, before the Zaneville office should be opened.

There is nothing repugnant to such a construction. Both acts may so far stand together, and be consistent with each other and with the general policy of the United States.

The 5th and 6th sections of the act of 1803, taken together, show that a previous survey was to be made of the unappropriated military lands which were to form a part of the Zaneville district, before the sales could commence there.

*The 4th section of the act of 1800, [***97** gave full powers to the Marietta land office to sell all the lands within that district.

This power exists until destroyed, and cannot be repealed by doubtful implication against the great national policy and the scope of the laws. It was well understood that the Zaneville land-office could not be opened until a survey should be made. Officers were to be appointed; and none were appointed until a year after, because they could not act until the surveys should be completed, and the lands ready for sale.

This shows what construction the executive gave to the law. The Surveyor General also re-

turned a list of sales made at Marietta, up to the 17th of May, 1804. All the sales upon that list have been confirmed by the treasury.

In the course of the year 1803 a survey was made, and Congress, by the act of the 26th of March, 1804 (vol. 7, p. 106, § 12), opened the Zaneville land-office on the 21st of May, 1804, and directed the sales to commence there on that day.

Is it a reasonable construction to contend that 700,000 acres should be locked up from market for a whole year, when every act of the government demonstrated their anxiety to make sales.

The act of 1803 described limits within which an office was erected for future sales, but the opening of that office and proceeding to sell was to be settled by a future law. This was done, and the office directed to go into operation on the 21st of May, 1804. Until that period the office at Marietta might proceed to sell.

This construction derives weight from an analogous case, a case also of revenue.

Suppose a district, for the collection of duties, **98***] divided, *and a new port of entry established, and a collector to be appointed, would this put a stop to the entry and collection at the first port until the second office was open for business?

If Matthews's purchase had been inserted in the Surveyor General's schedule, it would have been confirmed by the treasury for the same reason that the two other similar sales were confirmed.

The reason why it was not upon that schedule was the neglect of the register. Shall the neglect or omission of his duty by an officer of the United States prejudice the claim of an innocent purchaser?

The schedule of the Surveyor General was not the only admissible evidence of sales at the Marietta office. There was no statute, nor any principle of law, which made it such. It was a matter *in pais*, which might be proved by any kind of legal evidence. The register's certificate which Matthews produced at the Zaneville office at the time and place of sale to Zane, was the very best evidence which could then be required; and it ought to have been respected. Zane purchased with a full knowledge of Matthews's title.

Harper, contra, contended that the authority to sell at Zaneville was inconsistent with the authority to sell at Marietta; and that consequently the latter was revoked by the former. When the act of March 3, 1803, directed that these lands should be offered for sale at Zaneville, they could no longer be sold elsewhere. The act provides for the appointment of officers to sell. Congress had only to create the office. The President was to appoint the officers, under the general authority given to him by the constitution. If the President did not appoint, that did not prevent the effect of the act. The President cannot dispense with the law, nor suspend its operation.

The act of the 26th of March, 1804 (vol. 7, **99***] p. 106), *directs positively that the lands shall be offered for sale at Zaneville on the third Monday of May.

No quarter sections or fractions of sections of this land could be sold elsewhere. This act of the 26th of March, 1804, first gave the power to sell the fractions of sections separately. It could not be done at Marietta until the 14th of May, 1804, yet Matthews's purchase was on the 12th, so that even if this land could have been sold at Marietta at all, it could not, on the 12th of May, have been sold separately from a section; nor could have been sold until it had first been offered at public auction.

P. B. Key, in reply.

The purchase of this fraction was with a whole section, and therefore the fact does not support the argument on the other side.

The only questions are whether the authority to sell these lands at the Marietta office ceased before the Zaneville office was opened; and whether the neglect of the register to make a return of this sale to the Surveyor General shall prejudice the claim of the plaintiff in error.

February 16. MARSHALL, *Ch. J.*, stated the opinion of the court to be that the decision of the court below was correct; that the erection of the Zaneville district suspended the power of sale in the Marietta district.

Judgment affirmed.

S. C. 4 Cranch 382; 7 Wheat. 164.
Cited—8 Wheat. 324; 1 Pet. 664; 16 Pet. 249; 9 How. 447; 18 How. 27; 17 Wall. 198; 2 Bank. Reg. 189; 3 Blatchf. 339; Blatchf. Pr. 5; 2 Paine 517; 3 McLean 285.

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*HODGSON [*100
v.
THE MARINE INSURANCE COMPANY OF ALEXANDRIA.

A general policy, insuring every person having an interest in the thing insured, and containing no warranty that the property is neutral, covers belligerent as well as neutral property.

In an action of covenant on a policy, it is no defense to say that the premium has not been paid, but is enjoined by a court of chancery.

A misrepresentation, not averred to be material, is no bar to an action on a policy. A misrepresentation, to have that effect, must be material to the risk of the voyage.

It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters.

ERROR to the Circuit Court of the District of Columbia, in an action of covenant upon a sealed policy, whereby the Marine Insurance Company of Alexandria, in consideration of seventeen and a half per cent. premium paid by the plaintiff Hodgson, for "George F. Straas and others, of Richmond," covenanted with the plaintiff for the said "George F. Straas and others, of Richmond, as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all," to insure eight thousand dollars on the brig Hope "a prize vessel," lost or not lost, at and from her last port of lading in St. Domingo to a port of discharge in the Chesapeake. The vessel was valued in the policy at ten thousand dollars. The declaration averred the vessel to be of that value, and that in prosecution of the voyage insured she was seized by certain British vessels and carried into Jamaica, where she was libeled, condemned and sold, whereby she was totally lost. In one count of the declaration the vessel was

averred to be the property of George F. Straas and Jereiniah Leeds, of Richmond, in the other it was averred to be the property of Leeds alone.

The defendants, after *oyer*, pleaded eight pleas. Upon the three first there were issues in fact.

The 4th plea, in substance, was, that the vessel, at the time of the capture and sale was the property of the enemies of Great Britain, and as such was captured, libeled, condemned and sold. That Richmond was the capital town of the state of Virginia, a neutral state. That Straas and Leeds were of Richmond, and citi-
101*] zens of Virginia, and were *known to be so to the parties to the policy at the time of insurance. That the insurance was made by the contracting parties upon the property of American citizens in which no belligerent subject or citizen was interested; and that at the time of insurance, capture, condemnation and sale of the vessel, there was open war between France and Great Britain.

To this plea there was a demurrer, and the following causes were stated:

1. Because the plea alleges that the vessel was the property of the enemies of Great Britain, but does not show in particular who were the owners thereof.

2. Because the plea is double in this, 1st. That it tenders an issue upon the fact of its being enemies' property; 2d. That it was condemned as such; 3d. That the insurance was made upon the property of American citizens.

3. Because it alleges that the insurance was made upon the property of American citizens, which is matter of law, and not of fact.

4. Because, as the policy contained no warranty of neutrality, it is wholly immaterial whether the property was neutral or belligerent.

5. Because the plea is no answer to the plaintiff's declaration.

6. Because it admits Straas and Leeds to be owners of the property insured, and to be American citizens, and it does not state any other person or persons to be the owners thereof.

7. Because the defendants were estopped by the policy from alleging that the insurance was made upon the property of American citizens.

102*] *The 5th plea, in substance, was, that it has always been, and is the rule and practice of the defendants, never to make an insurance upon a vessel beyond her reasonable and just value according to the representation and description given of her, especially as to her age, tonnage and equipment, which rule and practice were well known to the contracting parties at the time of the contract, at which time the plaintiff proposed to the defendants that the value of the vessel should be agreed in the policy to be ten thousand dollars; and that at the time of executing the policy, the plaintiff, to induce the defendants to execute it, thereby insuring to the value of 8,000 dollars upon the vessel, represented that she was "about 250 tons burthen," "and from six to seven years old." That the defendants, in consequence of that representation, and placing full faith and credit therein, executed the policy. That the representation was untrue in this, that the vessel was not of two hundred and fifty tons burthen, but less than one hundred and sixty-five tons burthen, and was not from six to seven years old at the time of the representation, but much older, viz., more than eight and a half years old. That the vessel was not of the value of eight thousand dollars, but of the value of 3,000 dollars only. That the misrepresentation respecting the age and tonnage of the vessel induced the defendants to execute the policy, whereby the value was agreed to be ten thousand dollars, and whereby insurance was made to the amount of 8,000 dollars; "and so the said deed is void as to them; and this they are ready to verify."

To this plea also there was a demurrer, and the following causes were stated:

1. Because the plea does not aver the misrepresentation to be material.

2. Because it is not alleged to have been fraudulently made.

3. Because the matter of the plea is not sufficient to annul or make void the policy.

*4. Because the misrepresentation [***103** alleged is not of a definite fact; but that the vessel was of about 250 tons burthen, &c.

5. Because the plea is double in this, that it puts in issue the custom of the defendants, the representation touching the vessel, the age, the tonnage and the value of the vessel.

6. Because the defendants are estopped by the policy from averring that the vessel was of less value than 10,000 dollars.

The 6th plea was like the 5th, except that the averment respecting the rule and practice of the defendants was omitted, and that it contained an averment that the difference between the true and the represented age and tonnage of the vessel "was material in regard to the contract of insurance," in the policy set forth; and so the policy was void as to them.

To this plea the plaintiff, protesting that the vessel was seaworthy, and that he did not knowingly and fraudulently state any misrepresentation, and admitting that the vessel was of less than 165 tons burthen, and was eight and a half years old, replied, that the difference between the true and the represented age and tonnage of the vessel, was not material in regard to the seaworthiness of the vessel, and her ability to perform the voyage insured, and did not increase the probability of loss by means of any of the risks insured against, but was altogether immaterial in regard to those risks.

The rejoinder of the defendants set forth their rule and practice as stated in the 5th plea; and averred that the misrepresentation induced and deceived the defendants into the agreement as to the value of the vessel, and as to the sum insured, and that the sum insured was more than double the value of the vessel, and so the defendants say that the difference between the true and the represented age and tonnage of the vessel was material.

*To this rejoinder the plaintiff demur- [***104** red, and stated causes of demurrer nearly like those to the 5th plea.

The 7th plea was, in substance, that the vessel was in part owned by one Alexander Burot, a French citizen, and an enemy of Great Britain, and that this fact was not disclosed to the defendants at the time of executing the policy.

To this plea there was a general demurrer.

The 8th plea was, in substance, that the

plaintiff had not paid the premium, but had obtained a perpetual injunction from the Court of Chancery in Virginia, against the defendants, to prevent the recovery thereof.

To this plea also there was a general demurrer.

The judgment of the court below was in favor of the defendants on the demurrer to the 6th plea, and in favor of the plaintiff upon all the other demurrers.

Swann, for the plaintiff in error.

It is a sufficient answer to the 4th plea, that the policy is general; it contains no warranty of neutrality, and therefore covers belligerent as well as neutral property. (1 N. Y. T. Rep., 230, 238, 243; 2 Emerig., 460; Doug., 16; Marsh., 286.)

The objections to the 5th plea are,

1. That no misrepresentation touching the subject of a sealed contract is sufficient, in a court of law, to set it aside.

The insurance cases against incorporated companies in England show that an equitable defense may be made in that country under the statutes. All other cases upon insurances are cases of simple contract.

105*] *This question then depends upon the general principles of the common law. By that law a misrepresentation touching the subject of a sealed contract was not pleadable against that contract.

It is true that any fraud in the execution of an instrument which will authorize the plea of *non est factum*, may be relied on at law. (1 Burr., 391.) So you may show that the consideration of a deed is unlawful, as in the cases of usury, gaming, simony, &c. But this plea shows no fraud, nor unlawful consideration. It relies merely upon a mistake which goes only to a part of the subject matter of the contract.

2. The misrepresentation set forth in this plea would not be sufficient to vacate the policy, even if it were a simple contract. The misrepresentation must relate to the risk, and be material as it regards the risk. All the cases speak a uniform language upon this subject. (Marsh., 334, 335; Park, 197, 204, 205; 1 N. Y. T. Rep., 237, 238, 245.)

If the representation must be material in regard to the risk, the plea is bad in substance; because it does not show any facts which would increase the risk, nor aver the representation to be material to the risk.

3. As the misrepresentation relates to the value of the vessel, and not to the risk of the voyage, the defendants are estopped from alleging that the vessel was worth less than the value agreed upon in the policy.

4. In a valued policy the underwriter waives all inquiry into any fact or circumstance that relates to the value of the thing insured: and the extent or amount of value in such a policy is altogether immaterial. (Park, 1, 109.)

The 6th plea concludes by saying that the **106***] representation *was material in regard to the contract of insurance.

This averment is difficult to be understood. It might mean material as it regarded the amount insured, or material as it regarded the risk. If issue had been taken upon this averment, the jury might have decided that the representation was material as it regarded the amount insured; and upon that ground the cause might have been lost. If the plaintiff had demurred to it, it might have been an admission that it was material to the risk. If the averment had been that it was material as to the amount insured, we should have demurred; if it had been that it was material to the risk, we should have taken issue.

In this uncertainty it was necessary for the plaintiff to reply specially, tendering an issue as to the materiality of the representation in regard to the risk of the voyage. This issue the defendants refused to join, and have thereby explained their averment to be that the representation was material, not to the risk, but to the amount insured. In this point of view it is bad not only for the reasons alleged against the 5th plea, but because it neither shows nor avers the representation to be material in regard to the risk.

No falsehood or misrepresentation; not increasing the risk, is material. No misrepresentation touching the ability of the vessel to perform the voyage can be material if she is seaworthy. The law does not notice grades of seaworthiness; and with regard to this point her age and tonnage were perfectly immaterial: and it was equally immaterial as to the value, because the value was conclusively fixed in the policy.

E. J. Lee and *C. Lee*, contra, contended, 1st. That the expression "of Richmond" implied a warranty that the property was neutral, and the condemnation was conclusive evidence of a breach of that *warranty. 2d. That [***107** the declaration was bad because it contained no averment of an offer to abandon; and, 3d. That the misrepresentation, as stated, amounts to a fraud in law, and that fraud will vacate every kind of instrument; and that in all cases of insurance any misrepresentation material to the contract is fatal.

It is because it is a valued policy, that the misrepresentation as to the age and tonnage became material to the contract. It was a misrepresentation of those facts upon which a judgment was to be formed of the value of the vessel. The defendants never would have agreed to fix that value, unless they had believed the representation of the plaintiff as to those facts. The misrepresentation induced the defendants to make a contract which they would not otherwise have made. It is unnecessary that the plaintiff should have known that he was misrepresenting the facts.

He undertook to represent the facts, and by so doing must take the risk of their truth, and the consequences of their falsehood.

The materiality was a question for the jury. Whenever the question of law is involved with the fact, the court may leave the whole to the jury.

The plea is not double. A misrepresentation may be in a variety of particulars necessary for the formation of a correct judgment as to the value.

The defendants are not estopped by their deed from alleging facts which show the mistake, or misrepresentation upon which the instrument was predicated; because if the deed be void the estoppel cannot exist.

If the goods of an enemy be insured as the goods of an ally, the policy is void. The only

question on this point is, whether the vessel was insured as an American vessel.

108*] *The payment of the premium is forever enjoined, and nothing can be more unjust than to compel the defendants to pay the loss.

The following authorities were cited by the counsel of the defendants. (1 Rob., 11, 13; 1 Burr., 397; Shep. Touch., 58, 59; Chitty on Bills, 8, 9; 3 Bro. Parl. Cas., 525; Smith's Rep., 289; 2 P. Wms., 154, 157, 220, 287; Marsh., 339, 340, 348; Doug., 260; Marsh., 199, 201, 586; 2 Wils., 347; 1 Fonb., 230; 5 Com. Dig. tit. Pleader, 2 W. 18; 3 T. R.; 438, *Hayne* v. *Maltby;* 2 W. Bl., 1152; 5 Co., 129; Gilb. Ev., 163; 2 Vent., 107; Bull., 173; 1 Mod., 477; 1 Wooddeson, 207; 3 Burr., 1918; *Carter* v. *Boehm*, Park, 182; 1 N. Y. T. Rep., 229; *Barnewall* v. *Church*, Doug., 260, 261, 262; *McDowell* v. *Frazier*, 1 W. Bl., 593; *Carter* v. *Boehm*, Millar, 57; Park, 209; Marsh., 208, 209, 350, *Stewart* v. *Dunlop*; 2 East, 452, *Williamson* v. *Allison*; 4 East, 590, *Haywood* v. *Rodgers*; Marsh., 540, *Le Cras* v. *Hughes*; 3 Cranch, 281, *McFerran* v. *Taylor & Massie*; 1 Ves., 213; 4 Dall., 250; Doug., 96; 2 Wils., 352, *Collins* v. *Blantern*; 1 Vent. 121; Doug., 30; 2 Wils., 8, *Long* v. *Jackson*; Skin., 327.)

Jones, in reply, was directed by the court to confine his observations to the 5th and 6th pleas.

No fraud or covin is charged in either of those pleas; the doctrines, therefore, respecting a sealed instrument being vacated by fraud, do not apply. The case depends upon the principles of the common law applicable to contracts under seal.

The 5th and 6th pleas are in substance the same; and if the 5th be bad, as the court below decided, the 6th must be bad for the same reasons.

There is no case in which a sealed instrument has been set aside on the grounds alleged in the plea. If the facts would not maintain an action of deceit, they will not avoid a contract under seal. They cannot even be given in evidence.

109*] It must be a *matter that goes to the whole contract, and shows it to be void *ab initio*. It must be an allegation of fraud, or of illegal consideration.

The case of *Hayne* v. *Maltby* (3 T. R. 438), is the only one cited which bears upon the present. But there the contract was void *ab initio*, and the case was decided upon the principle of fraud. It is immaterial what the facts of the case were, or how slight the evidence of fraud was. It is the principle only which is to be considered.

In an action at law upon a sealed contract you cannot go into the question of consideration, but to show it fraudulent or illegal. (2 Cro., 4, *Chandler* v. *Lopus*; 1 Com. Dig., 184; 2 East, 446.)

February 24. CUSHING, *J.* (Marshall, Ch. J., not sitting in the cause), delivered the opinion of the court[1] as follows:

The insurance in this case being general, as well for the parties named as "for all and every other person or persons to whom the vessel did or might appertain," and containing no warranty of neutrality, belligerent as well as American property was covered by it. Some of the parties being described as of Richmond, does not necessarily imply that they all resided there; but if they did, mere residence would not make them citizens; and even then, an express warranty was necessary, if it had been designed to run only a neutral risk. This is an answer to the 7th as well as to the 4th plea; because there can be no undue concealment as to the parties interested, where the terms of the policy are so broad as to preclude the necessity, either of disclosing their names, or of inserting them in the instrument.

*The 8th plea is also bad. The de- [***110** fendants acknowledge, under seal, to have received a consideration of 17 1-2 per cent. for the insurance they made, which it appears was secured by a note, the amount of which was to be deducted from the sum to be paid for a loss, if any happened. On the face of the instrument, then, a valid consideration, if that be necessary, is stated, and if the note be never paid it cannot vacate the contract, or be relied on as a defense to an action on it. This court knows not why a court of equity has been applied to for an injunction. Its proceedings, therefore, can have no influence on the present suit, for notwithstanding its interposition in the way mentioned in this plea, the defendants cannot be deprived of the right they have reserved of deducting the amount of premium from whatever sum they may have to pay for the loss that has occurred.

Without deciding whether a material misrepresentation, not fraudulent, can be pleaded in avoidance of a sealed instrument, the court thinks there is no fact disclosed by either the fifth or sixth plea which could vacate an insurance were it only a simple contract. In no part of the 5th plea is the misrepresentation alleged to be material. It is only to be inferred that it had some influence (but to what degree does not appear) in prevailing on the defendants to agree to so high a valuation. It will hardly, however, be insisted, that every over-valuation, however inconsiderable, or however innocently produced, will annul a contract of this nature. It would seem more reasonable to let mistakes of this kind (if they are to have any operation at all) regulate the extent of recovery, and not deprive the party of his whole indemnity: for if an extravagant valuation be made, an underwriter cannot reasonably ask to be relieved beyond the excess complained of. The allegation that the vessel was worth, when insured, only 3,000 dollars, is also very unimportant, it being nowhere stated that the plaintiff represented her to be worth more, but only proposed that her value in the policy should be agreed *at ten thou- [***111** sand dollars. Now, although she might not in fact have been worth this sum, it is impossible for the court to say that this difference was produced entirely by the mistake which was made in her age and tonnage. This would be to say that a difference of a year or two in the age, and of fifty or sixty tons in the burden of a vessel, must, in all cases, have the same effect on her value; a conclusion which, on investigation, would be found very incorrect. Nor, if it appeared on trial that her actual worth were no more than 3,000 dollars, would it necessarily avoid the contract, or restrict the damages to that sum; for she may, notwithstanding, have fairly cost her owners the whole amount of her

1.—Present, Cushing, Washington, Livingston and Johnson, justices.

valuation; who, in that case, would have honestly represented her as worth 10,000 dollars.

But a more fatal objection to this plea is, that the misrepresentation relied on is not stated to have been material to the risk of the voyage; and yet the only cases in which policies have been avoided for innocent misrepresentations are those in which the matter disclosed or concealed has affected the risk so as to render it different from the one understood at the time, and on which the premium was calculated.

Most of the remarks on the 5th apply also to the 6th plea: for although it be here alleged that the misrepresentation was material "in regard to the contract of insurance," it should have been stated in what particular, that it might appear whether the risk run were at all affected by it.

An objection is made to the declaration, but not much relied on, that no abandonment is averred to have been made. In covenant such averment cannot be necessary. If it be proved on the trial, it will be sufficient.

The judgment of the Circuit Court on the 4th, 5th, 7th and 8th pleas must be affirmed with costs; and its judgment in favor of the defend-
112*] ants on the *6th plea reversed; and judgment on that plea be also rendered for the plaintiff.

JOHNSON, *J.* The difficulties in this case arise partly from the pleadings, and partly from the case presented by the pleadings.

This policy, having been effected by a corporation under its corporate seal, has been considered as imposing an obligation on the insured to bring covenant instead of *assumpsit*, as is usual on such contracts.

Thus the defendants have been obliged to plead specially; and the cause comes up on demurrer, which, of course, admits the case as made up on the pleadings.

Whether there is sufficient matter well pleaded why the plaintiff ought not to recover? is therefore the question before us.

I am of opinion that there is. I cannot for a moment suffer the sealing of the policy, or the form of the action, to impose any restriction upon the latitude of defence applicable to the contract of insurance. Such a doctrine would be fatal to every incorporated insurance company. I therefore maintain, that, in the action of covenant on a policy of insurance, every defense may be taken advantage of, in pleading, that could be introduced, in evidence, before a jury. It is an exceedingly inconvenient form of action for trying the merits of questions arising out of this species of contract, and I feel disposed, if possible, to diminish the inevitable difficulties, and the intricate and voluminous pleadings, which must grow out of this form of action, and to admit every facility which the rules of pleading will possibly sanction.

There are eight pleas filed to the present action. On the three first there are issues in fact, and the court below has given judgment on the
113*] remaining *five. I am disposed to concur in their decisions on each of these several pleas, although, perhaps, on some of them, for reasons not altogether the same with those by which they were influenced; but I shall confine my observations solely to the sixth plea, as that disposes of the case finally, if decided for the defendants, and has been the principal subject of the argument before this court.

The substance of this plea is, that the plaintiff misrepresented the age and tonnage of the vessel, whereby the defendants were induced to insure to a higher amount than they otherwise should; and concludes with averring, that the difference between the true age and tonnage of the vessel, and the represented age and tonnage, was material in regard to the contract of insurance.

The plaintiff replies that this misrepresentation was immaterial in regard to the seaworthiness of the vessel, her ability to perform the voyage, and the other risks insured against.

To me it appears that the plea presents the true turning points of the case, and that the replication draws towards questions very different from that which ought to control our decision.

It is not on the doctrine of seaworthiness that a misrepresentation is held to vitiate the policy, because the insured is always held to guarantee the sufficiency of his vessel to perform the voyage insured. Nor is it an evident and necessary increase of the risk; but it is presenting such false lights to the insurer as induce him to enter into a contract materially different from that which he supposes he is entering into. It is a rule of law introduced to protect underwriters from those innumerable frauds which are practiced upon them in a contract which must of necessity be regulated almost wholly by the information derived from the insured.

I do not lay so much stress upon the misrepresentation *with regard to the age of the [*
114 vessel; for that appertains much to her seaworthiness; but with regard to her size the misrepresentation was so enormous as leaves no doubt upon my mind that had the case been submitted to a jury, the court would have been bound to charge them in favor of the defendants. It had in its nature an immediate tendency to entrap the defendants into one of the most common and most successful snares laid for the unwary underwriter. To make it the interest of the insured rather to sink than to save his vessel. It can very well be conceived that an underwriter may be induced to insure a certain sum upon a certain vessel for a very moderate premium, when no premium would induce him to insure double that amount upon the same bottom. I am aware of a very considerable difficulty arising out of this case, viz., how we are to estimate the degree of misrepresentation with regard to tonnage which shall vitiate a policy; but it is a difficulty arising out of the mode in which we are drawn into a decision on the case, rather than out of the case itself.

If this question had been brought before a jury, the difficulty would have vanished; but shall the party lose the benefit of this defense because the pleadings have assumed such a shape as to force the court into a decision upon the point without a jury? I am of opinion that he ought not; if it can be avoided; an extreme case may be supposed in which the misrepresentation may be very inconsiderable, as of a single ton for instance; but, on the other hand, we may suppose an extreme case of a misrepresentation to the highest possible number of tons burden, say 1,000 tons; will it be said that, in the latter case, the misrepresentation would not avoid the policy?

From these considerations it seems to result that the court is driven to the necessity of deciding this case upon its intrinsic merits, and reserving its opinion upon successive cases as they shall occur. This necessity is forced upon us by the alternative either to decide that no
115*] misrepresentation, however gross, *of the size of the vessel will avoid a policy, or that any misrepresentation, however minute, will have that effect. It is to be hoped, in the meantime, that some statutory provision may be made which will relieve the court from a similar embarrassment.

Judgment reversed.

Rev'g—S. C. 1 Cranch, C. C., 460; Id. 569.
Cited—1 Cranch, C. C., 346; 1 Mason, 136.

THE UNITED STATES
v.
JUDGE PETERS.

The legislature of a state cannot annul the judgments, nor determine the jurisdiction, of the courts of the United States.

The Court of Appeals in prize causes, erected by the Continental Congress, had power to revise and correct the sentences of the state courts of admiralty.

Although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.

AT the last term Gideon Olmstead, in behalf of himself and Artimus White, Aquilla Rumsdale, and David Clark, moved the court for a *mandamus*[1] to be directed to the honorable Richard Peters, Judge of the District Court of the United States for the Pennsylvania District, commanding him to order and direct an attachment or other proper process to issue to enforce obedience to the sentence of the said District Court in a civil cause of admiralty and maritime jurisdiction, in which the said Gideon Olmstead and others were libellants, and Elizabeth Serjeant and Esther Waters were respondents. This motion was made upon a suggestion, supported by affidavit, that a copy of the sentence had been served upon the respondents, which they refused to obey; and that application had been made to the judge for an attachment, which he had refused to grant; whereupon a *mandamus nisi* was granted returnable to this term; when the judge made the following return:

116*] *"To the Honorable the Supreme Court of the United States,

"The subscriber, judge of the District Court of the United States, in and for the District of Pennsylvania, in obedience to the *mandamus* issued by order of the Supreme Court in the case of Gideon Olmstead and others, libellants, against the surviving executrixes of the late David Rittenhouse, Esq., and to the said district judge directed, begs leave to return,

"That the proceedings of the District Court in the above cause, which are herewith transmitted, and respectfully submitted, will show the grounds of the judgment by the said court rendered. Every opportunity, through the whole course of these proceedings, was given to the parties to litigate the claim, or discuss questions, either on the merits or jurisdiction. Nor was any step taken without due and timely notice.

"The answer of the respondents will show their objections to the claim of the libellants. This answer refers to an act of assembly of the state of Pennsylvania, passed the 26th day of February, 1801, which was not produced or brought under the legal notice of the court.

"No application for execution of the decree was made until within twelve or eighteen months past; nor has it been, till more recently, much pressed.

"By the suggestion filed by the respondents, their objections to the execution of the decree will appear. They have made an act of assembly of the state of Pennsylvania a part of their suggestion; and thus, for the first time, during the pendency of the suit, brought this act under the judicial notice of the court. It is entitled "An act relating to the claim of this commonwealth against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse, Esq., deceased, passed *April [***117** the second, 1803:" and to this act I pray leave to refer.

"This act, or any of its allegations, has no influence on my opinion. Let this opinion be erroneous or correct, a proceeding, in some of its parts, indecorous, and, in others, unjustifiable, can have no operation in rectifying supposed errors, or convincing my judgment. But from prudential, more than other motives, I deemed it best to avoid embroiling the government of the United States and that of Pennsylvania (if the latter government should choose so to do) on a question which has rested on my single opinion, so far as it is touched by my decree: and, under the influence of this sentiment, I have withheld the process required. If this be not considered a legal cause, it must be deemed a candid acknowledgment that I do not invariably obey a rigorous dictate of duty, or follow an inflexibly strict construction of law.

"I entertained a hope that a legislature succeeding that by which the act before mentioned was passed, would, under a more temperate view of the subject, have repealed it; and enabled and directed the executive of the state, or some other authority, to put this case in a legal train of investigation: so that the final judgment and decree of the superior tribunal of the United States might have been, in a proper course, obtained; and thereby any erroneous opinion, or decree, given or made by me, might have been rectified (if any opinion or decree should have been found illegal or erroneous) in a manner more becoming the real dignity of a state, more suitable to the situation of those who execute the duties of a branch of the government of the United States, and more consistent with the good order and peace of the community. This hope was cherished by the proceedings of the

1.—On Saturday, March 5th, 1808, upon the affidavit of Olmstead, a rule was granted that Judge Peters should show cause by the next Saturday, why a *mandamus* should not issue. On Saturday, March 12th, a letter was received by one of the counsel for Olmstead, from Judge Peters, acknowledging service of the rule; and stating that an act of the legislature of Pennsylvania had commanded the governor of that state to call out an armed force to prevent the execution of any process to enforce the performance of the sentence. That such being the state of things he should not direct process to issue unless he should be so ordered by this court; whereupon a *mandamus nisi* was granted, returnable at the next term.

legislature of Pennsylvania, in other cases wherein the state claimed interests. This expectation has been disappointed. There being no other legal mode of obtaining the decision of **118***] *the superior tribunal of the United States, (the only jurisdiction by which the judgments of inferior courts of the United States can be finally rectified or judicially annulled,) I have thought it proper, and, under all circumstances, fully justifiable, to obtain that decision, by placing the case under the cognizance of your honorable court, in its present form.

"On the merits and justice of the claim of the libellants, I have no doubt; but remain of the same opinion I have mentioned in my decree.

"As to the jurisdiction; I have never conceived that the allegations on this point, contained in the act of assembly last mentioned, had legal foundation. It is well known to your honorable court, that third persons claiming interests *in pais*, cannot, by such claims, constitute themselves, or be judicially considered, parties in suits pending in the names of others. Nor does there now exist any legal mode of interpleading, or compelling states to become parties to suits in the courts of the United States. Yet if your honorable court shall be of opinion that the objections to jurisdiction are relevant, I shall, agreeably to my duty, continue to withhold any farther proceeding. But if, on the other hand, a peremptory direction to execute the decree shall be the consequence of your deliberations, having now the whole case before you, there can be no order or direction, which it is in my legal obligation to obey, to which (impelled by a sense of justice, however I may regret the circumstance, as it respects the parties respondents, or other consequences which may flow from it) I shall more cheerfully submit.

"RICHARD PETERS.

"Philadelphia, July 18th, 1808."

The facts as they appear in the record and documents referred to by the judge, in the above answer, were in substance as follows:

Gideon Olmstead, Artimus White, Aquilla **119***] *Rumsdale and David Clark, citizens and inhabitants of the state of Connecticut, were, during the revolutionary war, captured by the British and carried to Jamaica, where they were put on board the sloop Active to assist as mariners in navigating the sloop to New York, then in possession of the British, with a cargo of supplies for the fleets and armies of Great Britain. During which voyage, about the 6th of September, 1778, they rose upon the master and crew of the sloop, confined them to the cabin, took the command of the vessel and steered for Egg Harbor, in the state of New Jersey. On the 8th of September, when in sight of that harbor they were pursued, and forcibly taken possession of by Captain Thomas Houston, commander of the armed brig Convention, belonging to the state of Pennsylvania, and, on the 15th of September, brought into the port of Philadelphia; when Houston libeled the vessel as prize to the Convention. A claim was interposed by Captain James Josiah, master of the American privateer Le Gerard, who claimed a share of the capture as having been in sight and by agreement cruising in concert with the Convention. A claim was also interposed by Olmstead and others for the whole vessel and cargo, as being their exclusive prize. The state Court of Admiralty, however, adjudged them only one-fourth part, and decreed the residue to be divided between the state and the owners of the privateer, and the officers and crews of the Convention and the Le Gerard. From this sentence Olmstead and others appealed to the Court of Commissioners of Appeals in prize causes for the United States of America, where, on the 15th of December, 1778, the sentence of the state court was reversed, and it was ordered and adjudged that the vessel and cargo should be condemned as lawful prize for the use of the appellants, Olmstead and others, and that the marshal should sell the same, and pay the net proceeds to them or their agent or attorney. Upon receipt of a copy of this sentence, the Court of Admiralty made the following order:

*"Thomas Houston, Esq. et al., appellees, ads. "Gideon Olmstead, Artimus White, Aquilla Rumsdale, and David Clark, appellants, claimants of the sloop Active and her cargo. [***120** "In the Court of Admiralty, for the state of Pennsylvania.

"The court, taking into consideration the decree of the Court of Appeals in this cause, reversing the judgment or sentence of this court in the same cause, and further decreeing a condemnation of the sloop Active, her tackle, apparel, furniture and cargo, as prize, &c., and that process of this court should issue for the sale of the said sloop, her cargo, &c., and for the distribution of the moneys arising from the said sale after deducting costs to the claimants above named, their agent or attorney; after mature consideration are of opinion, that although the Court of Appeals have full authority to alter or set aside the decree of a judge of this court, yet that the finding of the jury in the cause does establish the facts in the cause without re-examination or appeal. And therefore the verdict of the jury still standing, and being in full force, this court cannot issue any process, or proceed in any manner whatsoever contradictory to the finding of the said jury. And therefore doth now decree, order and adjudge, that the marshal of this court be commanded to sell at public vendue at the highest price that can be gotten for the same, the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandises laden and found on board her at the time of her capture, &c., and after deducting the costs and charges of the trial, condemnation and sale thereof, out of the moneys arising from the said sale, that he bring the residue thereof into court, there to remain ready to abide the further order of this court therein. "GEORGE ROSS.

"December 28th, 1778."

*The finding of the jury, alluded to [***121** in the above order, was in these words:

"In the cause wherein Thomas Houston is libellant, and Olmstead and others first claimants, and James Josiah second claimant, we find as follows:

1-4th of the net proceeds of the sloop Active and her cargo to the first claimants.

3-4ths of the net proceeds of said sloop and her cargo to the libellant and to the second claimants, as per agreement between them.

"Nov. 4th, 1778."

The warrant which Judge Ross directed to be issued to the marshal to make sale of the vessel and cargo, in pursuance of the above order, and which was accordingly issued on the 28th of December, 1778, after reciting the proceedings in this court, and in the Court of Appeals, proceeds as follows: "This court therefore taking into consideration the premises, and being of opinion that consistent with the laws of this state it cannot carry into execution the whole of the said sentence of the honorable the Court of Appeals aforesaid: yet willing, so far as the said sentence appears legal, to carry it into effect, and to prevent, as far as possible, any injuries or losses which the parties to this cause, or either of them, may be liable to by the vessel and cargo continuing in their present situation, do therefore hereby command you forthwith to sell," &c., "and, after deducting the costs and charges, to bring the residue of the said moneys into court ready to abide the further order of this court." This warrant was made returnable at a court of admiralty, to be holden at the judge's chambers on the 7th of January, 1779.

Copies of the above order and warrant being produced, on the same 28th of December, 1778, before the Court of Appeals, it was moved, on **122***] the *part of the appellants, Olmstead and others, that process might issue to the marshal of the admiralty of Pennsylvania, commanding him to execute the decree of the Court of Appeals; and after argument the case was postponed for further argument until Monday, 4th of January, 1779, at 5 o'clock P.M. On which day at 8 o'clock A. M. the Court of Appeals being again convened at the pressing instance and request of the claimants Olmstead and others, it was moved and suggested by their advocates that notwithstanding the decree of the Court of Appeals, which had been transmitted to the Court of Admiralty, the judge of that court had appointed the hour of nine on that morning for the marshal to pay into court the money arising from the sale of the sloop Active and cargo, which suggestion was supported by the oath of the registrar of the admiralty; whereupon it was prayed that an injunction might issue from the Court of Appeals directed to the marshal of the Court of Admiralty, commanding him to keep the money in his hands until the further order of the Court of Appeals; which injunction was accordingly granted, reciting the sentence of the Court of Admiralty and its reversal, and the decree by the Court of Appeals; the refusal of the judge of the Court of Admiralty to cause that decree to be executed; and the motion to the Court of Appeals for a writ to the marshal commanding him to execute the same; the continuance of that motion to the 4th of January, 1779, at 5 o'clock P. M. and the appointment of the hour of 9 o'clock A. M. of the same day, by the special order of the judge of the Court of Admiralty, for the marshal to pay the money into that court, whereby the effect of the writ payed for, if the court should grant it, would be eluded.

This injunction was served upon the marshal before he paid the money into the Court of Admiralty; but he disregarded it, and paid the money over to the judge, who gave a receipt for it.

"Whereupon the Court (of Appeals) declared and ordered to be entered on record, that as the judge and marshal of the Court of Admiralty of the state *of Pennsylvania had absolute- [***123** ly and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience, this court being unwilling to enter upon any proceedings for contempt, lest consequences might ensue at this juncture dangerous to the public peace of the United States, will not proceed further in this affair, nor hear any appeal, until the authority of this court be so settled as to give full efficacy to their decrees and process.

"Ordered that the register do prepare a state of the proceedings had upon the decree of this court, in the case of the sloop Active, in order that the commissioners may lay the same before Congress."

Upon the writ issued by the judge commanding the marshal to sell the vessel and cargo, and bring the proceeds into court to abide its further order, the marshal, on the 4th of January, 1779, returned, that in obedience to that writ he had deposited in the Court of Admiralty 47,981*l.* 2*s.* 5*d.*, Pennsylvania currency, on account of the cargo of the prize sloop Active; but that the sloop remained yet unsold.

The money was loaned to the United States, and the loan-office certificates brought into court and deposited in the hands of the judge, who, on the 1st of May, 1779, delivered to David Rittenhouse, treasurer of the state of Pennsylvania, fifty of the certificates, amounting to 11,496*l.* 9*s.* 9*d.*, "being the share or dividend of the state in right of the brig Convention in and out of the prize sloop Active, according to the verdict of the jury on the trial of the said sloop Active in the Admiralty Court of that state;" at the same time taking a bond of indemnity from Mr. Rittenhouse, by the name of "David Rittenhouse, of the city of Philadelphia, Gent.," the condition of which was that "Whereas the said George Ross hath this day paid to the said David Rittenhouse, treasurer of the state of Pennsylvania, for the use of the said state, the sum," &c. Now, "if he, the said David Rittenhouse, shall make repayment *and [***124** restitution of the said sum of 11,496*l.* 9*s.* 9*d.* unto the said George Ross, his executors or administrators, in case he, the said George Ross, shall hereafter by due course of law be compelled to pay the same according to the decree of the Court of Appeals in the case of the said sloop Active; and if he, the said David Rittenhouse, shall and do in all things well and truly save harmless and indemnified at all times hereafter the said George Ross, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels of and from all damages, actions and demands which may arise or happen, for or on account of his having paid the money aforesaid, then the above obligation to be void, or else to be and remain in full force and virtue."

The certificates were afterwards funded in the name of David Rittenhouse, and among his papers was found a list of the old loan-office certificates, and of the new funded stock, at the foot of which was written, in the handwriting of Mr. Rittenhouse, the following memorandum:

"Note.—The above certificates will be the

property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the fifty original certificates into the state treasury as the state's share of the prize."

In the year 1801, the legislature of Pennsylvania passed an act requiring the treasurer to call upon the executrixes of Mr. Rittenhouse for the certificates of stock, and to give them a bond of indemnity, but they refused to deliver them up, being advised that they would not be safe in so doing.

On the 4th of January, 1803, the judge of the District Court for the District of Pennsylvania, pronounced the following final decree in the cause:

"This is the long-depending case of the sloop Active and cargo. It comes before me by libel **125***] *filed against the executors of the late Mr. Rittenhouse, who received from George Ross, Esq., then judge of the state Court of Admiralty, the sums mentioned in the libel, which were invested in the certificates of stock as stated therein. Mr. Rittenhouse, on receiving these certificates, which were proceeds of the sales of the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered, when payment of these proceeds is made, to be delivered up. The suit is instituted for the purpose of carrying into effect a decree of the Court of Appeals established under the old confederation, a copy whereof appears among the exhibits. In the answer it is alleged that the moneys were received for the state of Pennsylvania. In the replication this is denied. In a memorandum made by Mr. Rittenhouse, at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the state, when indemnified. No such payment ever has been made, and the certificates and moneys are yet in the hands of the respondents.

"It appears to me that Mr. Rittenhouse considered himself, as I conceive he was, a stakeholder, liable to pay over the deposit to those lawfully entitled thereto. His executors conceive themselves in the same predicament, and have declined paying over the certificates and interest. No counsel have appeared, and requested to be heard on the part of the respondents, and I am left to judge from the libel, answer, replication and exhibits which contain the state of the facts. If I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal.

"I throw out of the case all circumstances not immediately within my present view of the duty I have to perform. I have nothing to do with the original question, that has been decided by the Court of Appeals; nor does it appear to me essential for me to determine with what intentions Mr. Rittenhouse received the **126***] certificates. The fact of the *certificates and interest being now in the hands of the respondents is granted by them in their answer. It has been determined by the Supreme Court of the United States that this court has power to effectuate the decrees of the late Court of Appeals in prize causes, and this court has, on several occasions, practiced agreeably to that decision. There is no doubt in my mind (the authorities in the books being clear on this point) that the process and jurisdiction of this court will reach and extend over the proceeds of all ships, goods and articles taken as lawful prize, found within the district, and legally proceeded against therein. These proceeds are under the same legal disposition, and subject to the same responsibility, under whatever shape they may appear, as the original thing from which they were produced. It is conceded that the certificates and moneys in question are proceeds of the sloop and cargo in the libel mentioned. These were decreed to the libellants by the judgment of the late Court of Appeals. I am, therefore, of opinion, and accordingly decree, and finally adjudge and determine, that the certificates be transferred and delivered, and the interest moneys paid over by the respondents to the libellants, in execution of the judgment and decree of the Court of Appeals, as stated in the proceedings in this cause, with costs. I make it, however, a condition that the bond of indemnity be cancelled or delivered to the respondents, on their compliance with this decree.

"RICHARD PETERS.

"January 14, 1803."

No further proceedings in this cause were had in the District Court until the 18th of May, 1807, when, on motion of Mr. Lewis, in behalf of the libellants, Olmstead and others, the respondents were ruled to show cause by the next Friday why the decree pronounced in this cause should not be carried into execution; and the bond of indemnity referred to in the decree was filed in court ready to be delivered *up, or cancelled, on compliance with [***127** the decree by the respondents.

On the 29th of May, 1807, to which day the rule had been enlarged, the respondents appeared and suggested to the court,

That after making the decree in this case, to wit, on the second day of April, A. D. 1803, the general assembly of the commonwealth of Pennsylvania passed an act, which was then approved by the governor of the said commonwealth, in the following words: "An act relating to the claim of this commonwealth against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse, Esq., deceased."

Whereas, by an act of Congress for the erecting of tribunals competent to determine the propriety of captures during the late war between Great Britain and her then colonies, passed the 25th day of November, one thousand seven hundred and seventy-five, it is enacted, in the fourth section thereof, as follows, viz.: "That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient;" and in the sixth section thereof as follows, viz.: "That in all cases an appeal shall be allowed to the Congress, or to such person or persons as they shall appoint for the trial of appeals."

And whereas, by an act of the general assembly of Pennsylvania, passed the 9th of

September, 1778, entitled, "An act for establishing a court of admiralty," appeals were allowed from the said court in all cases, unless from the determination or finding of the facts by a jury, which was, under the provisions of that law, to be without re-examination **128***] *or appeal: And whereas, by a resolution of Congress of the 15th of January, 1780, it was, among other things, declared: "That trials in the Court of Appeals shall be according to the law of nations, and not by jury."

And whereas, the British sloop Active, having been captured as prize on the high seas, in the month of September, 1778, and brought into the port of Philadelphia, and there libeled in the Court of Admiralty of the said State, held before George Ross, Esq., the then judge of the said court, on the 18th day of the said month of September: And whereas, the libellants then and there against the said sloop Active, Gideon Urmstead or Olmstead, Artimus White, Aquilla Rumsdale and David Clark, who claimed the whole vessel and cargo as their exclusive prize; Thomas Houston, master of the brig Convention, a vessel of war belonging to Pennsylvania, who claimed a moiety of the said prize for the state of Pennsylvania, himself, and his crew; and James Josiah, master of the sloop Gerard, private vessel of war, who claimed one-fourth part of the said prize for himself, his owners, and crew: And whereas, all the facts respecting the said capture being submitted to the said Court of Admiralty, and a jury then and there returned, empannelled, and sworn, a general verdict was brought in by the said jury, which was confirmed by the court, whereby Gideon Olmstead, Artimus White, Aquilla Rumsdale, and David Clark, became entitled to one-fourth of the said prize; Thomas Houston, for himself and crew, became entitled to another fourth; the state of Pennsylvania, as owner of the vessel of war, the Convention, to another fourth; and James Josiah, himself and owners and crew of the sloop Gerard, became entitled to the remaining one-fourth part of the said prize: And whereas, the said Gideon Olmstead, Artimus White, Aquilla Rumsdale, and David Clark, being dissatisfied with the verdict and sentence aforesaid, did appeal from the said Court of Admiralty of Pennsylvania unto the Court or Committee of Appeals, appointed as aforesaid **129***] under the *authority of Congress, notwithstanding the recommendation of Congress aforesaid of the 25th day of November, 1775, for the appointment of courts of admiralty in each of the then United Colonies, did expressly provide that all trials respectiug capture should be had by a jury, and under such qualifications as to the respective legislatures should seem expedient, and notwithstanding the Court of Appeals did decide not by a jury, but by the usage of nations, and notwithstanding the law for establishing the Court of Admiralty of Pennsylvania did expressly take away the right of appeal where the facts were found aud determined by the intervention of a jury, and notwithstanding the state was authorized at the time to make such qualification or provision, taking away the right of appeal in jury cases, by virtue of the recommendation of Congress aforesaid, which allowed and recommended the said courts of admiralty to be established with a jury, under such qualifications as to the respective legislatures should seem expedient: And whereas, the said Court of Appeals of the United States, on the 15th day of December, 1778, did reverse the sentence of the Court of Admiralty aforesaid, and did decree the whole of the said prize to the appellants: And whereas, the judge of the Court of Admiralty, to wit., George Ross aforesaid, did refuse obedience to the decree of reversal, and did direct Matthew Clarkson, then marshal of the said court, to pay part of the proceeds of the said prize, to the amount of 11,496*l.* 9*s.* 9*d.*, Pennsylvania curreney, for the use of the state of Pennsylvania, into the treasury of the state of Pennsylvania, whereof David Rittenhouse was then treasurer, taking a bond of indemnity from the said David Rittenhouse, as treasurer as aforesaid, to save him, the said George Ross, his executors, and ministrators, &c., harmless from the consequences of such payment, which bond is dated the 1st day of May, 1779:

And whereas, the said George Ross dying, suit was brought against his executors in the Court of Common Pleas of Lancaster county, by and on the part of the appellants before named for the money whereunto they pretended *title by virtue of the decree aforesaid [***130** of the Court of Appeals reversing the sentence of the Court of Admiralty, whereof the said George Ross had been judge: And whereas, it does not appear that the said David Rittenhouse had any notice or information, or was in any legal way apprized of, or made a party to, the said suit in the Court of Common Pleas of Lancaster county, either in his personal capacity, or as treasurer of the state of Pennsylvania, so that judgment was obtained by default against the executors of the said George Ross without any knowledge of the said David Rittenhouse, or his being able to take any measures on behalf of himself or the state of Pennsylvania to prevent the same: And whereas, in consequence of the judgment so obtained in the said Court of Common Pleas of Lancaster county, against the executors of the said George Ross, the said executors brought suit against the said David Rittenhouse, which, in the year one thousand seven hundred and ninety-two, in the term of April of the same year, was heard and determined in the Supreme Court of Pennsylvania, (on a case stated for the opinion of the court, after verdict taken for the plaintiff, subject to that opinion,) by Thomas M'Kean, Chief Justice, and others, the judges of the said court, who, among other things thereunto relating, did decree and determine that the reversal, as before mentioned, had and made in the Court of Appeals, was contrary to the provisions of the act of Congress recommending the establishment of courts of admiralty, and of the general assembly of the state of Pennsylvania, in their act for the establishment of the said court, and was extrajudicial, erroneous and void, and that the Court of Common Pleas of the county of Lancaster was incompetent to carry into effect the decree of the Court of Appeals, and that the judge of the Court of Admiralty aforesaid, George Ross, was not liable to an action in a court of law for distributing money according to his decree, as judge of the said court: And whereas, at the

second session of the third Congress of the United States, held at the city of Philadelphia, **131***] in the month of *December, one thousand seven hundred and ninety-three, it was proposed, as an amendment to the constitution of the United States, that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state, which, having been adopted by the requisite number of states, as appears by the communication to Congress of the then President, John Adams, to this purpose, of January the eighth, one thousand seven hundred and ninety-eight, did become a part of the constitution of the United States:

And whereas, on the twenty-seventh day of May, one thousand eight hundred and two, the said Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, by their attorney, William Lewis, Esq., did file a bill in the District Court of the United States, at Philadelphia, for the District of Pennsylvania, before Richard Peters, judge of the said court, against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse aforesaid, deceased, for the recovery of the moneys, with interest, so paid into the hands of the said David Rittenhouse by Matthew Clarkson, marshal of the Admiralty Court aforesaid, as proceeds of the prize, the brig Active so captured as aforesaid, and by the said David Rittenhouse and his executrixes aforesaid formerly and still retained: And whereas, in the answer of the said Elizabeth Serjeant and Esther Waters to the bill aforesaid, it sufficiently and substantially appears, that the said money was originally received by the said David Rittenhouse, and was by him detained, as treasurer of the commonwealth of Pennsylvania, which commonwealth was, and still is, interested in, and a claimant of, the same, under the decree of the said George Ross, as judge of the Court of Admiralty in manner as herein before stated: And whereas, the said Richard Peters, judge of the said District Court, on the bill, answer and replication so filed by and between the said Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, of the one part, against Elizabeth **132***] *Serjeant and Esther Waters, executrixes as aforesaid, did, on the fourteenth day of January, one thousand eight hundred and three, proceed to decree as follows, viz.: "This is the long-depending case of the sloop Active and cargo," &c. All which legal proceedings herein before stated, will more fully and at large appear on reference to the records of the respective courts wherein the same were had:

Therefore it hath become necessary for the general assembly of Pennsylvania, as guardians of the rights and interests of this commonwealth, and to prevent any future infringements on the same, to declare, that the jurisdiction entertained by the court or committee of appeals, over the decree of George Ross, as judge of the Court of Admiralty of Pennsylvania, in the suit where the claimants of the brig Active, as prize, were the libellants, as herein before stated, was illegally usurped and exercised, in contradiction to the just rights of Pennsylvania, and the proper jurisdiction of the Court of Admiralty established as aforesaid, under the authority of this state, and that the reversal of the decree of the said George Ross, in that suit, was null and void; that the jurisdiction entertained by Richard Peters, judge of the District Court aforesaid, in the suit of Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse, deceased, was illegally usurped and exercised; that the rights of this commonwealth, as a claimant, and as the party substantially interested in the said suit, though apparent on the face of the proceedings, were unfairly passed over and set aside; that the said David Rittenhouse was not and ought not to have been considered in the light of a mere stakeholder, but as the treasurer and agent of this commonwealth, and that the jurisdiction and decree of the said Richard Peters hereon were entertained and made in manifest opposition to, and violation of, the last amendment of the constitution of the United States herein before stated, and ought not to be supported or obeyed. Therefore,

*Sect. 1. Be it enacted by the Senate [***133** and House of Representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, that the Governor of this commonwealth be authorized, and he is hereby authorized and required, to direct the Attorney General of this commonwealth to apply without delay to Elizabeth Serjeant and Esther Waters, executrixes as aforesaid, and require them forthwith to pay into the treasury of this commonwealth, the moneys by them admitted to have been received in respect of the premises, in their answer to the bill so as aforesaid filed against them, in the District Court of Pennsylvania, before Richard Peters, judge of the said court, without regard to the decree of the said Richard Peters herein, and in default thereof by the said Elizabeth Serjeant and Esther Waters, to direct the said Attorney General to bring suit in the name of the commonwealth, in the proper court of this commonwealth, against the said Elizabeth Serjeant and Esther Waters, for the moneys aforesaid, and proceed as speedily as the course of legal proceedings will permit, to enforce the recovery and payment thereof into the treasury of this commonwealth.

Sect. 2. And be it further enacted by the authority aforesaid, that the governor of this commonwealth be authorized and required, and he is hereby authorized and required, to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Serjeant and Esther Waters from any process whatever issued out of any federal court in consequence of their obedience to the requisition, so as aforesaid directed to be made to them by the Attorney General of this commonwealth, and in the name of this commonwealth to give to the said Elizabeth Serjeant and Esther Waters a sufficient instrument of indemnification, in case of their payment of the moneys aforesaid, in compliance with this act, without suit brought

134*] *against them on the part of this commonwealth for the recovery of the same.

SIMON SNYDER,
Speaker of the House of Representatives.
ROBERT WHITEHILL,
Speaker of the Senate.

Approved, April 2, 1803.

THOMAS M'KEAN, Governor of the Commonwealth of Pennsylvania.

That they, the defendants, being required by proper authority to pay into the treasury of the said commonwealth the moneys admitted to have been received as executrixes of David Rittenhouse, Esq., in manner aforesaid, did, on the 19th day of July, 1803, transfer to the treasurer of the commonwealth the certificates of stock above mentioned, and on the 29th of July, 1803, pay into the treasury of the commonwealth the moneys by them received as aforesaid, in obedience to the said act of the general assembly, and to the requisition made under it.

The defendants respectfully further suggest, that the said certificates and money were received by their said testator, as the treasurer and officer of the said commonwealth, as appears by the bond of the said David Rittenhouse, given on the receipt thereof, filed in this court by the libellants, the 22d of May inst.; and that the same came to their hands, as his representatives, after such receipt: And, it being expressly insisted by the said act of the general assembly that the said commonwealth had and has a right to the said certificates and money, and these defendants having, as aforesaid, obeyed the requisition of the said act, these defendants suggest that the said decree of this honorable court ought not to be executed, nor any process issued thereupon against them.

135*] *The defendants respectfully further suggest that the said decrec of this honorable court was pronounced, so far as respects the claims, rights and interests of the said commonwealth of Pennsylvania, *ex parte*, and without jurisdiction,

John Serjeant, attorney for defendants.

After this suggestion, nothing appears to have been done until the application to this court at February term, 1808, when the motion was made for a rule on the judge to show cause why a *mandamus* should not issuc commanding him to issuc an attachment, or other proper process, to enforce obedience to his sentence, as before mentioned.

At this term, Rodney (Attorney General), Lewis, and F. S. Key, of counsel for Olmstead and others, submitted the return of the *mandamus* to the consideration of the court without argument.

February 20. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

With great attention, and with serious concern, the court has considered the return made by the judge for the District of Pennsylvania to the *mandamus* directing him to execute the sentence pronounced by him in the case of *Gideon Olmstead and others* v. *Rittenhouse's Executrixes*, or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the governor to demand, for the use of the state of Pennsylvania, the money which had been decreed to Gideon Olmstead and others; and which was in the hands of the executrixes of David Rittenhouse; and, in defanlt of payment, to direct the Attorney General to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means he *may think necessary [***136** for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executrixes of David Rittenhouse, deceased, against any process whatever, issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the District Court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmstead and *others, citizens of Connecti- [***137** cut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New York, and laden with a cargo for the use of the British army in that place. On the voyage they seized the vessel, confined the captain, and sailed for Egg Harbor. In sight of that place, the Active was captured by the Convention, an armed ship belonging to the state of Pennsylvania, brought into port, libeled and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the Court of Appeals established by Congress, by which tribunal the sentence of condemnation was reversed, the Active and her cargo condemned as prize to the claimants, and process was directed to issuc out of the Court of Admiralty, commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court

established by Congress, as an appellate court, but denied its power to control the verdict of a jury which had been rendered in favor of the captors, the officers and crew of the Convention; and therefore refused obedience to the mandate: but directed the marshal to make the sale, and, after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals for an injunction to prohibit the marshal from paying the money, arising from the sales, into the Court of Admiralty; which was awarded, and served upon him: in contempt of which, on the 4th of January, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

On the 1st of May, 1779, George Ross, the **138***] judge *of the Court of Admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of 11,496*l.* 9*s.* 9*d.*, in loan-office certificates; which was the proportion of the prize money to which that state would have been entitled, had the sentence of the Court of Admiralty remained in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the Court of Appeals.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the Court of Admiralty, and were dated the 6th of November, 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of Congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note. The above certificates will be the property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the 50 original certificates into the treasury, as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives; against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the Court of Appeals.

139*] *While this suit was depending, the state of Pennsylvania forbore to assert its title, and, in January, 1803, the court decreed in favor of the libellants; soon after which, the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction, in this cause, by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their *looking into the suggestion, and ex- [***140** amining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the state of Pennsylvania.

By the highest judicial authority of the nation it has been long since decided, that the Court of Appeals erected by Congress had full authority to revise and correct the sentences of the courts of admiralty of the several states, in prize causes. That question, therefore, is at rest. Consequently, the decision of the Court of Appeals in this case annulled the sentence of the Court of Admiralty, and extinguished the interest of the state of Pennsylvania in the Active and her cargo, which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosesoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge of the Court of Admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right, until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the property of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for interest, were drawn by David Rittenhouse, and

preserved with the original certificates. When
141*] funded as *part of the debt of the United States, they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the state of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property which represented the Active and her cargo, was in possession, not of the state of Pennsylvania, but of David Rittenhouse as an individual; after whose death it passed, like other property, to his representatives.

Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and, consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory *mandamus* must be awarded.

Cited—1 Pet. 122; 5 Pet. 219; 12 Pet. 750; 14 Pet. 632; 2 How. 550; 24 How. 459; 2 Black 633; 6 Wall. 195, 253; 14 Wall. 166; 7 Bank; Reg. 426; 1 Biss. 12.

142*] *VIOLETT *v.* PATTON.

To constitute a consideration it is not necessary that a benefit should accrue to the promisor. It is sufficient that something valuable flows from the promisee, and that the promise is the inducement to the transaction.

A blank indorsement upon a blank piece of paper with intent to give a person credit, is in effect a letter of credit. And if a promissory note be afterwards written on the paper, the indorser cannot object that the note was written after the indorsement.

The English statute of frauds requires that the agreement should be in writing; the statute of Virginia requires only the promise to be in writing.

Before resort can be had to the indorser of a promissory note in Virginia, the maker must be sued, if solvent; but his insolvency renders a suit against him unnecessary.

It is a question to be left to the jury whether a suit against the maker would have produced the money.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, to reverse a judgment in an action of *assumpsit*, brought by Patton, as indorsee of a promissory note, against Violett, the indorser. The note was made by Brooke, payable, in 30 days, at the bank of Alexandria, to the order of Violett, and by him indorsed to Patton.

The declaration had two counts. The first was upon the indorsement, and stated the making of the note by Brooke, for value received; the assignment by indorsement to Patton (but did not state that the assignment was for value received), by means whereof, and of the statute of Virginia, Patton had a right to demand and receive the money from Brooke; the demand of payment from Brooke; his refusal and insolvency at the time of demand; and notice thereof to Violett, whereby he became liable, and in consideration thereof promised to pay, &c.

The other count was for money had and received.

At the trial of the general issue, the defendant below took two bills of exceptions.

The first was to the following opinions and instructions of the court to the jury, viz.:

That if the jury should be satisfied by the evidence that the defendant indorsed the note with intent to give a credit for the amount thereof to Brooke with the plaintiff, and that the body of the note was filled up by the plaintiff before it was signed by Brooke, and that the plaintiff, upon the faith of the note so drawn and indorsed, gave credit to Brooke to the amount thereof; the circumstance *of [**143** such indorsement being made before the body of the note was filled up by the plaintiff and signed by Brooke, is no bar to the plaintiff's recovery in this action; although the jury should be satisfied that no other value was received by the defendant for his indorsement than the credit thus given by the plaintiff to Brooke. And further, that the indorsement by the defendant with the intent aforesaid, if proved, authorized Brooke to make the note to the plaintiff in the form and manner in which it appears upon the face of it to be made; and that the circumstance that the body of the note was in the handwriting of the plaintiff, was wholly immaterial to the present issue.

The second bill of exceptions stated, that the defendant prayed the court to instruct the jury that if they should be satisfied by the evidence that Brooke, at the time the note became payable, or at any time previous to the commencement of this action, had property sufficient to pay the debt claimed by the plaintiff, and that both he and the plaintiff lived in the town of Alexandria at the time the note became due, and that the plaintiff brought no suit against Brooke to recover the amount of the note, but suffered him to leave the District of Columbia, without suing him: or if the jury should be satisfied that the plaintiff and Brooke have, since the note became due, both lived in the county of Fairfax, in Virginia, and have continued to reside there until the bringing of the present suit, and that the plaintiff has not brought suit against Brooke in Virginia, then the defendant is not liable in this action. But the court refused to give those instructions as prayed.

E. J. Lee, for the plaintiff in error.

1. The indorsement, being on a blank piece of paper, and delivered with intent to give credit to Brooke, but without an express authority to him to fill up the paper with a promissory note, did not authorize him so to fill it up. But if Brooke was so authorized, Patton was not. There does not appear *to [**144** have been any communication between Patton and Violett upon the subject.

The cases of *Russel and Langstaffe* (Doug., 514), and *Collins* v. *Emett* (1 H., Bla., 313), do not apply; because in those cases it appears that the body of the note was filled up by the person authorized, and who was to use it for his benefit; and because the principles of those cases are not drawn from the common law, but from the custom of merchants, which is not applicable to promissory notes in Virginia, which are there placed upon the same footing as bonds, and subject only to the same common law principles.

2. There was no consideration from Patton to Violett. The defendant in error must show a good and valuable consideration. (Chitty, 9; 4 Mod., 242; 1 Strange. 674; Buller, 274; 2 Bl. Com., 445; 1 Fonb., Eq., 331, 332, 335, 336; 7 Term Rep., 350, *Rann* v. *Hughes.*)

A consideration which will support an *assumpsit* must be either a benefit to the defendant or a prejudice to the plaintiff; but here Violett received no benefit, and Patton no prejudice.

It does not appear that Patton gave a credit solely in consequence of Violett's indorsement. On the contrary, there was no communication between them, so that there was no undertaking on the part of Violett to Patton, except what the law implies from the indorsement; and that implication is founded upon a presumption that the indorser received value, and can be extended no farther than the value received.

It does not appear that Patton would not have credited Brooke without Violett's indorsement.

3. The indorsement, being in blank, was not a writing signed by him; and the undertaking being to pay the debt of another, is void by the statute of frauds of Virginia.

145*] *At common law the holder of the paper had no right to fill up the indorsement so as to make it a promise in writing. Such a right in mercantile cases is founded only on the custom of merchants. The undertaking in writing must set out the precise terms of the promise, as well as the consideration. (Prec., Ch., 560; Strange, 426; 1 Atk., 13; 5 East, 10, *Wain* v. *Warlters.*) Brooke was clearly liable for this debt. And it is laid down as a principle, that if he for whose use the goods are furnished be liable at all, the promise of a third person must be in writing, or it is void. (Roberts, 209.) But if this is a parol promise, it must be made to appear that the credit was given to Violett alone. (1 H., Bla., 120; 2 Term Rep., 80.)

4. Violett is not liable, if Brooke, at the time the note became due, and at the time the suit was brought, had property sufficient to pay the amount of the note, and Patton did not at any time bring suit against Brooke.

In *Mackie* v. *Davis* (2 Wash., 219), it is decided that the holder of a bond must use due diligence for the recovery of the money. In *Lee* v. *Love* (1 Call, 497), the assignee of a note must sue the maker before he can resort to the indorser.

The case of *Fenwick* v. *Barkesdale*, decided in the Court of Appeals in Virginia, in October, 1803, affirms the general doctrine laid down in *Mackie* v. *Davis*, and shows that a suit is necessary, and is the only kind of diligence which is meant.

It also proves that it is not sufficient to show that the maker of the note was not able to pay all his debts; but the plaintiff must go further and show that he was not able to pay the particular debt due to him by the note.

The oath which is taken under the insolvent law of Virginia, shows what is meant by the term insolvent. *He must swear that [***146** he is not worth 30 dollars, exclusive of his wearing apparel.

The insolvency of the drawee of a bill is no excuse for neglect to give notice of its dishonor. (Chitty, 88; Doug., 497, 515.)

Swann, contra.

The case of *Russell* and *Langstaffe* (Doug., 514), is clear as to the authority given by an indorsement on a blank piece of paper.

It is a letter of credit. The defendant has given the bearer of it authority to use it, and cannot deny the authority when it is executed. This is a mercantile transaction depending upon good faith, in which the want of consideration can never be alleged. (3 Burr., 1663, *Philans & Rose* v. *Van Mierop & Hopkins.*) It is a promise in writing, which is sufficient to take it out of the Virginia statute of frauds. The defendant cannot be permitted to say that the indorsement was blank, and the plaintiff had no authority to fill it up, unless he can show that the confidence he placed in Brooke and the plaintiff has been abused.

If the maker of a note be insolvent when the note becomes due, it is not necessary that the holder should bring suit against him. Brooke might have had property enough to pay this note, and yet be insolvent: And it does not follow because he might have paid this note, that he would have paid it if suit had been brought, or that he could have been compelled to pay it.

Youngs, in reply.

No action can be sustained upon the indorsement of the note. The act of assembly respecting promissory notes gives no action against the indorser. It only gives the assignee a right to recover in his own name against the maker. The action *against the indor- [***147** ser is only at common law, upon the ground that the consideration paid for the note has failed. The legislature of Virginia did not mean to extend the liability of the indorser farther than that. They had the statute of Anne before them, but they did not choose to adopt it; they preferred to place notes in the class with bonds rather than with bills of exchange. The indorser is liable only upon the principle of money had and received to the plaintiff's use. (1 Cranch, 298, *Manderville* v. *Riddle;* 2 Wash., 219, 221, *Mackie* v. *Davis;* 2 Wash., 148, *Norton* v. *Rose.*) If there be no consideration, if the defendant has never received value for the note, he is not liable upon any of the grounds stated in those cases. Between immediate parties the want of consideration is always a good defense, even in England. (Kyd, 276.)

In an action against a surety for money had and received, you cannot recover if the money were received by the principal, although the surety join in giving a receipt for it. (2 Term Rep., 366, *Straton* v. *Rastall.*)

In a written agreement to pay the debt of another, the consideration must be stated as well as the promise. (5 East, 10, *Wain* v. *Warlters.*)

MARSHALL, *Ch. J.* Do you mean to state that if A writes a letter to B stating that if B

will let C have goods, A will pay for them if C does not, A would not be bound?

Youngs. Probably in that case it would be considered that the letter did state the consideration.

In the case of *Clark* v. *Russel* (3 Dal., 415), it was decided by this court that the whole agreement must be in writing, and that nothing can be supplied by parol. It must be a complete agreement, or it will not support an action at law. And upon the count for money had and received, you must prove a considera- [**148***] tion in money actually received by *the defendant, and can then recover only the amount of that consideration. Suppose a note indorsed for accommodation at the bank, and the bank refuse to discount it. If the indorsee puts it in circulation can the holder recover upon it against the indorser?

If the promise be in writing, there must still be a consideration, and you can recover only to the extent of that consideration. (7 Term Rep., 350, *Rann* v. *Hughes.*)

MARSHALL, *Ch. J.* The question seems to be whether the declaration must not state the consideration?

WASHINGTON, *J.* In *Mackie* v. *Davis* there was a special consideration.

LIVINGSTON, *J.* The case of a promissory note is the only case where you need not state a consideration in your declaration.

MARSHALL, *Ch. J.* My impression is very strong that in Virginia there has been a general practice to consider an indorser as liable upon an implied promise; and to declare upon it without averring a consideration.

Youngs. If there must be a consideration to support the *assumpsit*, it must be averred in the declaration. (*Simms* v. *Cook*, 2 Call; *Winston* v. *Francisco*, 2 Wash., 187; *Taliaferro* v. *Robb*, 2 Call, 258.)

February 23. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This case comes on upon two exceptions; one to the opinion of the Circuit Court given to the jury, and the other to the refusal of that [**149***] court to give an *opinion which was prayed by the counsel for the defendant below.

The declaration contains two counts. One upon the indorsement of a promissory note, and the other for money had and received to the plaintiff's use. The question arising on the first bill of exceptions is, whether the court erred in directing the jury respecting the liability of the defendant below, on the indorsement which was the foundation of the action.

The indorsement was made before the note was written; and it appeared that the body of the note was filled up by Patton. The opinion of the court was, that, if the jury should be satisfied, from the testimony, that Violett indorsed this paper for the purpose of giving Brooke a credit with Patton, and that, upon the faith of the note so drawn and indorsed, Patton did credit Brooke to the amount thereof, the circumstances, that the note was made subsequent to the indorsement, without any consideration from Brooke to Violett, and was filled up by the plaintiff, did not bar the action; and, further, that the said Brooke was to be considered as authorized by the said Violett to make the note to Patton.

This opinion is said to be erroneous; because,

1. The indorsement was made without consideration.

2. It was made on a blank paper.

3. There was no memorandum of the agreement in writing.

In support of the first point, the counsel for the plaintiff in error have cited several cases, intending to prove that an indorsement made without consideration, though it transfers the paper to the indorsee, creates no liability in the indorser; and that *a promise in writ- [**150*** ing, made without consideration, is void.

So far as respects the immediate parties having knowledge of the fact, and so far as relates to an indorsement under the statute of Virginia, this is correct; but the real question in the cause is, does the testimony prove a sufficient consideration for the promise created by the indorsement? This is not intended to comprehend any writing on which an action of debt is given.

To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction. In the common case of a letter of credit given by A to B, the person who, on the faith of that letter, trusts B, is admitted to have his remedy against A, although no benefit accrued to A as the consideration of his promise. So in the present case, Patton trusted Brooke on the credit of Violett's name, and Violett wrote his name for the purpose of giving Brooke that credit with Patton. It was, in effect, and in intention, a letter of credit. The case shows that this was both the intention and the effect of Violett's giving his name to Brooke. In conscience, and in substance, then, it is a letter of credit, upon which the money, it was intended to secure, was advanced; and although in point of form the transaction takes the shape, and was intended to take the shape, of an indorsement, yet, so far as respects consideration, the indorsement has the full operation of an undertaking in the form of a letter of credit.

It is common in Virginia for two persons to join in a promissory note, the one being the principal and the other the security. Although the whole benefit is received by the principal, this contract has never been considered as a *nudum pactum* with regard to the security. So far as respects consideration, no *dif- [**151*** ference is preceived in the cases. Violett has signed his name upon this paper for the purpose of giving Brooke a credit with Patton, and his signature has obtained that credit. The consideration is precisely the same, whether his name be on the back or the face of the paper.

2. The second objection is, that the indorsement preceded the making of the note.

This objection certainly comes with a very bad grace from the mouth of Violett. He indorsed the paper with the intent that the promissory note should be written on the other side; and that he should be considered as the indorser of that note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he indorsed it. It would be to protect himself from the effect of his promise, by alleging a fraudulent combination be-

tween himself and another to obtain money for that other from a third person. The case of *Russel* and *Langstaffe*, reported in Douglass, is conclusive on this point.

3. The third objection is, that there was no memorandum of the agreement in writing.

The argument on this point is founded on the idea that the statute of frauds in Virginia is copied literally from the statute of Charles II. This is not the fact. The first section of the act of Virginia differs from the 4th sec. of the statute of Charles II. in one essential respect. The statute of England enacts that no action shall be brought, in the cases specified, "unless the agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing," &c. The Virginia act enacts that no action shall be brought in the specified cases, "unless the promise or agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing," &c. The reasoning of the judges, in the cases in which they have decided that the **152*]** consideration ought to be *in writing, turns upon the word agreement, of which the consideration forms an integral part. This reasoning does not apply to the act of Virginia, in which the word "promise" is introduced.

It was thought proper to notice this difference between the act of parliament and the act of Virginia, although the opinion of the court is not determined by it. In this case the assignment does express a consideration. It is made for value received.

It is unnecessary to decide in this case, whether the declaration ought to have alleged that the indorsement was made on consideration. With that question the jury had no concern, and the direction of the court was not affected by it. There being no demurrer, it could only occur in arrest of judgment. But on a motion in arrest of judgment, the defendant below could not have availed himself of this error, if it be one, because there are two counts in the declaration, one of which is unquestionably good, and the court cannot preceive on which the verdict was rendered. By the act of jeofails in Virginia, there is no error if any one count will support the judgment.

The second exception is to the refusal of the Circuit Court to give the opinion prayed for by the counsel for the defendant below.

When the error alleged is, not that the court has misdirected the jury, but that the court has refused to give a particular opinion, the opinion demanded must be so perfectly stated, that it becomes the duty of the court to give it as stated.

In this case, the opinion required by the counsel consists of two parts. The first is to instruct the jury "that if they shall be satisfied, from the evidence, that Richard Brooke, the maker of the note in this case, had, at the time the note became due, or at any time previous to the commencement of this suit against the de- **153*]** fendant, property sufficient to pay *the debt claimed," &c., and the plaintiff brought no suit, then this action is not maintainable.

This court conceives that the Circuit Court ought not to have given this opinion. Had Richard Brooke possessed property before the making of the note, and not afterwards, the opinion, in the terms in which it was required, would have been a direction to find their verdict for the defendant. So if Richard Brooke had been in possession of property for a single day, and had the next day become insolvent, the court was asked to say that, in such a case, the indorser could only be made liable by suit against the maker. Such a direction, in the opinion of this court, would have been improper.

The second branch of the opinion the Circuit Court was required to give, is in these words: "Or if the jury shall be satisfied that the said plaintiff and the said Brooke have, since the said note became due, both lived in the county of Fairfax, in Virginia, and have continued to reside in the county of Fairfax until the beginning of the present suit, and the plaintiff hath not brought suit against the said Brooke in Virginia, then the defendant is not liable in this action."

If the plaintiff had sued Brooke elsewhere than in Virginia, or if Brooke had become insolvent previous to the making of the note, and had continued to be so, the opinion of the court, if given as prayed, would have been, that, still, a suit against the maker of the note was necessary to give a right of action against the indorser.

This is not understood to be the law of Virginia. It is understood to be the law, that the maker of the note must be sued, if he is solvent, but his insolvency dispenses with the necessity of suing him. It is not known that any decision of the state courts requires that this insolvency should be proved by taking the oath of an insolvent debtor, nor is it believed that this is the only admissible testimony of *the [***154** fact of insolvency. Other testimony may be admitted. It would therefore have been proper to leave it to the jury to determine whether it was, at any time, in the power of the plaintiff to have made the money due on this note, or any part of it, from the maker by suit; and their verdict ought to have been regulated by the testimony in this respect.

This opinion was not required.

This court is of opinion that there is no error, and that the judgment is to be affirmed with costs.

Cited—5 Cranch 50, 53; 15 Pet. 314; 3 How. 533; 20 How; 361; 22 How. 43; Id. 108; 9 Wall. 552; 22 Wall. 507; 2 Otto 339; 1 Cranch C. C. 574; 3 Id. 310; 2 McLean 107; 2 Brock. 72.

PIERCE *v.* TURNER.

The act of assembly of Virginia, which makes unrecorded deeds void as to creditors, and subsequent purchasers, means creditors of, and subsequent purchasers from, the grantor.

A marriage settlement, conveying the wife's land and slaves to trustees, by a deed, to which the husband was a party, although not recorded, protects the property from the creditors of the husband.

ERROR to the Circuit Court of the District of Columbia, sitting at Alexandria, in an action of debt brought by Pierce against Rebecca Turner, charging her as executrix in her own wrong of her late husband, Charles Turner, deceased.

Upon the issue of never executrix, the jury found a special verdict, stating in substance the following case:

On the 14th of February, 1798, the defendant, by the name of Rebecca Kenner, being a *feme sole*, and seized and possessed, in her own right, of certain land and slaves, conveyed the same by deed, in consideration of an intended marriage between herself and Charles Turner, to trustees, to be held in trust for the use of herself until the marriage should be solemnized, and from and after the solemnization thereof to the use of herself and the said Charles Turner, and the longest liver of them, and from and after their deaths, to the use of her heirs. The deed purports to be an indenture tripartite, in which Charles Turner is named as the second party, and as such he duly executes the **155***] deed; *he does not, however, make any settlement of his own property upon his intended wife, but appears to be made a party merely for the purpose of testifying his privity and consent.

About four months after the execution of the deed, two of the three subscribing witnesses proved the execution before the county court of Fairfax, where all the parties inhabited. The probate was duly certified by the clerk under direction of the court. But the deed purporting to be a conveyance of land as well as slaves, and one of the subscribing witnesses, soon after the execution of it, having left the United States, and never having returned, the deed was not fully admitted to record, but remained in the clerk's office under the certificate of probate before stated, until the 1st of September, 1807, when the County Court, upon proof of the absence of the third subscribing witness, and of his handwriting, admitted the deed to record; all which is certified by the recording clerk, and found by the special verdict.

Soon after the execution of the deed, and in the same month, (February, 1798,) the contemplated marriage took place; whereupon the trustees put Turner into possession of the land and slaves, and he continued possessed of the same, with the knowledge and approbation of the trustees, till his death, which happened some time in the month of December, 1802, less than five years from the time of his marriage, and of his first coming into possession of the property.

Turner and his wife resided in Alexandria from the time of their marriage till the autumn of 1801, when they removed into the county of Northumberland, in the state of Virginia, taking the slaves with them by consent of the trustees; they continued to reside there, upon the land in the deed mentioned, on which the slaves were kept, till his death, in December, 1802. Upon his death she remained in possession both of the land and slaves, claiming exclusive property in the same, and to **156***] *hold possession of the same with the privity and approbation of the trustees, whose privity and approbation are expressly found. In the autumn of 1803, the defendant removed back to Alexandria, in the District of Columbia, and brought with her a part of the slaves, (of value sufficient to satisfy the plaintiff's debt,) and has ever since resided in Alexandria, and there used the slaves so brought with her.

Three months after Turner's death, and seven months before the defendant removed from Northumberland back to Alexandria, the County Court of Northumberland, finding that no person would apply for administration of the intestate's estate, committed the administration to the sheriff of the county, under a particular statute of Virginia. The sheriff returned an inventory of assets appraised at 4,631 dollars and 72 cents, which was distributed in due proportions among the creditors, under the especial direction of the court. But the plaintiff put in no claim, and, not being on the list of creditors reported to the court, received no part of the sum so distributed. None of the slaves conveyed by the said deed were meddled with in the course of the sheriff's administration, nor included in the inventory and appraisement, although they were all then in the county, and some of them have continued in the county ever since Turner's death. It is found that Turner died insolvent, unless the said slaves are charged with his debts.

By the 4th section of the act of assembly of Virginia, entitled "An act for regulating conveyances," it is enacted, "that all conveyances of lands," "and all deeds of settlement upon marriage wherein either lands, slaves, money or other personal thing shall be settled," "and all deeds of trusts and mortgages whatsoever," "shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged, or proved and recorded according to the directions of this act; but the same, as between the parties and their heirs, shall nevertheless be valid and binding.

*The deed in question never was [***157** proved or acknowledged and recorded according to the directions of the act; and the question was, whether it was void as to the creditors of the husband, so as to charge the widow as his executrix in her own wrong.

The opinion of the court below was, that the deed was good and effectual to prevent the property vesting in the husband by virtue of the marriage, and consequently was never liable for his debts. That at the time of the marriage no legal estate in the slaves was vested in the wife, and therefore nothing was transferred to the husband by the marriage.

E. J. Lee, for the plaintiff in error.

By marriage all the personal estate of the wife becomes the absolute property of the husband. The operation of this principle can only be prevented by pursuing strictly the mode pointed out by law. This deed wants those legal solemnities which the law requires to make it valid against creditors. The plaintiff is a creditor; the deed is, therefore, not valid against him. The word creditor, in the act of assembly, means not only the creditors of the grantor, but the creditors of every person whose debts could have been legally satisfied out of the property, if such deed had not been made. If the word is to have the limited construction contended for on the other side, and the deed be void only as to her creditors, and as to subsequent purchasers from her, the statute becomes nugatory; because after marriage she has no creditors, and cannot sell and convey. Her creditors have become his creditors; her debts have become his debts. If the deed be void as to her creditors, it must be void as to his cred-

itors. If she can neither sell nor have creditors, the act must apply to his creditors, or it will be idle and unavailing.

If the husband had sold these slaves to persons ignorant of the deed, the sale would have **158***] been valid. *If he had been trusted upon the faith of this property, which he had in his possession, and which was supposed to have come by his wife, such creditors, who were ignorant of the deed, would have a right to payment out of this property. If they could not, the possession of the slaves would have been a fraud upon such creditors.

It is true, in the present case, the debt was contracted before the marriage, but that cannot alter the principle of law. If the deed be void as to any of his creditors, it is void as to all.

The term creditors is general, and literally comprehends creditors of the husband, as well as creditors of the wife. Where the words of a statute are plain, the court cannot indulge any latitude of construction, but must pursue the words. (3 Call, 106; 2 Call, 183, *Eppes* v. *Randolph.*)

If the property was liable for the husband's debts, it was assets, and her appropriating it to her own use, makes her an executrix in her own wrong (Toller, 17); although she did it claiming them as her own, and under a void deed (2 Vin. Abr., 211; 2 Term Rep., 588, *Edwards* v. *Mercer;* Cro. Jac., 270, *Hawes* v. *Loring;* 2 Bac. Abr., 338; 5 Co., 34, a.); even if there be a rightful administrator. But the possession taken by the sheriff of Northumberland county was not an administration. (2 Term Rep., 97.)

If this deed be valid against creditors, no marriage settlement need be recorded. It renders unnecessary all the precaution which the legislature so anxiously took to prevent this kind of fraud and imposition.

C. Simms, P. B. Key and *Jones,* contra.

.The act for regulating conveyances, as it relates to creditors and their debtors, was intended to protect the former against secret deeds and conveyances made by the latter; it never was **159***] intended to *injure the rights of third persons, who do not claim under the debtor.

Lord Mansfield, in the case of *Cadogan* v. *Kennett* (Cowp., 434), speaking of the statute of 13 Eliz., c. 5, which relates to frauds against creditors, says, that "such a construction is not to be given in support of creditors as will make third persons sufferers."

If there is any difficulty in the construction of this act it arises from the generality of the expression, "creditors and subsequent purchasers."

The first section of the act declares, that uo conveyance shall be good against any creditor or purchaser, for valuable consideration, not having notice thereof, unless it be acknowlcdged or proved by three witnesses, &c.

What purchaser is intended by this act? Unquestionably a purchaser from the person who made the first deed. The effect or operation of the act is to give validity to the second deed duly proved and recorded iu preference to a prior deed, not duly proved and recorded; and not to invalidate the first deed, in favor of a purchaser for a valuable consideration from a person other than the maker of the first deed.

To illustrate the subject; suppose A, the rightful owner of property, makes a conveyance of it to B, which is not recorded. C, who sets up a claim to the property, sells and conveys it to D, for a valuable consideration, and the deed is duly recorded; would the deed from A to B be considered as void against D, who does not claim under A? Certainly not. Then the subsequent purchaser must claim under the person who made the first deed, or the first deed cannot be considered void as to him. So the general term "creditors," used in the act must, for the like reason, be understood to mean the creditors of the grantor or bargainor *in the first deed, and none but such [***160** creditors can set aside the deed.

If A, by deed conveys property to B, and the deed is not recorded according to the act, C, the heir of A, contracts debts. The creditors of C would have no lien or claim on the property conveyed by A to B, nor would it be liable in any manner to C's debts; yet, but for the deed, the land would have descended to C. The right which creditors have to the property of their debtor is derivitive. If he never had a right to the property, they can have none. Charles Turner never had any right to this property, unless under the deed.

Rebecca Kenner, before the marriage, was the sole and absolute owner of it, and was fully competent to dispose of it as she thought proper.

She did dispose of it by a deed to trustees, which she was competent to make, which was completely binding upon her, and which devested from her all legal title and claim to the property. At the time of the marriage she had no legal estate in her which could, by operation of law, be transferred to her husband by the marriage. As he was a party to the deed, and thereby assented to it, he was bouud by it, and could never set it aside. Between all the parties to the deed it was as valid and binding as if it had been duly acknowledged and recorded. The creditors of Charles Turner can claim nothing which he could not claim. If the marriage did not transfer the property to him, they cannot claim it at law. What never was his cannot be theirs.

If the property never was his, so as to be assets, the defendant can never be charged as executrix in her own wrong for taking possession of it.

But even if this property should finally be adjudged to be assets, yet we contend she is not liable as *executrix de son tort.* If she took possession of the slaves on a fair claim of property, believing herself *lawfully [***161** entitled to them, it cannot amount to such a tortious act as will charge her as *executrix de son tort.* (Bro., Abr., Administrator, pl. 36; Executor, pl. 162; Fitz., Abr., Executor, pl. 65; Roll., Abr., Executor, pl. 417; 11 Vin., Abr., Executor, C. a. and B. a. pl. 5; 2 Lcon. 226; Com., Dig., Administrator, C. 2; Freem., 13. pl. 12; Dyer, 166, *Stokes* v. *Porter.*)

The deed was good at law between the parties, and by the assent of her trustees she had a legal right to the possession; and wherever a person comes lawfully into the possession of the goods he can never be charged as *executor de son tort.* The rightful executor could never claim these slaves as assets, because the deed

was good between the parties, and he would be estopped by the sealing and delivery of the deed by Charles Turner, his testator.

If the creditors of the husband have any remedy, it must be in equity; where it is a well settled principle that if the representatives of the husband are obliged to resort to equity to get possession of the wife's estate, they shall first make her an adequate settlement. She is considered as a fair creditor to that extent. (1 Fonbl., c. 2, § 6, p. 87, note k; 10 Ves. Jun., 360, *Rider* v. *Kidder;* 1 P. Wms. 382, *Jacobson* v. *Williams.*) And so far from setting aside such a deed as this, a court of equity will enforce a mere agreement for a settlement even in opposition to creditors.

If this were a contest between the creditors of the wife, and the creditors of the husband, the contest must be decided in favor of the former. "Though the husband by the marriage adopts the wife and her circumstances together, and is liable to her then debts, yet he is liable to them only during the coverture, unless the creditor recover judgment against him in the life-time of the wife; nor can a court of equity make him liable in respect of the fortune which he may have had with her." (1 Fonb., 91, c. 2, § 6; 1 P., Wms., 461, *Earl of Thom-*
162*] *ond* v. **Earl of Suffolk;* 3 P., Wms., 410, *Heard* v. *Stamford;* Forrester, 173.) Her debts do not by the marriage become absolutely his debts. Her creditors do not lose their right of action against her; but after his death may pursue their remedy against her and her separate estate.

The terms debtor and creditor are correlative. The creditor meant by the statute must mean the creditor of that debtor whose deed is to be set aside.

This deed was not void *ab initio* as to any creditor of either of the parties. For eight months it was valid as to all creditors; and is still valid as to all the parties.

Here is no fraud, either legal or moral, as to the creditors of the husband. The consideration of marriage is a fair, a valuable, and a highly favored consideration, and has always prevailed, both at law and in equity, even against creditors.

The plaintiff's counsel, however, set up the marriage itself to defeat the deed made in consideration of that marriage.

The case of *Edwards* v. *Mercer* (2 Term., Rep., 588), was a case of fraud. It was void *ab initio;* not by reason of the omission to record it.

MARSHALL, *Ch. J.*, mentioned the case of *Anderson* v. *Anderson* (2 Call, 204), where it seems to have been decided that the word creditor, in the act, included creditors of the husband as well as creditors of the wife.

Jones. That was not the case of a conveyance, but of a contract before marriage without the intervention of a trustee. This contract did not, and could not, prevent the legal operation of the marriage which transferred everything to the husband. The wife was possessed of the legal estate at the time of the mar-
163*] riage. But in the present case the *deed was good, and no legal estate remained in Rebecca Kenner, at the time of her marriage.

Swann, in reply.

The words of the act are, that the deed shall be void as to "all creditors and subsequent purchasers" unless, &c. The plaintiff being a creditor, it is void as to him. By the marriage the property, as to the plaintiff's claim, vested in Charles Turner, in the same manner as if Rebecca Kenner had transferred it to him by deed duly acknowledged and recorded. He received possession of them, and from that possession acquired credit with the plaintiff and others. If this property should not be rendered liable to his debts, the object of the law will be frustrated.

To restrict the term creditors to the creditors of the grantor is neither consistent with the letter nor the spirit of the law.

If this construction be correct, the creditors of a subsequent purchaser are not entitled to the benefit of this act. If the property should pass through the hands of six purchasers, would not the creditors of the last purchaser be entitled to seize it? And shall the vendor set up a secret deed, and claim it, because the creditor is not his creditor? How would this differ from the case of a creditor of the first purchaser? The claim of such a creditor would be good against the secret deed of the vendor.

The marriage being a purchase, the creditor stands upon the same ground.

The creditors of the vendor and purchaser have a right to consider the deed as null.

If the vendor retains possession of the property, and appears to be the owner, the creditor may seize it notwithstanding a secret unrecorded deed.

So if a purchaser has obtained a deed for it, and *is the apparent owner of it, the [***164**
creditor of the purchaser may seize it notwithstanding a secret unrecorded deed.

Unless the act of assembly has this operation, it has none, and no marriage settlement will be recorded in future.

The derivative title may be better than the original; as in the case of a purchaser without notice from a purchaser with notice.

Charles Turner had notice, but if he had sold to a purchaser who had not notice, this purchaser must have held the property against this unrecorded deed. (Sugden's Law of Vendors, 448; 2 Vern., 384; Amb., 313; 2 Atk., 242.)

The deed was void *ab initio* as to creditors, as soon as the time for recording had elapsed.

March 13. WASHINGTON, *J.*, delivered the opinion of the court as follows, viz.:

This is an action brought by a creditor of Charles Turner, against Rebecca Turner, who is charged as his executrix; and the questions submitted to the consideration of the court are, 1st. Whether the slaves, mentioned in the deed of the 14th of February, 1798, are to be taken as assets belonging to the estate of Charles Turner; and if so, then, 2d. Whether Mrs. Turner can, under the circumstances of this case, be properly charged as an executrix of her own wrong? If the first question be determined in favor of the defendant in error, it will become unnecessary to consider the second; as it does not appear that Mrs. Turner intermeddled in any manner with the estate of her deceased husband, unless these slaves did, in point of law, constitute a part of that estate.

*The first question depends upon the [***165**
construction which the court may give to the 4th

section of the statute of Virginia, passed on the 13th of December, 1792, entitled "An act for regulating conveyances," which declares that all conveyances of land, marriage settlements of lands, slaves, or other personal property, deeds of trust and mortgages thereafter made should be void as to all creditors and subsequent purchasers, unless the same were acknowledged or proved, and recorded within the time prescribed by the statute; but that the same as between the parties and their heirs should nevertheless be valid and binding.

The deed from Rebecca Kenner, the defendant in error, previous to her intermarriage with Charles Turner, by which the slaves in question were settled on the said Charles Turner and herself, during their lives, and the life of the longest liver of them, with remainder to the heirs of the said Rebecca, not having been proved and recorded within the time prescribed by law, it is contended by the plaintiff in error that the same became void as to the creditors of Charles Turner, whose rights remained unimpaired by that deed, in the same manner as if it had never been made; in which case, it is not denied that an absolute estate would have vested in the husband, on his marriage.

This argument proceeds upon the ground, that by the words "all creditors and subsequent purchasers," is meant as well the creditors of the grantee and subsequent purchasers from him, as those who might derive title under the grantor. Although the words are certainly broad enough to comprehend the whole, it is believed by a majority of the court that the construction should be such as to limit the application of them to the creditors of, and subsequent purchasers from, the grantor. In no case but one, where a title can be set up for the grantee paramount the deed, can it ever be the interest of a creditor of the grantee to insist upon such a construction as is contended for in this; for as he must derive his title under the **166***] *deed, if it be void as to him, it is impossible for him to found a claim upon it in right of the grantee, whose only title is under the deed. It would be strange that a deed should be binding upon the grantee and his heirs, and yet void as to persons claiming under him, for a valuable consideration; and yet such would be the consequence, if the words "all creditors and subsequent purchasers" should be understood to apply to persons claiming under the grantee as well as those claiming under the grantor. Indeed it would seem repugnant and absurd to apply the same expressions to persons, who, if they claim at all, must claim under the deed, and also to those who claim against the deed; in the latter case, the invalidity of the deed is consistent with the claim, in the former it is destructive of it.

It may be said, however, that these observations are inapplicable to this particular case, because the creditors of the husband do not claim under but against the deed; and, in this respect, stand upon the same ground as the creditors of the grantor. But if in every other case which can be stated, the invalidity of the deed is applicable to the creditors of the grantor, or those claiming under him, and to none other, by what rule of construction can the same words have a more extended meaning, so as to be applied to persons who claim in right of a party to the same deed other than the grantor? If the deed in question had granted to Charles Turner an estate in fee as to the land, and for life in respect to the slaves, would it have been void as to simple contract creditors, who could go only against the personal estate, and good as to specialty creditors, who might subject the real assets? and yet, if the deed be void at all, as to the creditors of the husband, it must be so throughout; in which case it might well be doubted whether the land could be made liable to the payment of the husband's debts; or, to present the question in a less doubtful shade, would the deed be considered void as to a purchaser, from the husband, of the slaves, and good as to a purchaser of the land? Let the true interpretation of the words "all *creditors and subsequent [***167** purchasers" be once ascertained, and every difficulty in the case is at an end. If they are construed to mean the creditors of the grantor, or subsequent purchasers from him, then, the deed being good between all the parties to it, no estate vested in Charles Turner but such as the deed itself passed to him. The title of his creditors being clearly derivative, if he had no title under the deed, (and being himself bound by it, he could have none which was inconsistent with it), then his creditors could have none. But if he had a title incompatible with that granted by the deed, then he was not bound by the deed; contrary to the statute which declares that he was bound. If his creditors have any such title, it cannot be derived from him, when, in point of law, he had none in himself; and, independent of his title, it is impossible to show any in them. If a subsequent purchaser, with notice of a prior unrecorded deed, could not prevail against the title of the first purchaser, and most unquestionably he could not, how much stronger is the case when such subsequent purchaser is even a party to the first deed, and claims an interest under it? To say in this case, that, upon the marriage of Charles Turner, or at any time afterwards, the law cast upon him an estate in the property conveyed by this deed, of which he had notice, and to which he was a party, inconsistent with the estate conveyed to him by that deed, (and this must be said, if his creditors can claim such estate in his right), is, in the opinion of a majority of the court, repugnant to the plain meaning and spirit of the law under consideration.

That creditors of the husband, or purchasers from him, may be injured by the construction which this court feels itself compelled to give to this law, need not be denied; but it is not for this tribunal to afford them relief. It might, perhaps, be well if the law were so amended as to render deeds made in contemplation of marriage void in express terms, as to the creditors of the husband, or purchasers from him, in case the same should not be recorded within the time prescribed by law.

*The court has felt some difficulty [***168** in consequence of a decision of the Court of Appeals in the case of *Anderson* v. *Anderson;* but it is believed that the judgment in that case was perfectly correct, let the particular point which occurs in this cause be settled one way or the other. In that case, the contract was

not only executory and rendered void, at law, by the subsequent intermarriage of the parties to the contract, but it was, at the time when the slaves were taken in execution, perfectly contingent whether the wife could ever claim any interest in them, in opposition to persons deriving title under the husband. For if the husband should have survived the wife, or if they should have had issue, the absolute legal estate of the husband, gained by the intermarriage, would have remained unaffected by the deed. There was, therefore, no reason why the creditors of the husband should be prevented from receiving satisfaction of their debts out of his legal estate in the slaves, because it was subject to an equitable contingent interest in the wife, which might never become effectual. A court of equity might well say to her, as you have no remedy, at law, for a breach of the contract by the husband, in consequence of not having interposed trustees to protect your rights, and have omitted to record the deed by which creditors and subsequent purchasers might be defrauded, we will not now decree you a specific performance against creditors who have law and equity on their side.

Decree affirmed.

JOHNSON, *J.* I am unfortunate enough to dissent from my brethren in this case. I think the creditors of Turner entitled to recover, and entitled to recover in this form of action.

I will not contest the general principle, that the creditors, to whose benefit this act must be understood to operate, are the creditors of that party only from whom the estate moves. But this case presents an exception to the general **169***] rule; and the reasoning, *from which the general conclusion results, will be found inapplicable to the case of husband and wife, with regard to the personal estate of the latter.

The words of the act are admitted to be sufficiently comprehensive to include the creditors of both: the general rule is, that the letter must prevail; and it is only when an adherence to the letter will involve a court in absurdity, or inextricable difficulty, that the spirit is resorted to as a restriction upon the literal meaning. But the construction which I give to this act removes repugnance and absurdity, and produces a concordance between the letter and the spirit, which appears to my mind conclusive upon its correctness.

What was the object of the legislature? It was to protect the community from that false credit which men acquire in society, from the possession of or supposed interest in property; to place within their reach the means of avoiding those frauds which may be practiced upon them, by the possessor of property, when an estate or interest in it exists, in fact, in some other person.

The argument in favor of the defendant is, that the creditors of the grantee can derive no benefit from a deed which the act declares void, and which, consequently, could vest no interest in their debtor. Through him they must claim, and no other estate but that which existed in him, ought to be subjected to their debts.

I will not pass an opinion upon the correctness of an argument which, in the case where possession follows the alienation, may make the act productive of the very fraud which it was intended to obviate. My opinion is founded upon a ground which is unaffected by the conclusion upon this point, or rather in perfect coincidence with that conclusion. I deduce my conclusion from the consideration that the claim of Turner's creditors is not derived through the *deed, but is, in fact, in direct hostility [***170** with its operation. The effect of the marriage, in transferring the property to the husband, is the foundation of their claim; and the deed executed on the intermarriage of the defendant with Charles Turner, constitutes the subject of the defense against their claim. The creditors, in order to maintain their action, prove, first, the property in the wife before marriage, then her intermarriage with their debtor. These facts, in operation of law, upon her personal property, sustain their right of recovery. But, in opposition to their claim, the wife endeavors to avail herself of this deed; and this question is brought up on an exception taken by the creditors to its legal validity. The ground of their objection is, that it wants that evidence of authenticity, which the law requires, to make it, as to them, a valid instrument. No doubt is entertained with regard to the invalidity of this instrument, as to one description of creditors; but it is contended, on behalf of the defendant, that no other creditors can avail themselves of that objection, except the creditors of the wife before marriage. There appears to me to be no reason for the distinction in the case of husband and wife. Her creditors before marriage become his during coverture; she can contract no debts to which she can be made personally liable; her personal property becomes his by the act of intermarriage, and he acquires all the credit in society, resulting from the acquisition and possession of that property. It is not upon a deed, which this act declares void, that the creditors found their claim, but upon an act in *pais*, the operation of which is an immediate transfer of property, unless that effect be prevented by the legal execution of some instrument of writing. If such an instrument, executed before marriage, be not recorded within eight months, it loses all legal validity as to creditors, and it is the same as if no such instrument had ever been executed. The recording, as to them, is as necessary as the sealing and delivery is between the parties.

*The consistency of this opinion with [***171** the argument that the creditors of the grantee can derive no interest under a deed which, as to them, is declared void, will appear from distinctly reflecting on the necessary consequence of such an admission in this case. Declare the deed void, and what is the consequence? It no longer affects the property of the wife, so as to produce a state of things different from that which would exist if it had never been created; and the operation of the deed was not to vest an interest or estate in Charles Turner, but to prevent any estate from vesting in him by the ordinary effect of marriage. Remove the preventing cause, and the property becomes, unquestionably, subject to the husband's debts.

Two objections to this opinion have been urged, on which it may be proper to make some remarks. The first that I shall notice is, how the same deed can be valid as between the parties, so as really to prevent any transfer of property to the husband, and yet, through him, creditors may derive such an interest as to subject it to the payment of his debts. If this ar-

gument proves anything, it proves too much. A moment's reflection will show, that it is as applicable to the case of the grantor as of the grantee; for, after the execution of the deed, the grantor has, in fact, and in the acknowledgment of the act, no more interest in the property than the grantee had before its execution, or upon its becoming void for want of recording. But every apparent absurdity may be reconciled thus. Legal claims must be supported by legal proof. The abstract rights of parties become immaterial, if not susceptible of substantiation by evidence. In a question, then, between the direct representatives of the husband and wife, the deed is a valid instrument, and may be received as duly authenticated written evidence, to support a right derived under it. But, between the one party and the creditor of the other, the law declares it wholly inefficacious, for want of a ceremony which is made essential to its authenticity. The most ordinary deed **172***] cannot be *received in evidence until proved according to the rules of evidence; and the operation of individual acts, in producing transfers of property, must ever be subject to such modifications as may be made by positive law.

The other difficulty arises from the consideration how this deed can be valid against all persons (which it confessedly is) during eight months, and then cease to operate as to creditors. To this it may be answered, that this objection, as well as the preceding, is equally applicable to the case of the creditor both of alienor and alienee; and, if valid at all, might defeat the operation of this act altogether. But, as a provision of positive law, such considerations are not to defeat it. Possibly some inconvenience may result from holding property in this suspended situation; but the duration of the inconvenience is not long, nor the contingency far remote. Nor is an analogous state of things unknown to the common or civil lawyer; executory devises, contingent remainders, and shifting uses, produce a similar uncertainty and suspension of right. During the eight months which are given for recording a deed, the interests of parties must have vested only *sub modo*, or subject to the contingency of recording it within the legal time: and no doubt a court of equity would interpose its authority, during that period, to adjust the rights of parties. Nor will this objection at all affect the opinion which I entertain respecting the rights of the plaintiff; for, although the deed certainly did hold the personal property of the wife in a suspended state, during the eight months, so that the creditors could not in that time, have taken it under execution, yet, after the expiration of that period, the deed lost its protecting effect, and that property then became subject to their debts.

These views of the subject appeared to me to solve every difficulty, and lead to a conclusion upon the second point made in the argument; viz., whether the defendant may be charged as executrix *de son tort*. The case of *Harding & Mercer* comes *fully up to the present, and it will be found of necessity, in order to give effect to this act, that this remedy should be countenanced. The hardships of it would, no doubt, be remedied by a court of equity, in cases free from collusion or moral fraud, so as to prevent the defendant from being charged to an amount greater than the value of the goods which actually came to her hands. But the necessity of sanctioning this mode of pursuing property, circumstanced as in this case, will appear from the impossibility of a creditor's getting at it in any other manner, at law. Should the creditor himself administer, he can never recover it, because, as the legal representative of the husband, the deed would be valid against him without being recorded. Should any other person administer, he could never be charged with the value of assets, which, for the same reason, could never come to his hands. So that both precedent and principle concur in supporting the correctness of permitting him to resort to the present remedy.

173*]

KEMPE'S LESSEE *v.* KENNEDY *et al*

The inferior Court of Common Pleas for the county of Hunterdon, in the state of New Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason, and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause.

ERROR to the Circuit Court of the District of New Jersey, in an action of ejectment brought by John Den, lessee of Grace Kempe, a British subject, against R. Kennedy and M. Cowell, citizens of the state of New Jersey, for land in that state.

Upon the trial of the cause upon the general issue, a bill of exceptions was taken by the plaintiff, which presents the following case:

Grace Coxe, the lessor of the plaintiff, being seized in fee of the land in question, before the year 1772 intermarried with John Tabor Kempe, who died in August 1792. They resided in New York before and during the war with Great Britain, and went to Great Britain when New York was evacuated *by the British army. [*174 Grace Kempe, since the death of her husband, has continued to reside, and now resides, in Great Britain, where he died; having been in possession of the land in right of his wife, on the first of March, 1776, and until the same was seized by the authority of the state of New Jersey.

The defendants relied upon several acts of the legislature of New Jersey; an inquisition taken under the authority of those acts; a judgment of the inferior Court of Common Pleas for the county of Hunterdon, in May, 1779, upon that inquisition, confiscating the estate; a judgment of the inferior Court of Common Pleas for the county of Sussex; an execution upon that judgment; and a deed from Joseph Gaston, an agent for the state of New Jersey, to the defendant Kennedy, whose tenant the other defendant was; and proved, that he had always been in possession under that deed from the day of its date to the day of trial.

Upon this case the plaintiff prayed the court to instruct the jury that they ought to find a verdict for him; which the court refused, and directed the jury that they ought to find a verdict for the defendants; to which refusal and direction the plaintiff excepted, and brought his writ of error.

R. Stockton, for plaintiff in error.

This case turns on the validity of the forfeiture and confiscation under the acts of the state of New Jersey.

The great objection is, that Mrs. Kempe was not an object of those laws.

The whole question depends upon the act of the 11th of December, 1778, entitled "An act for forfeiting to, and vesting in, the state of New Jersey, the real estates of certain fugitives and offenders, and for directing the mode of determining and satisfying the lawful debts and **175***] demands which may *be due from, or made against, such fugitives and offenders, and for other purposes therein mentioned;" by the 3d section of which it is enacted, "that each and every person, not an inhabitant of this state, but of some of the other United States, and seized or possessed of, interested in, or entitled unto, any estate, real or personal, within this state, who hath, since the 19th day of April, 1775, aided or assisted, or doth now, or hereafter may, aid or assist the enemies of this state, or of the United States, by joining their armies within this state, or elsewhere, or who already hath, or hereafter shall have, voluntarily gone to, taken refuge or continued with, or endeavored to continue with, the enemy aforesaid, and aid them by counsel, or otherwise, shall be, and is hereby declared to be, guilty of high treason against this state; and on conviction thereof by inquisition found, and final judgment entered thereon in favor of the state, in manner hereinafter declared, such conviction shall amount to a full and absolute forfeiture of such offender's estate, both real and personal whatsoever, within this state, to and for the use of the same. Provided always, that such conviction shall not in any instance extend to affect the person of any such offender, but shall operate against his or her estate only."

Mrs. Kempe does not come within any of the descriptions of offenders in this section.

The inquisition charges, that Kempe and wife are offenders against the act of 11th of December, 1778, in this, "that the said John Tabor Kempe and Grace his wife, did go to the enemy, and took refuge with them some time in April, 1776, and still remain with them," "against the form of their allegiance to this estate."

The truth of the fact is, that they did not go to the enemy, but remained at their own homes, and the enemy came to them.

176*] *But take the fact as charged; she and her husband, *i. e.*, she in company with her husband; and legally, by the command and control of her husband, in April, 1776, went to the British and remained with them.

This is a joint charge for a joint act of the husband and wife; and is in the technical language always used when the wife is charged with concurring in the act of the husband.

Here, then, is a *feme covert* charged under this section for accompanying her baron in April, 1776, before any government was established, before any law defining treason, and even before New Jersey had formed her constitution, and before any prohibition of the act done by her. She simply remained with her husband, without affording any aid to the enemy.

Such a person is not within the purview of this section, and therefore, though the forfeiture perhaps operated on the interest of the husband, it did not reach the estate of the wife.

We contend,

1. That this section does not extend to *femes covert* acting with, and therefore by presumption of law under control of, their husbands.

And, 2. That if it did extend to any *feme covert*, yet it did not extend to one who only went and remained; she must have aided and assisted.

1. No *feme covert* is within the act. It is confined to those who voluntarily go and remain. It supposes a free will, a volition, an election to go or stay; but a *feme covert* in the presence of her baron, has no will; and on the subject of residence, she can have no will different from his. She is bound by law to live with him if he requires it. This would be the case at all times, even after *the [***177** passing of these laws; for as freedom of will is of the essence of all crimes, a woman cannot commit a crime of this sort, not even this species of treason, by obeying her husband.

But when this fact was done there was neither government nor law to offend against. The only law which existed placed her under the dominion of her husband. He had the right to command, and the power to compel her to go and remain with him, and she had neither right to refuse nor power to resist.

But if these laws had then existed, she could not be charged for any breach of them in company with her husband. (1 Hawk., 3, § 9; 1 Hale, 47.) Receiving her husband, knowing him to be a traitor, is not treason.

The facts of her coverture, and going and remaining with her husband, appear upon the face of the inquisition itself, and clearly show that she could not have been an offender against the act, and therefore that her estate was not forfeited.

Nor can the legislature be presumed to have intended to include persons in her situation; for that would have been cruel. They did not mean to legislate against the most important duties of social and domestic life, to cut asunder the bands of matrimonial union, to compel a wife to abandon her husband or forfeit her estate.

Mrs. Kempe, not having the capacity voluntarily to commit the offense, was not an object of the law, and, consequently, the justice who took the inquisition had not jurisdiction as it regarded her. The inquisition itself does not charge the act to be done by her voluntarily; and this being essential to the offense, ought to have been directly charged. No implication is sufficient. (2 Hawk., 354, § 110.) Penal laws are to be construed strictly, especially as to the description of the offender; and general words *ought to be so restrained as not to in- [***178** clude innocent persons if they can be otherwise satisfied.

The person who is the proper object of the act must be an inhabitant of some state other than New Jersey. A *feme covert* cannot properly be called an inhabitant of a state. The husband is the inhabitant. By the constitution of New Jersey, all inhabitants are entitled to vote; but it has never been supposed that a *feme covert* was a legal voter. Single women have been allowed to vote, because the law supposes them to have wills of their own.

The word "her" in the last clause of the section may be satisfied by restricting its sense to single women.

If this act be not limited to those acting *sui juris*, it may as well comprehend infants at the breast as *femes covert*.

In the case of *Martin* v. *The Commonwealth of Massachusetts*, (1 Williams's Mass., Rep.,390,) it was decided that a *feme covert* did not forfeit her lands by joining the enemy with her husband; and the reasoning of the judges in that case applies with equal force to this.

2. If the provisions of this act extend to any *feme covert*, yet they do not extend to one in the situation of Mrs. Kempe; for by the very words of the act, she must not only have "voluntarily gone to, taken refuge, or continued with, or endeavored to continue with, the enemy," but she must also have "aided them by counsel or otherwise."

The inquisition does not find that she aided them in any manner. The species of treason intended to be described was that of adhering to the enemies of the country, giving them aid and comfort, as defined by the statute of Edw. III.

It is clear then that Mrs. Kempe was not an **179*]** offender *against that law, and consequently her estate not forfeitable under it.

But an important point still remains to be decided, viz., what is to be the consequence of this improper construction? are the proceedings merely erroneous, or are they void? are they good until reversed, or a nullity *ab initio*? If merely erroneous and good until reversed, the judgment of the Circuit Court must be affirmed. But if the proceedings are void *ab initio*, there has been no judgment, and, consequently, no forfeiture.

This point must be determined by the known principles of the common law. These were ingrafted into the constitution of New Jersey, and have never been impaired by the legislature, so far as they apply to the ordinary administration of justice.

The tribunal erected to execute these laws was an inferior tribunal, proceeding, by force of particular statutes, out of the course of the common law; it was a jurisdiction limited by the statute, both as to the nature of the offense and the description of persons over whom it should have cognizance. Everything ought to have been stated in the proceedings which was necessary to give the court jurisdiction, and to justify the judgment of forfeiture. If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is, that the court had not jurisdiction, and so the cause *coram non judice*. In which case no valid judgment could be rendered.

The proceedings were instituted before a justice of peace upon the information of certain commissioners. The justice issued his warrant to a constable to summon a jury, who take the inquest and return it to the justice, who returns it to the inferior Court of Common Pleas, all of whom are to procced according to certain forms prescribed by the statute. The inferior Court of Common Pleas has no criminal jurisdiction but what is given by these very statutes relative to treason. And if the pro- **180*]** ceedings in this *case do not show it to be a case within those statutes, the presumption of law is that the case was not within the cognizance of the court.

But the law itself is founded in manifest injustice. It is clearly *ex post facto*. It makes that act a crime which was innocent when committed; not only innocent when committed, but at that time there was neither constitution nor government to sin against.

There is no presumption in favor of the jurisdiction of the court of limited jurisdiction. (2 Wils., 382, 383; 6 Mod., 224; 9 Mod., 95.)

This is a case of conviction under a penal statute; and there is, in point of principle, no difference between this and a conviction before a single magistrate. The cases on this subject fully apply. (4 Burr., 2279, *Rex* v. *Corden;* 1 Burr., 148,153, *Rex* v. *Jarvis;* 6 Term Rep., 583; 4 Burr., 2244; Cowp., 26, 29; 2 Wils., 382; 2 Inst., 231; 12 Mod., 355; 1 Lev., 160.)

The 11th section of the act of December 11, 1778, will be relied on as barring the plaintiff's claim to the land, and compelling her to resort to the treasury for indemnification.

But that section both in words and spirit is applicable only to proceedings and judgments having legal entity and existence, not to proceedings void for want of jurisdiction. It speaks of proceedings by virtue of which any such sale shall be made. The sale referred to is a sale in pursuance of, and warranted by, the acts.

The words "shall hereafter be reversed or made void," refer to some measure afterwards to be resorted to, to accomplish the reversal of existing judgments or proceedings, for error, or irregularity. The term "erroneous" being the appropriate word to describe errors apparent on the record, and *"void," to describe [***181** irregularities. The case of *Parsons* v. *Loyd* (3 Wils.,344), shows that irregular proceedings are called void proceedings. The legislature meant to encourage sales by protecting the purchaser in all cases where the offender was a proper object of the laws. It was foreseen that writs of error or *certiorari* might be brought to reverse those judgments; and that applications might be made to the courts of common pleas to vacate the proceedings for irregularities committed by the justice, or constable, or jury, or the court itself. It interposed this section, but it never meant to give sanction to a proceeding entirely *coram non judice*.

Lewis, contra.

The bill of exceptions prays the opinion of the court upon the whole case. Upon such a prayer the facts ought to be as fully stated as in a special verdict. It presents no question of law. It does not appear that Grace Kempe ever was seized in fee. But if she was, the estate was devested out of her, and vested in the state of New Jersey.

The proceedings were all perfectly regular, and correspondent with the law.

But even if they were not, the 11th section of the law prevents such error from affecting the title of a *bona fide* purchaser. It declares "That if any process or proceedings, by virtue of which any such sale may be made as aforesaid, shall hereafter be reversed, or made void, for error, or any other cause whatsoever, such reversal shall not affect, or injure, or be in force, or in any wise operate against any *bona fide* purchaser under this act, but against the state only; and in every such case the plaintiff in error, or person injured by the sale of any estate, shall apply to the legislature to be indem-

nified out of the public treasury, to the amount of the purchase money received for such estate."

The title under the sale is good even if the **182***] person *whose lands were so condemned and sold were dead at the time of the judgment. Even an innocent third person, whose lands may have been condemned and sold, can never disturb the title of the purchaser; his only remedy is against the state by petition to the legislature.

If the judgment be erroneous, still it is valid until it is reversed; and if reversed, the only remedy is against the state.

It is objected, that the law is *ex post facto*, and contrary to natural justice. Admit it to be so, yet there was nothing to prevent New Jersey from passing such a law. She was sovereign and independent, and had the power to make what laws she pleased. There was nothing in her constitution to prevent it.

A wife may commit treason in company with her husband. The only exception in cases of treason is, that the wife is not guilty of treason in receiving her husband knowing him to be a traitor.

It is objected that a wife living with her husband cannot be an inhabitant: but there is nothing inconsistent in the idea. The husband and wife are both inhabitants; and it is evident that the legislature meant to include them, because they speak of "his or her estate." And the word "her" comprehends *femes covert* as well as *femes sole*.

The inquisition does not state it to be a joint offense. If she would avail herself of the objections, she ought to have appeared and traversed the inquisition.

Martin's case, in Massachusetts, was a mere question of escheat. It was a civil case, and it was clear that no woman was comprehended within the terms of the law. The question altogether depended upon the words and intention of the statute of Massachusetts, and not at **183***] all upon the *question whether a woman could commit treason in company with her husband.

The Court of Common Pleas of New Jersey is not limited as to subject matter in common pleas. It is a court of record, and a writ of error lies to its judgment. The cases respecting limited jurisdictions do not apply. It is true that it has not a general criminal jurisdiction, but in these cases of confiscation it had an unlimited and exclusive jurisdiction. The legislature of New Jersey had a right to alter the law which required that the jurisdiction should appear upon the face of the inquisition.

If the inquisition be upon a matter within their jurisdiction, it is unimportant whether the offense be defectively set forth.

The defect in setting forth the offense does not affect the jurisdiction of the court.

If the word "voluntarily" ought to have been inserted in the inquisition, it is only error of judgment in the court; but it does not deprive the court of its jurisdiction.

Stockton, in reply.

There is no well-founded objection to the bill of exceptions; the form of which is warranted, as well by the books as by the practice of New Jersey. It contains the evidence on both sides, and the point of the charge of the court to the jury, which in such a case, is all that is necessary to bring the whole case fairly before this court.

The neglect of Mrs. Kempe to traverse the inquisition cannot injure her, if the court had no jurisdiction. A person not an object of that law was under no obligation to take notice of the proceeding.

*The estates of third persons, whose [***184** lands by mistake were sold, were not forfeited, nor their rights affected. All the sections of the act, which create forfeitures, relate only to the estate of the offender.

The 11th section of the act applies only to cases in which the court having jurisdiction has proceeded wrongfully, whereby their proceedings might be reversed for error, or declared void for irregularity; not to cases where the court, under color of the law, proceeded against persons not within it.

February 20. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

In this case two points are made by the plaintiff in error.

1. That the judgment rendered by the Court of Common Pleas, which is supposed to bar the plaintiff's title, is clearly erroneous.

2. That it is an absolute nullity, and is to be entirely disregarded in this suit.

However clear the opinion of the court may be, on the first point, in favor of the plaintiff, it will avail her nothing unless she succeeds upon the second. Without repeating, therefore, those arguments which have been so well urged at the bar, to show that the inquisition in this case did not warrant the judgment which was rendered on it, the court will proceed to inquire whether that judgment, while unreversed, does not bar the plaintiff's title.

The law respecting the proceedings of inferior courts, according to the sense of that term as employed in the English books, has been correctly laid down. The only question is, was the court, in *which this [***185** judgment was rendered, "an inferor court," in that sense of the term?

All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.

In considering this question, therefore, the constitution and powers of the court, in which this judgment was rendered, must be inspected.

It is understood to be a court of record possessing, in civil cases, a general jurisdiction to any amount, with the exception of suits for real property.

In treason, its jurisdiction is over all who can commit the offense.

The act of the 4th of October, 1776, defines the crime, and that of the 20th of September,

1777, prescribes the punishment. The act of the 18th of April, 1778, describes the mode of trial, and the tribunal by which final judgment shall be rendered. That tribunal is the inferior Court of Common Pleas in each county. Every case of treason, which could arise under the former statutes, is to be finally decided in this court. With respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused.

186*] *The act of the 11th December, 1778, extends the crime of treason to acts not previously comprehended within the law, but makes no alteration in the tribunal before which this offense is to be tried, and by which final judgment is to be rendered.

This act cannot, it is conceived, be fairly construed to convert the Court of Common Pleas into a court of limited jurisdiction, in cases of treason. It remains the only court capable of trying the offenses described by the laws which have been mentioned, and it has jurisdiction over all offenses committed under them.

In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and, if an offense, punishable by the law, had been in fact committed, the accused was amenable to its jurisdiction, so far as respected her property in the state of New Jersey. The question whether this offense was or was not committed, that is, whether the inquest which is substituted for a verdict on an indictment, did or did not show that the offeuse had been committed, was a question which the court was competent to decide. The judgment it gave was erroneous, but it is a judgment, and, until reversed, cannot be disregarded.

This case differs from the case from third Institute in this. In that case the court was composed of special commissioners authorized to proceed, not in all cases of treason, but in those cases only in which an indictment had been taken before fifteen commissioners. Their error was not in rendering judgment againt a person who was not proved by the indictment to have committed the crime, but who, if guilty, they had no power to try. The proceedings there were clearly *coram non judice.*

It is unnecessary to notice the eleventh sec-

187*] tion of *the act, since, without resorting to it, this court is of opinion that there is no error in the judgment of the Circuit Court. It is affirmed, with costs.

Cited—3 Cranch C. C. 137; 10 Wheat. 199; 3 Pet. 203; 2 How. 22; 6 How. 39; 8 How. 611; 2 Wall. 242, 243, 246; 2 Wall. 340, 342, 346; 10 Wall. 316; 5 Otto 776; 12 Id. 255; 1 Bald. 193; Id. 406; 1 Abb. U. S. 579; 2 McLean 478; 6 McLean 9; 1 Sawy. 156; 2 Wood. & M. 79, 80; 1 Wood. & M. 406.

THE MARINE INSURANCE COMPANY OF ALEXANDRIA

v.

JAMES YOUNG.

The court is not bound to give an opinion to the jury as to the meaning, or construction, of a written deposition read in evidence in the cause.

It is no ground of reversal that the court below refused a new trial which had been moved for on the ground that the verdict was contrary to the evidence.

ERROR to the Circuit Court of the District of Columbia, sittiug at Alexandria, in an action of covenant, brought by the defendant in error upon a policy of insurance under the corporate seal of the plaintiffs in error.

The point in issue, in the court below, was, whether the insured, on the 11th of December, 1800, when he wrote his order for insurance, had notice of a storm which happened at Jamaica, on thc 2d of November, 1800.

Part of the evidence offered to the jury was the deposition of David Young, a witness examined on behalf of the plaintiffs in error. Upon his cross-examination by the defeudant in error, at the time of the taking of the deposition, he was asked this question, viz., "On what day in December did you inform the plaintiff that there had been a gale of wind in Jamaica? To which it was stated in the deposition that he answered, "that on the 13th of December, 1800, he had informed the plaintiff (below) that there had been a strong northern in Jamaica; the circumstance which induced him to mention this, was in consequence of a very heavy gale having happened the day before, and the brig Mary, being then in Hampton Roads, which produced this remark, that he had a blowing voyage out, being compelled to throw over his guns, and that the aforesaid northern had happened when he was in St. Anne's."

After the jury had retired to consider of their *verdict, they sent a writteu paper to the [***188** judges, requesting to be instructed by the court, whether the above answer of David Young would admit of any other reasouable or legal constrnction, than that the 13th of December, 1800, was the first information given by him to the plaintiff below of the storm of the 2d of November.

But the court refused to give any opinion to the jury upon the coustruction of the answer of David Young, unless with the assent of both parties; and the counsel for the plaintiffs in error refused to assent, and took a bill of exceptions to the refusal of the court to instruct the jury, without the consent of both parties.

The jury found a verdict for the defendant in error; and before judgment, the plaintiffs in error moved the court for a new trial, upon the grouud that the verdict was contrary to evidence.

The court having refused to grant a new trial, the counsel for the plaintiffs in error tendered a bill of exceptions, containing what they supposed to be a correct statement of all the evidence offered on the trial, consisting of depositions and other papers, together with *viva voce* testimony, the substance of which they stated they had taken from their notes. But the court refused to seal the bill of exceptions uuless the counsel for the plaintiff below would agree to a statemeut of the evidence, the court not being satisfied that the bill of exceptions statcd all the evidence offered at the trial. To this refusal of the court to seal the bill of exceptions, the counsel for the plaintiffs in error tendered another bill of exceptions, which the judges sealed.

C. Lee and *E. J. Lee*, for the plaintiffs in error, contended,

1. That the court was bound to give an opinion to the jury, upon the meaning of the witness's answer, and ought to have instructed the **189***] jury *that the answer did not necessarily import that the 13th of December, 1800, was the first time that the witness mentioned to the defendant in error the storm of the 2d of November; and that if he had given him the information before that day, his answer was so vague that he could not have been convicted of perjury.

2. That the court below ought to have signed the bill of exceptions to their refusal to grant a new trial.

3. That the court ought to have granted a new trial, because the verdict was contrary to evidence; and,

4. That this court, if they believe the evidence is substantially stated in the rejected bill of exceptions, ought to order a new trial.

To support these points, they cited Co., Litt., 226, b; 295, b; 155, b; Harg. note; 1 Wash., 389; 2 Wash., 275; 9 Co., 12. b; 13, a; 3 Cranch, 298; 3 N. Y. Term Rep., 49; 2 N. Y. Term Rep., 330; Bac. Abr., 269; Hen. & Munf. Rep., 386; 1 Wash., 79; 1 Cranch, 110; 2 Cranch, 126; Laws U. S. vol. 1, p. 60, § 17; 3 Bl. Com., 375.

Swann, contra.

A deposition is merely parol testimony, and the jury is the proper tribunal to judge of the meaning of a witness.

If the witness was not sufficiently explicit, the counsel for the plaintiffs in error, who were present at the examination, ought to have made the witness explain himself more fully. (2 Term Rep., 760, *Lloyd* v. *Maund.*)

The refusal to grant a new trial, upon the ground that the verdict was against evidence, is not error.

A motion for a new trial on that ground is in **190***] the *nature of a writ of error *coram vobis* for error in fact.

C. Lee and *E. J. Lee*, in reply.

In the case of *Lloyd* v. *Maund*, the court was not called upon to say what was the construction of the letter.

This court is a substitute for the Court of Appeals of Virginia, as to the cases from Alexandria, and ought to decide as that court would decide in Virginia. By the practice of that state, it is error to refuse a new trial, if a new trial ought to have been granted. The refusal is a part of the proceedings, and appears upon the record.

In the case of *Clarke* v. *Russel*, (3 Dal., 415,) the court undertook to construe and expound a letter.

LIVINGSTON, *J.* Can this court reverse for error in fact? Suppose we should be of opinion that the court below ought to have granted a new trial, is it not an error in fact?

I have another doubt. Whether it be the ground of a writ of error, if a judge gives or refuses to give an opinion on matter of fact.

A written contract, a bond, note, &c., whatever is the act of the party, is a subject for the construction of the court; but this is not the act of the party, but a mere deposition.

If the court can give the construction of depositions, they may as well try the whole cause when all the evidence consists of depositions.

February 28. CUSHING, *J.*, delivered the opinion of the court as follows:

This court is of opinion that the inferior court *was not bound to give a construction [***191** of the answer of Captain David Young to the second interrogatory of the plaintiff below, as requested by the jury; and that it would be improper in this court to determine whether the inferior court ought or ought not to have granted the motion of the defendants below for a new trial, upon the ground that the verdict was contrary to evidence.

The judgment below is to be affirmed with costs.

JOHNSON, *J.* "My object in expressing my opinion in this case, is to avoid having an ambiguous decision hereafter imputed to me, or an opinion which I would not wish to be understood to have given.

"I decide against the appellant on the first point, because an examination of a witness, taken under commission, cannot possibly be considered written evidence, as the counsel have contended it is; nor is the meaning of a witness, words for the court to determine; but strictly within the province of the jury.

"I decide against the appellant on the second ground, because I am of opinion that no appeal lies to this court from the decision of a circuit court on a motion for a new trial."

Cited—1 Pet. 169; 5 How. 224; 7 Id. 191; 1 Wall. 598; 10 Otto, 81.

BODLEY AND OTHERS *v.* TAYLOR.

In Kentucky, it is a good ground of equitable jurisdiction, that the defendant has obtained a prior patent for land to which the complainant had the better right under the statute respecting lands; and in exercising that jurisdiction the court will decide in conformity with the settled principles of a court of chancery.

Entries of land in Kentucky must have that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum.

If the entry be placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road and not by a straight line.

If the entry be of a settlement and pre-emption to a tract of land lying on the east side of a road, the 400 acres allowed for the settlement right must be surveyed entirely on the east side of the road, and in the form of a square.

The call for the settlement right is sufficiently certain, but the call for the pre-emption right is too vague and must be rejected.

A defendant in equity who has obtained a patent for land not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants, but the complainants will not be required to convey to the defendant the land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey.

ERROR to the District Court of the United States, for the District of Kentucky, in a suit in chancery.

Thomas Bodley, James Hughes, Robert Poague and Robert Campbell, citizens of Kentucky, brought their bill in chancery against John Taylor, a citizen of Virginia, in the state

court for the District of Washington, from whence it was afterwards, by consent, removed into the federal court for the District of Kentucky.

The bill states that on the 17th of October, 1783, Henry Crutcher and John Tibbs made the following entry with the county surveyor, viz.: "Henry Crutcher and John Tibbs enter ten thousand acres of land on a treasury warrant No. 18,747, as tenants in common; beginning at a large black ash and small buckeye marked thus (I. T.) on the side of a buffalo road leading from the lower Blue Licks a north-east course, and about seven miles north-east by east from said Blue Licks, a corner of an entry of twenty thousand acres made in the name of John Tibbs, John Clarke, John Sharpe, David Blanchard and Alexander M'Clain, running thence with the said Tibbs & Co.'s line **192***] due east sixteen *hundred poles, thence south one thousand poles, thence west sixteen hundred poles, thence north one thousand poles to the beginning for quantity." That the same having been surveyed, Crutcher assigned his half to Robert Rutherford, to whom and Willoughby Tibbs (the heir of John Tibbs), a patent was afterwards granted. Tibbs sold his right to Peyton, who sold a moiety thereof to Magill. Rutherford, Peyton and Magill, sold and conveyed the whole for a valuable consideration to the plaintiffs, by deed dated February 15, 1799.

That the defendant Taylor having, on the 22d of May, 1780, made the following entry with the county surveyor, viz.: "John Taylor enters three thousand acres of land upon a treasury warrant adjoining John Walden, on the north side of Johnson's Fork of Licking, on the east and south-east sides, running up and down said creek, and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler," has caused the same to be surveyed expressly contrary to location, and so as to interfere with your orator's claim aforesaid; and having obtained a patent older than that obtained by the said Rutherford and Tibbs, notwithstanding he knows his claim is surveyed contrary to location, and although requested, he refuses to convey to the plaintiffs. The prayer of the bill was, that the defendant should convey to the plaintiffs so much of the land included in the defendant's patent as interfered with the plaintiffs' patent; and for general relief.

The defendant by his answer denied the jurisdiction of the court, as a court of equity, because the plaintiffs stated in their bill no equitable ground of relief. He avers his ignorance of the plaintiffs' title, and that he did not know until within a few days then past, the mode in which his own location or survey was made. That he had employed one Ambrose Walden to cause them to be located. He denies all fraud in making his survey. He avers that he was a *bona fide* purchaser for a full and **193***]*valuable consideration, prior to the title claimed by the plaintiffs. That no caveat was entered against his survey. That he regularly obtained his patent. That a considerable part of his land has been cleared and settled. That 20 years have elapsed since the entry. That the land-marks and geographical objects which were at that time visible, have been changed, altered or destroyed by time.

He contends that if he has surveyed and obtained a grant for lands not described in his entry, and which he had no right to survey, he ought not to be compelled to convey them to the plaintiffs, unless they will convey to him what he had a right to survey, and which they have surveyed, and for which they have obtained a patent. That the plaintiffs' entries cover almost all the lands which the defendant could have surveyed under his entry. That by the plaintiffs' delay the defendant had lost the power to locate his warrants elsewhere, if they are improperly located, which he denies.

He states that his entry was dependant on John Walden's, which depended upon Ambrose Walden's, which depended upon Jacob Johnson's. That Jacob Johnson's was first surveyed by the surveyor who surveyed the entries of the Waldens, and of the defendant. That although Jacob Johnson's survey was afterwards suppressed, yet that did not alter the actual location of the two Waldens and of the defendant. That his survey is correctly made according to the laws of Virginia when it was made, and while Kentucky was a part of Virginia, and that by the same laws, and the compact between Virginia and Kentucky, at the time of separation, his prior patent, founded upon a prior equity, and obtained without fraud, cannot be vacated.

A survey and connected plat was made under an order of the court, and according to the directions of each party.

A jury came, according to the custom of Kentucky *in chancery suits, and being [***194** sworn to inquire of such facts as should be submitted to them, found the following facts, viz.: That the place designated on the connected plat by the letter A is the place called for as the beginning corner of John Tibbs & Co.'s entry of 20,000 acres, dated July 31, 1783, on the buffalo road leading from the lower Blue Licks to Limestone, which corner is also the beginning of an entry of 10,000 acres, made the 17th of October, 1783, in the names of Henry Crutcher and John Tibbs, under which the complainants claim; copies of which entries are annexed to their verdict.

The following facts were agreed by the parties, viz.:

2. That the entry of 20,000 acres in the name of John Tibbs and others, and a survey made thereon, for 16,000 acres on the 8th of June, 1796, were assigned to the complainant Bodley, who obtained a patent therefor in his own name dated 21st of April, 1798, and afterwards conveyed one undivided moiety thereof to the complainant Hughes, by deed duly recorded.

3. That the entry of 10,000 acres was made on the 17th of October, 1783, in the name of Henry Crutcher and John Tibbs, surveyed 14th March, 1784, registered 31st December, 1784, and patented in the names of Robert Rutherford, assignee of Henry Crutcher, and Willoughby Tibbs, heir at law of John Tibbs, deceased, 26th August, 1790, was purchased by Bodley 26th September, 1798, and conveyed to all the complainants jointly by deed duly recorded, dated the 15th of February, 1799. That the defendant's survey of 3,000 acres was made on the 1st of September, 1785, registered the 1st of November, 1785, and a patent obtained therefor dated 21st of November, 1786.

4. That the grants issued by the register of the Virginia land-office do not bear regular dates agreeably to the times the surveys were **195***] returned, but in *many instances the elder patent has issued on surveys returned several months after surveys on interfering claims were registered.

5. That the surveys of Jacob Johnson's settlement and pre-emption, as stated to have been surveyed in the defendant's first fact, (hereafter stated,) were made by the direction of Simon Kenton, his agent, who was also locator of the claims which call to adjoin the said Johnson's surveys, and were never admitted to record.

6. That Ambrose Walden's survey was made on the 29th of November, 1785, John Walden's the 27th of December, 1785, and Jacob Johnson's settlement and pre-emption, as represented on the connected plat by lines thus, (000,) was made on the 9th of April, 1789, registered and patents issued thereon to John Reed and Arthur Fox, assignee of Johnson, dated the 20th of February, 1793.

7. That more than one entry and survey has been made on almost all the good land in the state of Kentucky.

8. That the several claims, water-courses, improvements, objects and distances laid down on the connected plat, reported by the surveyor, are truly laid down and reported.

FACTS FOR THE DEFENDANT.

1. That the settlement and pre-emption of Peter Johnson, heir at law of Jacob Johnson, after being entered with the surveyor, were actually run out and surveyed as designated on the connected plat by the letters and figures M. N. 2 & 3, that the said surveys were made by a surveyor legally qualified to make the same, prior to the dates of the surveys made for Ambrose Walden, John Walden, and the defendant.

2. That the land surveyed for the said Peter **196***] *Johnson, upon the said right of pre-emption, there are now 300 acres of cleared land, upon the said survey of Ambrose Walden 200 acres, upon John Walden's 400, and upon the defendant's 300 acres of cleared land.

3. That on the 22d of May, 1780, the land on which the entries of Johnson, Ambrose Walden, John Walden, and the defendant, were made, was uncultivated, and the country for fifty or sixty miles on all sides without an inhabitant, except Indians, by whom it was much infested, and only occasionally visited by hunters and land-jobbers.

4. That on the 22d of May, 1780, and prior thereto, there were many cabins, marked trees, hunting camps and improvements then plain and notorious on Johnson's Fork, and the other branches of Licking, of which there remain now no traces, and which are now wholly incapable of proof as to what was their exact position.

5. That since that time a great change has taken place in the appearance of the country generally round, and at the place where the defendant's entry lies. That the country is now thickly settled, and in high cultivation. That great changes have taken place in the names of streams, roads and other objects, and that few of those who frequented that part of this country in the year 1780, are now alive.

6. That the complainants, Bodley and Hughes, assignees of Tibbs & Co., are the proprietors of the 16,000 adjoining the 10,000 acres in the bill mentioned.

7. That the cabin represented on the connected plat as Jacob Drennon's is the improvement called for in his certificate for a pre-emption, which was claimed for him before the commissioners by Simon Kenton, who also located the complainants' claim of 3,000 acres.

*8. That the place designated on the [***197** plat, on the south side of Johnson's Fork as a cabin, represents a cabin built prior to the first of May, 1780, by Simon Kenton, otherwise called Simon Butler and Jacob Drennon.

It was also agreed between the parties that on and before the 21st of February, 1780, the lower Blue Licks were generally and notoriously known by the appellations "the Blue Licks," and "the lower Blue Licks," and that the road on which the complainants claim their beginning was then generally and notoriously known by the name of the upper road.

That the three buffalo roads laid down upon the connected plat, in February, 1780, and before, led from the lower Blue Licks as represented.

That upon any reasonable plan of surveying the defendant's entry of 3,000 acres, it would be covered by the younger entries of 10,000, and 16,000 acres, the property of the plaintiffs, and would include land of equal or better quality than that which it now covers.

That the land in dispute is of more value than 2,000 dollars.

The following are the entries made by the parties respectively, viz.:

"January 7th, 1780.

"Peter Johnson, heir at law of Jacob Johnson, deceased, this day claimed a settlement and pre-emption to a tract of land in the District of Kentucky, lying on the east side of the buffalo road leading from the Blue Licks to Limestone, nine miles from the lick on the upper road, by the said decedent's raising a crop of corn in the year one thousand seven hundred and seventy-six; satisfactory proof being made to the court, they are of opinion that the said Peter Johnson, &c., has a *right [***198** to a settlement of four hundred acres of land, to include the above locations, and the pre-emption of one thousand acres adjoining; and that a certificate issue accordingly."

"February 21st, 1780.

"Peter Johnson, heir, &c., enters 400 acres in Kentucky, by virtue of a certificate, &c., lying on the east side of the buffalo road leading from the Blue Lick to Limestone, nine miles from the lick on the upper road."

"May 22d, 1780.

"Ambrose Walden enters 1,333 acres upon a treasury warrant on the east side of Jacob Johnson's settlement and pre-emption on the waters of Johnson's Fork a branch of Licking, to include two cabins on the north side of said Fork, built by Simon Butler, and to run eastwardly for quantity."

"May 22d, 1780.

"John Walden enters 1,666 2-3 acres upon a treasury warrant, joining the above entry on the south and south-east, to include three cabins built by Simon Kenton, running east and south-east for quantity."

"May 22d, 1780.

"John Taylor enters 3,000 acres upon a treasury warrant joining John Walden on the north side of Johnson's Fork of Licking, on the east and south-east side running up and down the said creek and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler."

The court below then proceeded to pass the following interlocutory decree:

"It is decreed and ordered that Duvall **199***] Payne, of *Mason county, do go on the land in controversy and survey the claim of the complainants, agreeable to their entries. Then survey the settlement entry of Peter Johnson, heir of Jacob, to begin at a point nine miles below the lower Blue Licks on the buffalo road as it meanders leading to the mouth of Limestone; thence east so far that a line north two hundred and fifty-three poles will give 400 acres on the east side of the road. That he then run out the pre-emption of Johnson in a square to the cardinal points, to lay around the settlement, and give an equal proportion of land on the south and east which is to direct the lines on the north and west.

"That he survey Ambrose Walden's entry on the east of Johnson's pre-emption, then John Walden's in equal proportions on the south and east of Ambrose, and the defendant's on the south and east of John Walden, in equal proportion.

"That he then ascertain the interference between the claims of the complainants and defendant, which lie without the limits of the defendant's entry as it is now directed to be surveyed; and within the lines of the complainant's entry, mark the lines and make corners to this interference when ascertained, and make report to the next court."

After this interlocutory decree, and before the surveyor made his report, the following facts were agreed and admitted by the parties:

1. "That there is at the Blue Licks a salt spring on the south side of Licking, which is south 36 deg. west 82 poles, from another salt spring on the north side of Licking."

2. That there are at the Blue Licks about 500 acres of land trodden and licked away by the resort of buffaloes and other wild beasts.

3. That the connected plat in this cause, and the survey executed in pursuance of the inter- **200***] locutory *decree, are made out by superficial, that is surface mensuration, and the distance from the Blue Licks to the respective beginnings of the parties' entries, ascertained in the same way.

Afterwards the surveyor made his report, with a plat stating that he had made the survey according to the decree, and found "that part of the defendant's survey which is included within his survey when laid down agreeable to the decree, and is also within the complainants' survey, to be 1,076 acres," "and that part of the defendant's survey which is included in the complainants' entry when laid down agreeable to decree, and will not be in the defendant's survey when made agreeable to the decree, is in two tracts, one containing 2,034 acres and 24 poles," "the other containing 182 1-2 acres."

Whereupon the court decreed and ordered that the defendant should, before the 1st of December then next, convey to the complainants by deed, with warranty against himself and those claiming under him, the two tracts not within his survey as laid down by the order of the court, and which were within the complainants' survey, amounting to 2,216 1-2 acres; and should pay the costs of suit.

Each party brought his writ of error.

The cause was argued at February term, 1806, by the defendant *Taylor*, and *P. B. Key*, for the original defendant, and by the complainant *Hughes*, for the original complainants; and again at February term, 1807, by *H. Clay* and *P. B. Key*, for the original defendant, and by *Hughes* and *H. Marshall*, for the original complainants; and again at this term by *Pope*, for the original complainants, and *P. B. Key*, for the defendant.

Argument for Taylor, the original defendant.

The bill discloses no facts which give an equitable jurisdiction to the court. It simply charges that *the defendant (Taylor) [***201** has surveyed contrary to his entry. It charges no fraud, it alleges nothing to show that a *caveat* would not have given a full, plain, and adequate remedy; and it shows no sufficient reason why the remedy by *caveat* was not pursued.

Virginia borrowed the term patent, or grant, from the English law, where it means a mode of conveyance by the sovereign power. The land law of Virginia considers it as the consummation of title, and directs the register to indorse thereon "that the grantor hath title."

By the compact between Virginia and the inhabitants of Kentucky, in 1789, when Kentucky was erected into an independent State, it is declared (in § 7), "that all private rights and interests of lands derived from the laws of Virginia, prior to such separation, shall remain valid, and shall be determined by the laws now existing in this State." If, therefore, the court had equitable jurisdiction in this case, it must have been bestowed by the English or Virginian precedents, and not by the practice in Kentucky since that compact. Kentucky could not, by law, affect those rights and interests, and, *a fortiori*, they could not be affected by the practice of her courts.

English precedents are therefore admitted to apply; and it is also admitted "that where a *caveat* was entered, or directed to be entered, and a hearing prevented by fraud or accident," the chancery in Virginia exercises jurisdiction; but it is denied that either in England or Virginia it has ever taken jurisdiction over the simple legality of the title; that it has ever constituted itself into a court of errors to examine whether surveys correspond with entries; or attempted to perpetuate questions in chancery intended by law to be laid at rest by the rapid remedy of a *caveat*. The cases of *White and Jones* (1 Wash., 116), and *Burnsides and Reid* (2 Wash., 48), *will confirm this [***202** doctrine, that fraud destroys, but the absence of it saves, a patent.

In the *allegata*, a survey "contrary to location" is made the only basis of jurisdiction. In the *probata*, the only auxiliary ground which appears, is a certificate of a practice by a register of Virginia, given by a register in Kentucky, "that a registry is kept of the returns of surveys, but that patents do not issue according to their priority."

Neither such a registry nor such an order in issuing patents are required by law. An act of the register, not required by law, cannot affect the title, and cannot be a ground of jurisdiction.

The jurisdiction rests, therefore, on the single allegation "that the defendant's survey was made contrary to his location."

The question then is, who has the legal title?

As subordinate to this question, it is contended,

1. That the defendant's entry is legal.

This is admitted both by the bill and the answer; 1. By charging the survey to have been made contrary to location; and, 2. By ordering a survey to be made agreeable thereto in the court's opinion. But the legality of the defendant's entry is proved, for the purpose of contrasting it with the illegality of that of the complainants.

The specialty of entries or locations, required by the land law, consisted of geographical objects, and not of geometrical protraction. The geography ought to be natural, and not artificial; because it was to convey information to those about to locate, upon reading the previous locations at the surveyor's office. It was a previous knowledge of the face of the country to which these locations were to convey a notice.

203*] No previous knowledge of chopping *a tree at the time of location could exist. Therefore, a nail driven into a tree, or letters marked on it, could be no notice to locators' reading an account of it at the office, however well informed of the geography of the country. The law did not intend to force them to delay locations, at the risk of losing the land, to go in search of such artificial geography.

A settlement is the only species of artificial geography recognized by the law. This being a previous mark in the face of the country, was a notice addressed to a previous knowledge of it. Still, rights founded upon this artificial geography were to be established by the law, within a very short period, to obstruct the inconveniences which might result from making even this very visible, artificial geography the basis of notice.

Johnson's settlement was recognized and established within the limited period. This settlement, although it was artificial geography, yet it was a more notorious and visible object than the two letters cut on a tree. It was a geographical object recognized by law; but the letters were not. Johnson's entry calls for several geographical objects, "the upper road," "leading to Limestone," "on its east side."

The entries of the Waldens, and of the defendant, by linking themselves to Johnson's, obtained all its specification. If Johnson's was good, the others needed no further precision.

Yet Ambrose Walden's specifies "Johnson's Fork," and "two cabins." J. Walden's calls for three cabins.

That of the defendant specifies "Johnson's Fork," and "a cabin," the site of which is agreed to have been at the place marked on the plat; but which is not on his land as surveyed by the order of the court.

204*] *If these entries were good at the time they were made, they never can be adjudged bad afterwards. Time, by defacing the natural geography, and destroying the witnesses to prove it, cannot destroy an entry originally good. We cannot now be obliged to test, by artificial geography, the validity of a survey made according to the natural geography as it existed at the time it was made.

The presumption, arising from a patent, certainly is, that the survey was made according to the entry; and that presumption ought not to be contradicted by less evidence than was in existence at the time the survey was made. At the time Johnson's survey was made, his settlement was in existence. Its actual site cannot now be proved; it is no longer visible. Is not the patent, then, conclusive evidence that his survey was according to his entry?

The *caveat* process is a positive provision against the effects of time. If a *caveat* could be instituted many years after a patent, after many years' possession, after 1,200 acres had been cleared, 20 years after the entry, 15 after the survey, a new moulded geographical face, and a generation of witnesses dead, it would subject the goodness of entries, intended to be permanent, to unceasing fluctuation. It would be to make titles bad in proportion to the length of possession under those titles.

What is this suit but an attempt to evade the limitation which the law has wisely prescribed for the process of *caveat?* Of what use is a limitation of *caveats* at law, if *caveats* in chancery are to be unlimited? Had a *caveat* been prosecuted in proper time, the actual site of Johnson's plantation and corn field would have been ascertained; and would have controlled the distance of nine miles. But now they make the nine miles control the actual settlement, and attempt, by course and distance, and geometrical potraction, to destroy a survey made originally by geographical objects. If the distance would not then have controlled the actual site, it cannot now. What was law then, must be the law now.

*The *onus probandi* lies on the com- [**205** plainants. They have alleged that the defendant's survey was contrary to his location. In order to support this allegation they must first prove where his entry was, and in order to do that, they must show where was Johnson's actual settlement. They must do it absolutely and not hypothetically. The law does not allow that to be a settlement which is to be found only by course and distance.

A presumption of weight enforces the reasonableness of requiring of those who would avail themselves of a geographical object, proof of its site, when they used that site to show in themselves a title to property long held by others. It is, that a survey, made when the site of the object was visible, is more likely to correspond with it, than one made after it is lost. The less probability ought not to overthrow the greater. The first presumption is supported by strong circumstances in addition to the visibility of Johnson's settlement. Why did the defendant take worse land, as it is agreed he did, if he ought to have taken better? Because he was controlled and limited to it by Johnson's real settlement. This construction of his entry, contemporaneous with the existence of the real settlement, contrary to his own interest, strongly enforces the reasonableness of adhering to the law by requiring from

those who assail an old title, and long possession, proof more than presumptive.

The presumption arising from the exact admeasurement to fix a site for Johnson, is extremely weak. In claiming his pre-emption, did Johnson measure? or did he compute? The country was then unpopulated, and infested by Indians. If he measured, from whence did he begin? The lick consisted of several salt springs, and 500 acres of land were licked and trodden away. Did he pursue the meanders of the road, or proceed in a straight line? By following a conjecture, subject to all those casualties, to fix the site of Johnson, the place may be mistaken. By this mistake the **206***] title obtained when that site was *not matter of conjecture, may be defeated, although the survey may have been made according to the entry.

An old title ought not in this manner to be destroyed by a new speculation, nor the rules of evidence relaxed to defeat a long possession.

Old titles and possession are never overturned, but saved by presumptions. In this case the title is supported by other presumptions arising from the facts stated in the record. The entries called for cabins and other geographical objects, disclosing an intimate knowledge of the country. Kenton, the locator, possessed this knowledge, and directed the surveys whilst the corn field and domicile of Johnson must have been visible. Which is most probable, that Keutou knew where Johnson's actual settlement was, and that he surveyed accordingly? or that Johnson's settlement was the place found by the geometrical conjecture, and that Kenton surveyed contrary to the known location?

But we contend that the defendant's survey does not want the aid of presumption.

The subject of entries and surveys are so connected, that they must be blended in the argument:

It must be understood what a location is, before it can be known whether a survey conforms to it.

By the third section of the land law "the party shall direct the location so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum." The land law of Virginia consists of two acts of assembly. Each uses the term location; the first explains what is meant by the term in the second. An actual settler was entitled to 400 acres to be surveyed "including the settlement." A settlement is described by the law to consist in "raising a crop of corn," &c. A settlement then was a visible, geograph-**207***] ical object, which fixed *the location of the 400 acres. The actual settler had also a right of pre-emption to 1,000 acres to be surveyed "adjoining the land allowed for settlement." In the mode of surveying Johnson's right, according to the decree of the court below, there is no proof that the actual settlement is included.

Some latitude is left to the party in surveying his settlement right, under the law.

By appointing judges to decide upon these settlements and pre-emption locations; to keep a record of the "quantities and locations" which they allowed; to give a certificate describing "the particular location;" and to furnish the register and surveyor "with a schedule of such certificates," it is demonstrated that the legislature considered their judgments to be locations; and that these locations were unalterable. They were the acts of judges, not of parties. Johnson's location is a judicial act, and a judicial exposition of the law. Johnson could not alter it. The certificate is directed to be delivered to a surveyor, and upon his receiving it, not a new location, but an entry is allowed "in such way, and upon such terms, as are therein prescribed."

If the court below has such a latitude as to exclude Johnson's settlement from his survey, had not he some latitude to survey so as to include it? The factitious settlement assumed by the court was included in Johnson's first and second surveys, but not in the third made by order of the court.

To affect this a process occurs, under the decree, of a novel kind.

It is assumed that a nine-mile point, measured straight, or crooked, is Johnson's settlement. The certificate is construed to mean that not an acre of Johnson's 1,400 shall approach nearer the licks than nine miles, and his plantation or settlement is placed, in the face of the law, and of probability, on an edge of a large tract. By what authority *could the court do [***208** this? The only condition of the law is, that the settlement right (*i. e.* the 400 acres) should include the settlement or improvement; and that the pre-emption right (*i. e.* the 1,000 acres) should adjoin the settlement right. With this restriction only, and that respecting the shape of surveys (viz., that their breadth should be at least one-third of their length), Johnson had a latitude to survey it as he pleased. How can the court, at this distance of time, deprive him of that right long after he had exercised it.

But after having once exercised it he could not alter it. Can the court now do that for him which he could not have done for himself? and thereby overturn titles dependent upon his location?

In fact, this restriction is only extracted from an incorrect construction of Johnson's certificate.

This certificate consists of two parts; the claim and the judgment.

The court of commissioners received the claims verbally, and the clerk stated them in his own language. Johnson's claim was a settlement right, and to obtain it, he had only to prove where his settlement lay, that the commissioners might describe it, and notify the register and surveyor. The settlement being ascertained, the law locates the land by the references "include" and "adjoin." All beyond, ascertaining the situation of the settlement, was surplusage and idle.

This was a settlement right, and not a village right. This is evident from the certificate itself.

1. Because it mentions the date of the settlement, 1776, and adds the words, "before the 1st of January, 1778."

2. It uses the words of the law, applicable to a settlement right, viz., "to include the settlement;" *whereas the terms of the law [***209** relative to village rights are, "adjacent or convenient to the village."

3. No village is mentioned.

4. It mentions raising a crop of corn, which was the proper foundation of a settlement right.

But the decree of the court below turns on the word "lying" in the certificate; whether it means a settlement "lying" or a settlement right "lying" on the east side of the road. Whether Johnson, in using that expression, meant to apply it to the settlement which was the foundation of his claim, or to the thing claimed in consequence of that settlement.

It refers, says the decree, not to the settlement, but to the 400 acre settlement right, and to the 1,000 acre pre-emption.

If the whole 1,400 acres could be made the object of reference to the word "lying," then by declaring that no part of them should approach nearer to some arbitrary point of the 500 acre lick than nine measured miles, Johnson is thrown entirely to the east of the supposed settlement, and the chief part of his the Waldens', and the defendant's patents transposed to the complainants' 16,000 acre entry.

But if the word "lying" refers to "the settlement," then it is obvious that Johnson's survey No. 2 includes the assumed point of settlement with far greater coincidence with the Kentucky precedents; and the survey No. 1, with more still than the survey No. 3, which shoots out an irregular proboscis from the settlement right, to get at the settlement point.

By these precedents, the settlement is placed in the centre of the settlement right, and the settlement right in the center of the pre-emption [*210] right, *surveying from the settlement itself to the cardinal points for quantity.

The law, by saying that the pre-emption right shall adjoin, not the settlement itself, but the settlement right, countenances the idea that it could not adjoin the actual settlement, because that had been included in the settlement right. But the survey No. 3 makes the pre-emption adjoin the settlement itself.

The decree goes upon the idea that the certificate locates the 400 acre settlement right, and the 1,000 acre pre-emption right on a certain point, on the east side of a road, nine miles from the licks.

But a settlement right is not even mentioned or alluded to in the whole certificate, whose only object was to establish the fact that a settlement actually had been made at a certain place, and the number of acres which the settler claimed, or which the commissioners allowed in consequence of such settlement. The right was a legal consequence of establishing the settlement, and could not be located but by locating the site of the settlement. When that site was established, the law located the right.

Some stress is laid upon the words "to include the above location." If the "above location" was a location of the whole right, how could the right include the location? This would be to say that a thing may include itself. The thing enclosed must be less than the thing enclosing. Hence it results that the "above location" was not a location of the settlement right but of the settlement only.

By allowing the 400 acre tract to include the located settlement on a geographical point located or situated nine miles from the licks, on the east side of the road, and the 1,000 acre tract adjoining the 400 acre tract, and including it, the law is followed correctly, and exactly fulfilled.

*To comply with the idea of the de- [*211
cree, great bodies of land must be compressed into a particle at the end of the nine-mile line, and then be expanded for surface. If the decree had suffered it to expand equally in every direction from that point, the defendant's title would have been safe. What reason was there to limit this expansion to one particular direction? If the given distance must be violated to gain the required surface, why not expand toward the licks, as well as from them?

But Johnson's second survey has been perfected by acquiescence. There was no complaint, no *caveat*. Suppose the defendant had surveyed upon the ideal basis of Johnson assumed by the court below, and that universal acquiescence had perfected his title in another place; could he have held his land by a connection with no title of Johnson, whilst a perfect title existed at another place, with which, in his entry, he had connected himself?

If Johnson's and the Waldens' titles are good, the defendant's is good also. Those titles can never be affected by a suit in which they are not parties.

Johnson's entry is 25 years of age, his survey 16, his patent 12; neither has been questioned to this day, by *caveat* or suit.

But the continuity of the chain from Johnson to the defendant is said to be broken by the want of an "east side" on the buffalo-road, by the want of an "east side" to Johnson's first and second survey, and by want of an "east and south-east sides," by John Walden. There being no such "east sides," Johnson could not lie on the "east side" of the road. A. Walden could not lie on the "east side" of Johnson, nor the defendant on the east and south-east sides of John Walden. Accordingly the decree has provided in the survey No. 3, an "east side" for Johnson, by a north and south line for A. Walden to adjoin, and similar sides for J. Walden and the defendant, violating the positive provision of *law as to the [*212
length and breadth of surveys. But, in the language of these locations, "on the east side" means no more than that the lands are to lie eastward, or on the easterly side or part of. They do not necessarily suppose that the surveys must absolutely have an exact north and south line. It means aspect, one part of a body opposed to another part of the same body. In this sense every tract of land must have an east side.

As locators had a very considerable latitude in making their surveys; and as entries might join each other before any of them were actually surveyed, if the principles of the decree are just, and nothing but a north and south line will make an east side, it would put it in the power of the first locator to prevent the second locator from joining him at all, and of course to destroy the validity of his neighbor's entry. This could not be the intention of the law. Kenton used the term, "side" with a knowledge of this latitude. He therefore did not intend to use it in a sense which would destroy his locations. He used it merely to show the geographical relation of one entry to another.

Again; these entries call, not for surveys, but for each other. In John Walden's the words "joiuing the above entry" are expressly used. How can the east side of an entry be converted into a north and south line of a subsequent survey? The calls are to couple entries to entries; subsequent entries to previous entries, not previous entries to subsequent surveys.

It is by blending geometry and geography, in considering entries, that inaccurate constructions prevail; whereas the latter only is neeessary.

But the complainants' entry is bad in not giving any geographieal notiee. The letters I T eut in the bark of a tree do not constitute a geographieal objeet. A loeatiou was required not to enable a mau to fiud his own land, but **213***] to enable others to avoid *it. Admit that the complainants can find their beginning, the letters I T, it does not affeet the question whether this artificial geography can be a good loeation. We may find what we hide, but what we ean hide is not a geographical feature in the faee of the couutry. An object taken as the basis of an eutry ought to be such as a person aequainted with the eountry might have known before the entry was made.

The defendant's entry had not been surveyed when the complainants' entry was made. It had not then mistaken its area, as the decree now contends. It was a good entry, as the decree admits. Being good, the title to the land it covered was vested in the defendant, not liable to be re-eutered, and not capable of being devested by a younger entry. The youuger eutry thefefore was void as to this vested title. Being void, it could only be made good by a survey aud patent. The elder entry, if originally void also, is made good by the same ueans.

If the defendant has no title, so far as his entry was void, the complainants can have uo title so far as theirs was void; or if subsequeut events could perfect theirs, the same events could perfect his.

If the complainauts have the eldest survey for the lands said by the decree to have been within the defeudant's entry, he has the eldest for those said to be withiu theirs.

The parallel in the cases is eomplete, but the decree has not seen it. It has giveu the complainauts the land they claim of the defendant, and also that which the defendant has a right to claim upon the same prineiples.

Is an entry, a survey, or a patent, the basis of a title? The incipient and the final step, the entry and the patent, are for the defendant.

The complainants have the eldest survey as to the 10,000 acre entry. But neither the sur-**214***] vey nor its registry eau *give priority of title. The incipient and the final act being iu favor of the defendant, equity will not deprive a fair purchaser of the advantage, in order to do him wrong.

The law directs an indorsation on the patent "that the patentee has title." The decree declares "that his title shall depend on parol testimony for 10, 15, or 20 years.

How far courts of equity are bouud by the positive law, is still a question. Whether, with the eourts of Virginia, they will stop at the case of fraud or aceident having prevented the institution of a *caveat*, followed speedily by an application to equity for relief, or whether they will examine, during 20, 30, or 100 years, every circumstance eapable of being examined by *caveats*, is to be the precedent.

The law and equity of the case are so intimately blended that in discussing the one mueh of the other has beeu anticipated.

Two grounds of equity are set up by the complainants.

1. An irregularity in the defendant's survey. They make no objection to his entry, aud by charging the survey with non-eonformity, they admit that the eutry may be conformed to: they prctend also to show in what manner.

2. That one of their surveys was first made, returned and registered.

The defendaut on his side claims equity too:

1. From length of time. Though courts of equity are not bound by acts of limitation, in some cases, they are in others. There must be some ingredient to take a ease out of an act of limitation, *after it has fallen within [***215** it. The *caveat* process is an act of limitation.

Even in cases most deemed by equity to fall under the strict letter of laws of limitation. eourts of equity, in eomputing a reasouable length of time, will respect such laws as legislative computations founded in reason.

Written testimouy is supposed, by the laws of Virginia, to be a reasonable objeet of confidenee, until twenty years have expired. Precedents in ehaneery have diminished this term to eighteen. Oral testimony maintaius its credibility in some cases for five years, in others for a shorter term, and in contests capable of beiug tried by *caveat*, for six months ouly. This computation is made upon the particular eircumstances inimieal to such testimony in every case. These circumstanees induced the legislature, in cases of *caveat*, to refuse credibility to oral testimony for more than six months. But the complainauts demand it for twenty years.

2. The defendant elaims equity from the surveyor's negligence, in not having surveyed with the regularity required by law.

The law is imperative that he should give uotices.

Exeept for this breach of duty in the officer, the defendant would have surveyed and pateuted before the complainants entered. And a survey and patent eould not have been destroyed by a subsequent entry.

Equity eonsiders that as done which ought to have been done. The negleet of the surveyor was a real injury to the defendant, out of which grew not a real iujury, but the semblance of au injury to the complainants. It the first negleet had not happened, the case of the complainants would have been just as it now is. If by that negleet they had obtained an unjust advantage over the defendant, even *a *caveat*, or at least a suit in ehancery, [***216** would have relieved him. Can they be injured by not obtaining from this neglect, that which both law and justice would have taken from them? The defendant has in fact the eldest equity as well as the eldest patent.

3. The third ground of the defendant's cquity is, that the complainants have gotten better land belonging, as they say, to the defendant, and, therefore, have suffered no injury; that they are bound by their acquies-

cence; and that it would be unjust to make an exchange now, as it would deprive the defendant of his old patent, and, possibly, involve him in more litigation.

The following cases were cited in behalf of the original defendant, viz.:

On the question upon the construction of the entries:

Hughes's Rep., 110, 124, *Kenny* v. *Whitledge;* Hughes's Rep., 14, 15, *Pawling* v. *Mereweather;* MS. *Johnson* v. *Naul;* MS. *Jones* v. *Craig;* Hughes's Rep., *Jackson & Owens* v. *Whitaker and Wife,* and *Ward* v. *Kenton & Fox;* MS. *Speed* v. *Lewis;* MS. *Drake* v. *Rumney;* Hughes's Rep., *Ramsay & Logie* v. *Drake; Bryant* v. *Owens & Wallace;* Sneed's Rep., 9, *Wilson* v. *Speed;* Id. 396, *Frazier* v. *Steele.*

And upon the question of jurisdiction: (Hughes's Rep., 2, 181; 1 Wash., 116; 2 Wash., 48.)

Argument for the original complainants.

All the good lands in Kentucky are subject to at least two contending entries. In this case Taylor had the first entry, but Bodley had the first survey.

As to the question of jurisdiction, it has been long settled as a good ground of equity **217***] that the defendant *had obtained a legal title to which the plaintiff had a prior or better equity; and a court of law could not sustain an equitable against a legal title.

If the plaintiff shows an equitable title, the defendant must not only show his legal title, but he must support it by an equity equal at least to that of the plaintiff; for in equity the legal estate stands for nothing. (Sneed's Rep., 43, 46, 47; *Quarles* v. *Brown; Consella* v. *Briscow; Swearingen v. Briscow;* 1 Wash., 230; Hughes's Rep., 53, *Fry* v. *Ezra;* Id., 88, 92, *Smith* v. *Evans;* Id. 110, *Greenup* v. *Coburn;* Sneed's Rep., 32, *South* v. *Bowles;* Id., 52, *Bradford* v. *Allen;* Id., 130, *Bruce* v. ———.)

Taylor might have had a remedy by *caveat* if he would. But the remedy by *caveat* is only a concurrent remedy. It is not a remedy which can apply to all cases. A man may not know of a survey in time to enter his *caveat.*

The neglect of the process by *caveat* is no bar to relief in equity. (*Harwood* v. *Gibbons,* MS.; *Myers* v. *Speed,* Hughes's Rep., 97; *Kenton* v. *M'Connell,* Hughes's Rep., 140; *Picket* v. *Bib,* MS.)

If the court has jurisdiction, the next question is, whether the complainants' entry is legal and sufficiently certain.

Two questions arise respecting every entry: 1. Is it sufficiently specific? 2. Is the same land surveyed which is described in the entry?

It is sufficiently specific if the land can be found by a reasonable search. At the time of the complainants' entry, nothing was more notorious in Kentucky than a lick and a buffalo road. There is a difference where a distance is mentioned only to lead you to a part of the country where you will find a specific object **218***] which is described as the beginning *of a tract; and where the beginning is at the end of a particular line.

There must always be a general description, and a particular description.

It was not necessary that the marked trees should be notorious. You would be led to them by a reference to notorious objects, the Blue Licks, and the buffalo road. (*Greenup* v. *Coburn,* Hughes's Rep., 104; *Carter* v. ———, Hughes's Rep., 182; *Johnson* v. *Brown,* Hughes's Rep., 60; Sneed's Rep., 105.)

If the complainants' entry be sufficiently certain, the next question is as to that of the defendant.

The defendant's entry depends upon John Walden's, which depends upon Ambrose Walden's, which depends upon Peter Johnson's. If Peter Johnson's be uncertain, the rest are uncertain.

Peter Johnson's 400 acres, being his settlement right, were to lie on the east side of the upper buffalo road, and nine miles from the licks.

The beginning of the tract was to be nine miles from the lick, not the middle of the tract. The question then is, how is the survey to be made? Are you to follow the meanders of the road to ascertain the nine miles, or to take a point nine miles distant from the lick on a straight line? Are you to follow the road in running the lines of the survey? It would be impossible to be accurate as to the meanders of the road. The buffaloes make generally a number of paths not parallel to each other, sometimes approaching and again diverging, sometimes occupying a broad space which is all called the road; and they often meander so much, that after traveling nine miles you may not be a mile distant from the place of beginning. A distance upon a water-course is always measured in a straight line, without regard to the meanders of the *stream. [***219** So we say it ought to be understood when speaking of a buffalo road.

The whole of Peter Johnson's 1,400 acres were to lie on the east side of the road; but the claimant below has placed part of it on the west side.

The proper mode of surveying Peter Johnson's claim is to begin at the end of nine miles upon a straight line, and so make the whole survey on the east side of the road in the form of a square, making the general course of the road the base line of the survey.

But Ambrose Walden's land could not be bounded by a mere right of pre-emption, which was undefined, unlocated, and might never be carried into effect. It was a mere possibility. There must be an entry of a pre-emption before it can be considered as located, and until it be located it cannot be surveyed. (*Porter* v. *Gass,* Sneed's Rep.) The case of *Kenny* v. *Whitledge* applies only to village rights. (*Patrick* v. *Woods,* Hughes's Rep.; Sneed's Rep., 330, 336, 270.)

If it could not adjoin the pre-emption right, neither could it adjoin the settlement right, because the call was to join the 1,400 acre tract claimed by Peter Johnson, and not his 400 acre tract.

The defendant has lost his right to the land contained in his entry, by making his survey contrary to his location. When the survey is made, although erroneously, it is an execution of the warrant, and puts an end to the entry as such. The warrant, as well as the entry, is *functus officio.*

In these cases a court of chancery does not act upon equitable principles only, but is merely to decide which party has the legal right to

the patent. It is only a chancery form of deciding a legal right. The court cannot require the complainants to give up to the defendant **220***] the land which the defendant *might have surveyed under his entry, but which he failed to survey in proper time. It is not true in principle that the defendant is entitled to get his land somewhere; he did not purchase with that understanding. The state did not so contract.

When a man surveys contrary to his location he loses his equity. These are statutory rights, and therefore to be decided strictly according to the statute. An entry is a legal right; it descends to heirs; it is subject to execution; it may be sold and transferred. These points have all been decided by the courts of Kentucky.

P. B. Key, in reply.

There cannot be two valid entries of the same land at the same time.

When a first entry is forfeited the land is again waste and unappropriated; and not till then can a second entry of the same land be valid. A second entry made while the first was valid is void.

If Taylor's entry was valid, it gave a legal right, descendible, &c. The land was no longer waste and unappropriated or vacant. The entry of the complainants, while Taylor's entry was in force, was a nullity, and gave them no right either at law or in equity.

February 27th, 1807. MARSHALL, *Ch. J.* The court has been able to form an opinion as to a part only of this case.

That the court as a court of chancery has jurisdiction of such cases, is a point established by a long course of practice in Virginia and in Kentucky; but in the exercise of that jurisdiction, it will proceed according to the principles of equity. In such case, a prior entry will be **221***] considered as notice to him *who has the legal title, if such entry be sufficiently certain. And the legal title will be considered as holden for him who has the prior equity.

March 14th, 1809. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is an appeal from a decree of the court for the District of Kentucky, by which Taylor was directed to convey to Bodley and others a part of a tract of land to which he held an elder patent, but to which Bodley and others claim the better right under a junior patent. The judge of the District Court having directed such part of the land held by Taylor to be conveyed to Bodley and others, as appeared by certain rules, which he has applied to the case, to be within their claim, and not within Taylor's location, and having dismissed their bill as to the residue, each party has appealed from his decree.

Previous to any discussion of the rights of the parties, it has become necessary to dispose of a preliminary question.

The defendant in the court below objects to the jurisdiction of a court of equity, and contends not only that the present case furnishes no ground of jurisdiction, upon general principles, but that the land law under which both titles originate, in giving a remedy by which rights under entries might be decided previous to the emanation of a patent, has prohibited an examination of the same question after a patent shall have issued.

Had this been a case of the first impression, some contrariety of opinion would perhaps have existed on this point. But it has been sufficiently shown that the practice of resorting to a court of chancery in order to set up an equitable against the legal title, received, in its origin, the sanction of the Court of *Appeals, [***222** while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken.

But it is an inquiry of vast importance whether, in deciding claims of this description, a court of equity acts upon its known, established and general principles, or is merely substituted for a court of law, with power to decide questions respecting rights under the statute, as they existed previous to the consummation of those rights by patent.

It has been argued that the right acquired by an entry is a legal right, because it is given by a statute, that it is the statutory inception of a legal title which gives to the person making it a right, against every person not having a prior entry, to obtain a patent and to hold the land. The inference drawn from this is, that as the law affords no remedy against a person who has defeated this right by improperly obtaining a prior patent, a court of chancery, which can afford it, ought to consider itself as sitting in the character of a court of law, and ought to decide those questions as a court of law would decide them, if capable of looking beyond the patent.

This reasoning would perhaps be conclusive if a court of chancery was, by statute, substituted in the place of a court of law, with an express grant of jurisdiction in the case. But the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself: and what can justify that assumption but the opinion that cases of this description come within the sphere of its general action? In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. It is believed that no exception to this rule is to be found in the books, and the state of land titles in Kentucky is not believed to furnish one. The true ground of the jurisdiction *of a court of equity is, that an [***223** entry is considered as a record of which a subsequent locator may have notice, and therefore must be presumed to have it; consequently, although he may obtain the first patent, he is liable, in equity, to the rules which apply to a subsequent purchaser with notice of a prior equitable right. This certainly brings the validity of the entries before the court, but it also brings with that question every other which defeats the equity of the plaintiff.

The court, therefore, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery. It will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this court as the principles of equity require its application.

Neither is the compact between Virginia and Kentucky considered as affecting this case.

If the same measure of justice be meted to the citizens of each state, if laws be neither made nor expounded for the purpose of depriving those who are protected by that compact, of their rights, no violation of that compact is perceived.

The court will proceed, then, to inquire into the rights of the parties, and, in making this inquiry, will pay great respect to all those principles which appear to be well established in the state in which the lands in controversy lie.

Taylor holding the eldest patent, it is necessary that the complainants below should found their title on a good entry. The validity of their entry, therefore, is the first subject of examination.

It was made on the 17th of October, 1783, and is in these words: "Henry Crutcher and John Tibbs enter 10,000 acres of land on a treasury warrant, beginning at a large black ash and small buckeye marked thus, I T on the **224*** side of a buffalo *road leading from the lower Blue Licks a N. E. course, and about seven miles N. E. by E. from the said Blue Licks," &c.

The only objection to this entry is, that the beginning is uncertain.

Were the validity of this objection to be admitted, it would shake almost every title in Kentucky. If it be recollected that almost every acre of good land in that state was located at a time when only a few individuals, collected in scattered forts or villages, encroached on the rights of the savages and wild beasts of the country, that neither these sparse settlers, nor those hardy adventurers who traveled thither in quest of lands, could venture out to explore the country, without exposing their lives to imminent hazard, that many of those who had thus explored the country, and who made locations, were unlettered men, not only incapable of expounding the laws, but some of them incapable of reading, it is not wonderful that the courts of Kentucky should have relaxed, in some degree, the rigor of the rule requiring an impracticable precision in making entries, should have laid hold of every circumstance which might afford that certainty which the law has required, and should be content with that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum.

The entry of Crutcher and Tibbs possesses this reasonable certainty.

The Blue Licks was a place of general notoriety, and there appears to have been no difficulty in ascertaining the point from which the mensuration should commence. There being only one of the three roads leading from that point, which ran nearly a N. E. course, no subsequent locator could doubt on which road this land was placed. The entry having called for vis- **225*** ible objects on the road about *seven miles from the licks, those visible objects might be discovered without any extraordinary exertion; and if they could not be discovered, then that call, according to the course of decisions in Kentucky, would be discarded, and about seven miles would be considered as seven miles. But those objects remained, and it appears that no difficulty has arisen, or ought to arise, on this point. The jury have found it to be the beginning called for in the entry.

The entry, therefore, of Crutcher and Tibbs is sufficiently certain, and the court will proceed to examine the entry and survey of Taylor.

This entry being the last link of a chain commencing with Jacob Johnson, it is necessary to fix Jacob Johnson, in order to ascertain the position of Taylor.

Jacob Johnson's title is a settlement and pre-emption; a certificate for which was granted by the commissioners, on the 7th day of January, 1780, in the following terms:

Peter Johnson, heir at law of Jacob Johnson, deceased, this day claimed a settlement and pre-emption to a tract of land in the District of Kentucky, lying on the east side of the buffalo road leading from the Blue Licks to Limestone, nine miles from the lick on the upper road, by the said decedent's raising a crop of corn in the year 1776. Satisfactory proof being made to the court, they are of opinion that the said Peter Johnson, &c., has a right to a settlement of 400 acres of land to include the above location, and the pre-emption of 1,000 acres adjoining, and that a certificate issue accordingly.

On the 21st of February, 1780, this certificate, so far as respected the settlement of 400 acres, was entered with the surveyor.

It is the opinion of the court that the 400 acres *of land should lie entirely on the east [***226** side of the road, that it should begin at the distance of nine miles, and that those miles should be computed not by a straight line, but according to the meanders of the road.

In this respect the court perceives a clear distinction between a call for one place by its distance from another, if the intermediate space be entirely woods, or if a stream, which cannot well be followed, passes from the one to the other, and where a road is called for, which conducts individuals from point to point. The distance of places from each other is not generally computed by a stream not navigable, but is always computed by a road which is traveled. It is, therefore, the opinion of the court that where, as in this case, there is no other call in the entry showing a contrary intent, and the entry is placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line.

The beginning of Johnson's settlement being found, and its western side being placed along the road, the next inquiry is, in what manner the land is to be surveyed.

In order to give certainty to locations of this description, the courts of Kentucky have uniformly determined that they shall be understood as being made in a square. Johnson's line upon the road, therefore, must extend along the road until two lines at right angles from each end of this base shall, with a third line parallel to the general course of the road, include, in a figure which, if the road be reduced to a straight line, would make a square, the quantity of 400 acres on the east side of the road.

The next link in this chain of entries, on which the title of Taylor depends, is Ambrose Walden's.

On the 22d of May, 1780, Ambrose Walden entered *1,333 acres on the east side of [***227** Jacob Johnson's settlement and pre-emption, on the waters of Johnson's Fork, a branch of Lick-

ing, to include two cabins on the north side of said fork, built by Simon Butler, and to run eastwardly for quantity.

The cabins, it is said, cannot be found; or, if found, cannot be distinguished. The waters of Johnson's Fork would be too vague, and, therefore, the validity of this entry must depend on the call for Johnson's settlement and pre-emption.

This is said to be insufficient, because the pre-emption had not, at that time, been located with the surveyor, and the certificate of the commissioners was no location. Johnson's pre-emption, therefore, had, on the 22d of May, 1780, no locality, a subsequent entry could not depend upon it; for it might be placed in any situation, or in any form, provided it be so placed as to adjoin his settlement in any point.

The argument with respect to the pre-emption appears to the court to be conclusive. This pre-emption right certainly had no locality on the 22d of May, 1780, and an entry made to depend entirely on it would have been too vague, too uncertain, to be maintained. But it does not follow that the entry of Ambrose Walden is void. He does not call singly for the pre-emption, he calls for "the east side of Johnson's settlement and pre-emption right;" and it seems to the court that a fair application of the principles which have governed in Kentucky in similar cases, will maintain this location.

The settlement was actually located; the pre-emption, at the time, had no other than a potential existence; and the uniform course of decisions appears to have been to discard one call which is either impossible or uncertain, and to support the entry, if there be other calls which are sufficiently certain. The decisions have gone so far as to dismiss a part of the description of a single call, if other terms of de-
228*] scription *be sufficient to ascertain the thing called for. Now the call for the settlement right is valid and certain; and the court is not of opinion that this certainty is rendered uncertain by being united to the call for a pre-emption, which had no real existence.

The call appears to be substantially the same as if it had been for the land of Johnson. His settlement and pre-emption was perhaps the name which, in common parlance, designated this land even before the location of the pre-emption, because it was appendant to the settlement. It has been decided that a call for the land would be good, and the court thinks that decision applicable to this case.

Against this has been urged the doubt which a subsequent locator would have entertained at the time, whether Johnson might not have been permitted to locate his pre-emption on any land adjoining his settlement, and whether Walden's entry calling for that pre-emption might be decided to be good, and to be placed so as to bind upon it. This doubt, it is said, though now removed, then existed, and would have operated on the mind of the subsequent locator.

The force of this argument will not be denied. But it must also be admitted that it applies with equal strength to the course of artificial reasoning which has governed the decisions of the courts of Kentucky, and on which the titles of the people of that country depend. Subsequent locators must have doubted in what manner any of these questions would be decided. But having been decided, the certainty which they have introduced is carried back to the time when the location was made, and affirms that location.

It has also been said that it is uncertain which side of Johnson's settlement is the east side, and that, in point of fact, the upper side, or that furthest *from the Blue Licks, [***229** faces the east more nearly than any other.

However this fact may be, the court is of opinion that the terms of Johnson's entry designate his east side. His settlement is to lie on the east side of the road. The road, then, in contemplation of the locator, forms the west side, and the side opposite the road must be the east side. The entry must have been so understood by all subsequent locators, and when they call for his east side, the intention to place themselves on the side opposite the road is sufficiently intelligible.

In this, as in other difficulties which occur in the course of the inquiry, it is material to observe that the bill does not charge Taylor's entry to be void for uncertainty. On the contrary it impliedly admits the certainty of his location, and charges that his survey does not conform to it. The real question, then, is not whether Taylor shall be surveyed at all, but where he shall be placed.

The entry of Ambrose Walden, then, will lie on the east side of Johnson's settlement, that is, on the side opposite the road; and, this point being established, the manner in which his land is to be surveyed is free from further doubt. It is to be laid off in a square, the center of the base line of which is to be the centre of the south-eastern line of Johnson's settlement.

The next entry to be considered is that of John Walden. He enters 1,666 2-3 acres joining Ambrose Walden, on the south and south-east, and to run east and south-east for quantity.

Although Ambrose Walden has no south side, yet it is sufficiently apparent that his south-west side was intended by the locator. The difficulty arises from the subsequent call of the entry to run east and south-east for quantity. A line drawn east from Ambrose Walden's south-western corner would pass *through the middle of his land, and a [***230** line drawn south-east from the same corner would pass either through or so near his land as to make it almost impossible to suppose that the locator could have intended to make so long and narrow a triangle. The reasonable partiality of Kentucky for rectangular figures must, therefore, decide the shape of John Walden's land, and regulate the manner in which this call of his entry is to be understood. Ambrose Walden's north-western line must be extended to the south, and a line must be drawn due east from his eastern corner, so that a line parallel to his south-eastern line intersecting a line drawn south-east from the extremity of the north-western line of Ambrose Walden continued shall lay off 1,666 2-3 acres of land in equal quantities on the southern and south-eastern sides of Ambrose.

It is not to be disguised that there is much

difficulty in placing John Walden, but the court can perceive no mode of placing him more conformable to the principles which prevail in Kentucky than that which it has adopted.

We are now brought to Taylor's entry.

On the 22d of May, 1780, John Taylor enters 3,000 acres adjoining John Walden on the north side of Johnson's Fork of Licking, on the east and south-east side, running up and down said creek, and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler.

There is to John Walden's land no east side, nor any side so nearly east as the south-east side. The word side, being in the singular number, and the same side answering, better than any other, both parts of the description, the land must lie on the south-east side.

It is also thought to be the more reasonable construction of the entry that the words, on the north side of Johnson's Fork, refer to the **231***] situation of *John Walden's land, not to the location of Taylor's. But this is probably not important in the case. Taylor is to lie on the south-east of Walden, to include an improvement made by Drennon and Butler, to run up and down the creek, and north for quantity.

With these calls, it would have been the opinion of the court that Taylor could not cross the creek, had not his entry called for an object on the south side of the creek. That object is the improvement made by Jacob Drennon and Simon Butler.

It has been said that the country was covered with cabins, and that therefore this call was no designation of the land that was located. This argument is correct so far as it is urged to prove that this would not be sufficient, as a general description, to enable subsequent locators to say in what part of the country this entry was made. Neither would the letters I T marked on a tree answer this purpose. But, when brought into the neighborhood by other parts of the description, these letters serve to ascertain the beginning of the entry under which the claim adversary to that of Taylor is supported. So Taylor informs subsequent locators of the neighborhood in which his land lies, by calling for the south-east side of John Walden's entry, on the north of Johnson's Fork, which is found by a reference to other entries which commence at a point of public notoriety. When brought to the south-east side of John Walden, he is near the cabin called for, and it does not appear that there was, in the neighborhood, any other cabin which this entry could possibly be understood to include. This part of the description, then, will carry Taylor to the south side of Johnson's Fork, and, if permitted to cross that fork, the favorite figure of the square must be resorted to. Against this it is said that, in such a case, the rule of Kentucky will carry him no further than barely to include the object of his call. But this rule cannot apply to this case, because it would give a survey the breadth of which would not be one-third of its length. **232***] *It is impossible to look at the general plat returned in this case without feeling a conviction that the surveyor considered that fork which, in the plat, is termed Mud Lick Fork, as Johnson's Fork; and there is no testimony in the cause which shows that, when this location was made, that middle stream which runs through Taylor's survey was denominated Johnson's Fork. The finding of the jury, however, that the roads and water-courses are rightly laid down, must induce the opinion that this fact was proved to them.

In a case where the mistake is so obvious, the rule which, under circumstances so doubtful, relative to place, deprives the person, in surveying whose property the mistake has been made, of his legal title, appears to be a severe rule to be adopted in a court of equity. But such is the situation of land titles in Kentucky, that the rule must be inflexible.

Taylor, then, must adjoin John Walden on his south-east side, where that line crosses Johnson's Fork, if it does cross it, and if it does not, then at its south-eastern extremity, which will be nearest Johnson's Fork. If a square formed upon the whole line shall contain less than three thousand acres, then two lines are to be extended due north until, with a line running east and west, the quantity of three thousand acres shall be contained in the whole figure. If such a square shall contain more than three thousand acres, then it is to be laid off on so much of Walden's line as to contain the exact quantity.

This being the manner in which it appears to the court that Taylor's entry ought to be surveyed, it remains to inquire whether, under the principles which govern a court of equity in affording its aid to an equitable against a legal title, the complainants below ought to recover any, and, if any, what part of the lands surveyed by Taylor, and, if any, what terms are to be imposed upon them.

*The entry as well as patent of Taylor [***233** is prior to that under which the complainants in the District Court assert their title. Of the entries made within their location, therefore, they had that implied notice which gives a court of equity jurisdiction of this cause. They cannot object to the operation of a principle which enables them to come into court. But, in addition to this principle, they must be considered as having notice, in fact, of these locations. The position of the entries of both plaintiffs and defendant is ascertained by calling for certain distances along the same road from the same object. Crutcher and Tibbs, therefore, when they made their location, knew well that they included the Waldens and Taylor, and that their entry could give them no pretensions to the lands previously entered by those persons. If, by any inadvertence, the Waldens and Taylor have surveyed land to which Crutcher and Tibbs were entitled, and have left to Crutcher and Tibbs land to which the Waldens and Taylor were entitled, it would seem to the court to furnish no equity to Crutcher and Tibbs against the legal title which is held by their adversaries, unless they will submit to the condition of restoring the lands they have gained by the inadvertence of which they complain.

The court does not liken this inadvertent survey of lands, not within the location, to withdrawing of the warrant and re-entering it in another place. The latter is the act of the mind intentionally abandoning an entry once made: the former is no act of the mind, and so far from evidencing an intention to abandon, discovers an intention to adhere to the appropriation once made. Although their legal effect

may be the same, yet they are not the same with a person who has gained by the inadvertence, and applies to a court of equity to increase that gain.

Was this, then, a case of the first impression, the court would strongly incline to the opinion **234***] *that Bodley and Hughes ought not to receive a conveyance for the lands within Taylor's survey, and not within his entry, but on the condition of their consenting to convey to him the lands they hold which were within his entry and are not included in his survey. But this is not a case of the first impression. The court is compelled to believe that the principle is really settled in a manner different from that which this court would deem correct. It is impossible to say how many titles might be shaken by shaking the principle. The very extraordinary state of land title in that country has compelled its judges, in a series of decisions, to rear up an artificial pile from which no piece can be taken, by hands not intimately acquainted with the building, without endangering the structure, and producing a mischief to those holding under it, the extent of which may not be perceived. The rule as adopted must be pursued.

Taylor, then, must be surveyed according to the principles laid down in this decree, and must convey to the plaintiffs below the lands lying within his patent and theirs, which were not within his entry.

Distinguished—5 Cranch 255.

Cited—14 Pet. 159; 15 Pet. 105; 6 Pet. 296; 5 Pet. 200, 210; 9 How. 36; 2 Curt. 472; 2 McLean 575; 1 Woods. 547.

TAYLOR AND QUARLES *v.* BROWN.

The first survey, under a military land warrant in Virginia, gives the prior equity. The survey is the act of appropriation.

The certificate of survey is sufficient evidence that the warrant was in the hands of the surveyor.

That clause of the land law of Virginia, which requires every survey to be recorded within two months after it is made, is merely directory to the surveyor; and his neglect to record it does not invalidate the survey.

It is not necessary that the deputy surveyor who made the survey, should make out the plat and certify it. It may be done from his notes, by the principal surveyor.

A subsequent locator of land in Virginia, without notice of the prior location, cannot protect himself by obtaining the elder patent.

A survey is not void because it includes more land than was directed to be surveyed by the warrant.

The patent relates to the inception of title; and therefore, in a court of equity, the person who has first appropriated the land has the best title, unless his equity is impaired by the circumstances of the case.

The locator of a warrant undertakes himself to find waste and unappropriated land, and his patent issues upon his own information to the government, and at his own risk. He cannot be considered as a purchaser without notice.

The equity of the prior locator extends to the surplus land surveyed, as well as to the quantity mentioned in the warrant.

ERROR to the District Court for the Kentucky District, in a suit in chancery, wherein Taylor and Quarles were complainants against Brown. The bill of the complainants was dismissed by the court below.

Both parties claimed under military warrants upon the King's proclamation, for services rendered prior to the year 1763.

The complainants claimed under a warrant in favor of Angus M'Donald, for 2,000 acres issued *the 5th of February, 1774. The defend- [***235** ant claimed under a warrant in favor of Jethro Sumner, for 2,000 acres, issued the 3d of December, 1773. M'Donald's survey was made on the 7th of July, 1774. Sumner's was made on the 24th of June, 1775, and he obtained a patent on the 5th of January, 1780. The patent upon M'Donald's survey was not issued until the 10th of January, 1792; so that the complainants had a younger warrant and patent, but the elder survey. The defendant had the elder warrant and patent, but the younger survey. M'Donald's survey included 3,025 acres; Sumner's included, 2,576 acres. The quantity covered by both surveys was 1,080 acres, of which Taylor claimed 660, and Quarles, 200; it did not appear who claimed the other 220 acres, included in the interference.

M'Donald's survey was made by Hancock Taylor, an assistant surveyor of Fincastle county, where the lands lay, who, before his return to the office, was killed by the Indians on the last of July, 1774, but his field books and papers were preserved by his attendants, and delivered to the principal surveyor of the county, in September, 1774, who made out a plat therefrom.

The complainants' bill charges, that the survey of Sumner was fraudulently made, so as to interfere with M'Donald's. The answer denies the fraud; and there was no evidence of fraud, or even of notice on the part of Sumner.

* *P. B. Key and Rowan,* for the complainants, (the plaintiffs in error,) contended, that the survey made by Hancock Taylor, and the plat and certificate of survey made out by the principal surveyor, were a good execution of the warrant, and were a complete appropriation of the land surveyed, so as to give to M'Donald a prior title in equity; and that the subsequent patent related back to the survey, so as to give to the complainants a better title in equity than the defendants.

Pope* and *Swann,* contra, contended, [*236**

1. That it did not appear that M'Donald's warrant ever was in the hands of the surveyor.

2. That the survey was not recorded within two months after it was made.

3. That the survey was not certified by Hancock Taylor, the assistant surveyor who made the survey.

4. That the complainants had a remedy by *caveat;* and having neglected to avail themselves of that remedy, they could not have relief in equity.

5. That the survey, both in law and equity, was void as to all but 2,000 acres.

6. That the complainants have no equity.

1. Upon the first point it was said that the warrant is the only authority for the officer to survey the land; and if he never had the warrant, the whole proceeding is void. It must be proved, therefore, that the officer had the warrant.

2. The act of 1778 (c. 14, § 6), requires that every survey shall be recorded by the surveyor, in a book kept by him for that purpose, within

two months after the same shall be made. This was a condition precedent to the validity of the survey.

3. The survey was not certified by Hancock Taylor, the assistant surveyor who made the survey.

It is an incontrovertible position, that when the law entrusts an officer to do an act *in pais*, he is the only person who can certify the act done. A deputy surveyor, or a deputy sheriff does not derive his authority from the principal surveyor, or the high sheriff, but from the law. The principal has only the appointment of the **237***] deputy; but his *authority to act as, and for the principal, is derived from the law. There can be no evidence of a survey, but the certificate of the officer who made it. If a man went to make a settlement, but should be killed on the way, it is true, the act of God prevented, but still it was no settlement.

4. The complainants had a remedy by *caveat*, when they might have established their title at law. Having lost this remedy by their own negligence, it is contrary to the principles of equity to aid them.

5. The survey was void as to the surplus, beyond the 2,000 acres authorized by the warrant. As to this surplus M'Donald was a mere volunteer; he paid no consideration; it was a fraud upon the state; and a mere survey, without the authority of a warrant, can give no title in equity. (Hughes's Rep., 21, 26, *Dougherty* v. *Crow;* Sneed's Kentucky Cases, 9, *Ward* v. *Kenton;* Sugd., 200, 201, 202; 1 Fonb., 348.)

6. The complainants have no equity. The defendant was a purchaser for a valuable consideration without notice of any title or claim by M'Donald. No fraud or notice is brought home to Sumner. He purchased the land fairly; he has paid for it and obtained the legal title; and he must hold it until some other person shows a better title in equity.

There is no evidence of notice, even if the depositions can be read which are sent up with the record; of which there is strong doubt; for the jury, according to the practice in Kentucky, has found all the facts in dispute between the parties.

Even if one of the depositions should contradict the answer, yet a court of equity will never decree against the defendant's answer, upon a single deposition, unless it be strongly corroborated by circumstances.

238*] *Livingston, J. Are those the depositions upon which the jury acted in finding the facts? If they are, I, for myself, should consider the finding conclusive; and that we could not look into the depositions.

MARSHALL, *Ch. J.* When the first case of a suit in chancery of this kind came before this court from Kentucky, the court was struck with the irregularity of the intervention of a jury to ascertain the facts in any other mode than by an issue directed by the court as a court of chancery; and as this court is only authorized to proceed in chancery cases according to the principles and usages of courts of equity, the court was disposed to disregard facts thus found.

The court felt no difficulty in looking into the depositions, but their doubt was, whether they should take into consideration the facts found. However, as such a practice was said to have been established in Kentucky, the court agreed to look into the facts found where they were not inconsistent with the depositions in the cause. I think the first case of this kind which came up from Kentucky was that of *Taylor and Bodley*.

If M'Donald ever had equity, he has forfeited it by his negligence. No step was taken to complete the title from 1774 to 1792, a period of eighteen years. (2 Wash., 106, *Pickett* v. *Dowdall;* 2 Wash., 121, *Curry* v. *Burns;* 1 Wash., 116, *White* v. *Jones.*)

The doctrine of relation applies only to the parties themselves, viz., to M'Donald and the commonwealth of Virginia. It does not apply where the rights of third persons are concerned. (Co. Litt., 190; Plowd., 188; 2 Vent., 200; 2 Wash., 113, 120, 121.)

Rowan, in reply.

1. It was not necessary that the warrant should *have been in the hands of the surveyor. [***239** It was sufficient authority to him to survey the land if he knew that such a warrant existed. But if it were necessary that he should have had it in his hands, the presumption arising from his having made the survey is strong that he had the warrant, and is sufficient proof of that fact until the contrary be proved. The bill avers that the warrant was delivered to the surveyor. The answer does not deny it, and there is no evidence that it was not. It is a matter only between the complainants and the surveyor, and no other person can take advantage of it. It was no injury to the defendant.

2. The recording the survey within two months was a duty imposed by law upon the surveyor, and he was liable to a penalty if he neglected to do so; but his neglect could not invalidate the survey. It does not appear upon the record that the survey was not recorded within the two months. The presumption is, that the officer did his duty till the contrary appears. The act of 1748 requires the surveyor to return a list of his surveys to the college of William and Mary, who were entitled to certain fees upon every survey: It cannot be contended that the surveys were void if the list was not returned. There are a number of other things required of the surveyor by that act, yet it was never supposed that his neglect to do them would vacate his surveys. The recording was not intended as notice to others, because the surveyor was expressly forbidden by law to give a copy for twelve months. The only notice which the legislature intended should be given to subsequent purchasers during that period was the marking and bounding the land.

The survey is the appropriation. Sumner had all the notice which the legislature intended he should have. The depositions show that the land was actually marked and bounded; and that the marks and bounds were a matter of public notoriety.

*The act of recording was a duty [***240** which the officer was bound to perform. The complainants could not compel him to perform it, and therefore they ought not to suffer if he neglected it. The issuing of the patent is strong evidence either that the survey was recorded in time, or that the want of such record did not invalidate the title. The register of the land office was the person best acquainted with all the prerequisites to a grant. After a lapse of

thirty years, all these prerequisites are to be presumed until the contrary appears.

3. It was not necessary that the plat and certificate should be made out by the same officer who made the survey. Everything that is done by a deputy surveyor is supposed in law to be done by the principal, and when the principal himself undertakes to act, there can be no question. The principal is the only officer known to the law whose certificate can be respected. If the deputy acts, it is in the name of his principal. The making out of a plat and certificate from the field book is a mere mechanical operation. It may as well be done by another as by the officer who actually ran the lines.

4. The complainants were not bound to file their *caveat*. The delay is no argument against their claim. It appears from the record that the patent was made to the heirs or devisees of M'Donald. His death, and their minority, account for the apparent delay.

5. As to the surplus. There never has been a survey vacated in Kentucky because it contained more land than the warrant required. If the lines had comprehended less, the party must have been the loser. If they comprehend more, it does not vacate the survey. The case of *Beckley* v. *Bryan* (Sneed, 107), is decisive as to that point.

6. As to the equity of the case. It is not necessary now to inquire how the courts in Kentucky first obtained a chancery jurisdiction **241***] in cases of this *kind. By a long course of practice, the question of interfering surveys, or entries, has been a question in equity. It is a mode of getting behind the patent. An elder patent is only considered as a means of protecting the prior equity. (Sneed, 231, 233, 248, 267, 283, 331.)

The survey of M'Dould was a prior appropriation of the land. It was no longer waste, vacant, or unappropriated land. It was not a subject for Sumner's warrant to operate upon. Lapse of time cannot enfeeble a claim. It either destroys it altogether, or it has no effect.

If the court would restrict M'Donald to his 2,000 acres, where shall they be laid off? The impossibility of locating them, so as to designate the surplus, is a sufficient reason for not adopting the principle.

March 1. MARSHALL, *Ch. J.*, delivered the opinion of the court:

In this case the title of both parties originates in surveys made by the surveyor of Fincastle county, previous to the passage of the land law of Virginia. Both surveys were made on military warrants issued under the proclamation of 1763. The survey under which the plaintiffs claim, being prior in point of time, they have the first equitable title, and must prevail, unless the objections made to that survey be valid, or unless their equity is defeated by the circumstances of the case.

Several objections have been made to the survey, each of which will be considered.

1. It is said that the warrant was not in possession of the principal surveyor when the survey was made.

242*] *The answer given to this objection is conclusive. The warrant is an authority to, and an injunction on, the surveyor to lay off 2,000 acres of vacant land which had not been surveyed by order of council, and patented subsequent to the proclamation. Whether acts under this authority are valid or void, if the authority itself be not in possession of the officer, is perfectly unimportant in this case; because the court considers the certificate of the surveyor as sufficient evidence that the warrant was in his possession, if, in point of law, it was necessary that it should be lodged in the office. That certificate is in the usual form, and states the survey to have been made by virtue of the governor's warrant, and agreeably to his majesty's royal proclamation.

2. The second objection is, that the survey does not appear to have been recorded within two months after it was made.

The opinion, that this omission on the part of the surveyor avoids the title which accrued under the survey, is founded on the 6th section of an act passed in the year 1748, entitled, "An act directing the duty of surveyors of land." In prescribing this duty the law, among other things, enjoins the surveyor "to enter, or cause to be entered, in a book well bound, to be ordered and provided by the court of his county, a true, correct and fair copy and plat of every survey by him made during his continuance in office, within two months after making the same."

This section is merely directory to the surveyor. It does not make the validity of the survey dependent on its being recorded, nor does it give the proprietor any right to control the conduct of the surveyor in this respect. His title, where it can commence without an entry, begins with the survey; and it would be unreasonable to deprive him of that title by the subsequent neglect of an officer, not appointed by himself, in not performing an act which the law does not pronounce necessary to his title, *the performance of which he has not [***243** the means of coercing.

If the omission to record the survey in two months would avoid it, then the omission of any other act enjoined by the same section would equally avoid it. The surveyor is directed to see the land "plainly bounded by natural bounds, or marked trees." Has his conforming to this direction ever been inquired into, in a contest respecting the validity of a survey? Would any gentleman of the bar contend that the land was not plainly bounded, and that, for this reason, a survey actually made was void? He is, within five months, to deliver to his employer a plat and certificate. Suppose six months should elapse before he complies with this duty, is the survey void? He is to certify the true quantity of land contained in the survey. Would the gentlemen from Kentucky be willing to adopt it as a principle that every survey expressing a quantity more or less than the true quantity is absolutely void? He is to state the water-courses, and also the plantations next adjoining. Should any one of these be omitted, is the survey void? He is to return a list of surveys in the month of June annually to the clerk's office. Should he fail in this, are the surveys void? On these points it is impossible seriously to insist; and the court can perceive no distinction between them. They are all merely directory to the officer, and none of them affect a title which commenced before they are to be performed. He is subjected to a penalty for failing in any

one of these duties, but his performing or omitting them is unimportant to the rights of those for whom surveys have been made.

3. The third objection is of more weight. It is, that the survey must be certified by the person who made it, and can be authenticated in no other manner.

That, in point of fact, this survey was certified as made, is not doubted. But it is said **244***] that the *plat and certificate want those appropriate forms which alone the law will receive as evidence of their verity.

The survey was made by Hancock Taylor, assistant surveyor of Fincastle county, from whose field notes the plat and certificate were made out by his principal, who also signed them. Hancock Taylor was prevented from performing this duty by a mortal wound received from the Indians. It is understood to be usual for the assistant, where surveys are actually made by him, to sign the plat and certificate, which are also signed by his principal.

The 46th section of the act, "for settling the titles and bounds of lands, and for preventing unlawful hunting and ranging," enacts, "that every survey of lands intended to be patented shall be made and returned by a sworn surveyor duly commissioned for that purpose."

Let us inquire whether, under this section, the plat and certificate must be made out by the person who made the survey, and whether a survey actually made by an assistant must be platted and certified by him.

It may be of some importance, in the construction of this section, to inquire whether the return alluded to is to the office of the principal surveyor, or to the land-office, out of which the patent is to issue.

In construing this section, the accompanying sections afford us no aid. But the general object of the act, and the allusion to patenting which is made in the section, would lead to the opinion that returns to the land office were in contemplation of the legislature. If we examine the laws generally, we shall find that most usually the word "surveyor" is applied to the principal, and where the law alludes to the assistant, he is designated by the term "assistant surveyor." If the return directed by this section is to be made to the land-office, **245***] for the purpose *of obtaining a patent, then the principal surveyor is the person who is to certify it, and a survey actually run by himself, or by his assistant, is to be considered, in law, as a survey made by himself. It is believed to be most usual for the plat and certificate returned to the land-office to be signed by the principal and by his assistant; but this section seems not to require both. The signature of the assistant is the justification to the principal for recording and certifying the survey, and is the best testimony that it has been made; but the law does not require, in terms, that where that best testimony is unattainable, no other shall be received. So far as the section which has been recited goes, the signature of the principal surveyor sufficiently authenticated this plat, and that a patent has issued upon it, is proof that such was the opinion entertained in the land-office. A patent certainly does not issue, of course, unless the papers on which it issues be regular. A plat not legally authenticated is no plat, and the register cannot justify issuing a patent on it.

This consideration certainly deserves some weight: but if the court inspect this section, it seems, in fair construction, to require only the signature of the principal surveyor, who, consequently, judges, in the first instance, of the testimony which will enable him to certify a survey. If the signature of the assistant can be dispensed with, then other testimony than his signature may authorize the principal to certify a survey; and if, in any possible case, other testimony can be deemed competent, it surely may in this.

If the return directed by this section be understood to be a return to the office of the principal surveyor, it is necessary to inquire what it is that the section exacts. It is, that the "survey shall be made and returned by a sworn surveyor," not that the plat shall be made out and certified to the principal by the assistant who run the lines. The courses and distances contained in the field book of the assistant, represent to the principal as correctly *and as intelligibly the survey actually [***246** made, as the plat and certificate could do. From these data he is as capable of placing on his record book a correct plat, and of returning that plat to the land-office, as if the lines of the survey had been placed on paper by the assistant himself. It would seem reasonable, therefore, even on this construction of the section, in the actual case where death has disabled the assistant from platting his works, to consider the law as satisfied by the delivery of those works to the principal surveyor.

The "act directing the duty of surveyors of land" does not appear to this court to contain any provisions which are opposed to the construction here made of the preceding act of the same session. The 6th section of that act, which has been particularly referred to by counsel, prescribes the duty of surveyors, but contains no direction respecting the signature of plats and certificates, except this: "Every surveyor making a survey of land shall see the same plainly bounded by natural bounds, or marked trees, and within five months after survey, shall deliver to his employer a plat and certificate thereof."

It has never been understood that this plat and certificate may not be delivered by the principal; and other parts of this section show that the duties enjoined, are some of them to be performed by the principal. The section proceeds to say, "and shall also enter, or cause to be entered, in a book well bound, to be provided by the court of his county, a true, correct and fair copy and plat of every survey by him made." Now this book is the book of the principal. It is, of course, his duty to superintend the entries in it. They are to be "of the surveys by him made." The survey made by the assistant, is, then, to be entered by the principal as a survey by him made. He is also to return annually a list of the surveys by him made, to the county clerk's office. This return is made by the principal. Certainly the list must include all the surveys made by *his [***247** assistants. They also are considered as made by him. Upon a view of the whole section, the court perceives nothing in it which renders it improper for the principal to plat and

certify a survey made by his assistant whose field notes are returned complete to him, and who has been disabled by death from making the plat himself

This constrnction is very much strengthened by the terms of the act of 1779. That act declares "that all surveys of wastc and unappropriated land made upou any of the western waters before the 1st day of January, 1778," "by any county.surveyor, commissioned by the masters of William and Mary college, acting in couformity to the laws and rules of government then in force, and founded either upon charter," &c., "or upon any warrant from the governor for the time being, for military service, in virtue of a proclamation either from the King of Great Britain, or any former goveruor of Virginia, shall be aud are hereby declared good aud valid; bnt that all surveys of waste and unpatented lands made by any other person, or upon any other pretense whatsoever, shall be and are hereby declared null and void."

Notwithstanding this declaration, we fiud that patents have actually issued, uuder which both parties in this cause claim, on surveys made uot by the county surveyor in person, but by his assistant. It is perfectly well known that a great proportion of the surveys recognized by this act have been really executed by assistant surveyors. Upon what principle of construction are they brought within the act? Clearly upon this. The law so far as respects the validity of the survey, considers the act of the depnty as the act of his principal. A snrvey made by an assistant is, in law language, made by the principal. And if this idea be taken up on so material a clause as that which confirms or invalidates every survey previously made, and which is expressed in terms much more explicit and decisive than any of the **248***] clauses in the precediug acts, must *not the idea be carried throughont? Must not the survey, in all cases, be considered in a legal point of view as made by the principal through the agency of his depnty, and must not this priuciple be kept in view in coustruing the laws upon the subject?

This survey, then, is, in law lauguage, made by William Preston. It is confirmed as a survey made by him. The law recoguizes it as his snrvey. Assnredly, then, his certificate may authenticate it.

The act proceeds to say that "all and every person or persons, his, her, or their heirs, claiming lands upon any of the before recited rights, and under surveys made as herein before mentioned (that is, by a county surveyor), against which no *caveat* shall have been legally entered, shall, upou the plats and certificates of such surveys being returned into the land-office, together with the rights, &c., upon which they were respectively founded, be eutitled to a grant for the same."

To the court it seems clear that the law authorizes a plat and ccrtificate of survey from the person whom it contemplates as the maker of that survey; that is, from the county snrveyor. The formal requisites of the law are complied with by a plat and certificate under his siguature. He has given it, in this case, on testimouy, which the court deems as full and complete as even the plat certified by the assistant who made the survey would have been.

These are the objectious which have been made to the survey under which the plaintiffs claim. After bestowing on them the utmost attentiou, thc court is decidedly of opinion, that the survey of M'Donald was and ought to be considered as a good and valid survey.

4. The 4th objection to the plaintiffs' claim is founded on their negligcnce.

*At law, this objection is clearly of [***249** uo validity. The proviso to that section of the act of 1779, which has been considered, declares that snch surveys shall be returned to the land-office within twelve mouths after the expiration of that session of assembly, or shonld become void. The time for returning them, however, was prolonged until this patent issued. Consequently, a *caveat* to prevent the emanation of the patent, because the snrvey was not returned in time, could not have been maintained. If the survey of M'Douald came within the law, thc circumstance, that the subsequeut survey of Sumner was made without notice in fact, cannot alter the case. His warrant ouly authorized him to acquire vacaut land, and he took upon himself to find lands of that description. The principle, *caveat emptor*, is directly applicable.

5. The 5th objectiou made by the defendant is, that the patent of the plaintiffs coutains surplus land. The warrant, it is said, was au authority to snrvey only 2,000 acres, and, for the snrplns, the survey was made without authority.

It is a fact of universal uotoriety in Virginia not ouly that the old military surveys, but that the old patents of that country generally coutain a greater quautity of land than the patents call for. The ancieut law of Virginia uotices this fact, and provides for the case. It prescribes the manner in which this snrplus may be acquired by other persons; and it is worthy of notice that the patentee must himself reject the surplns before it can be acquired by another, aud, after having so rejected it, he has the election to allot it in such part of his patent as he pleases.

It is contended, however, that although a grant containing surplus laud might give a legal right to such surplus, yet a survey could uot be carried into grant so far as such surplns appeared upon a *caveat*.

*On this subject we find no act of Vir- [***250** ginia nnder the regal government. At that tiue the governor and council constituted a branch of the legislature and the geueral court of the colony. They also held a distinct court in the counsel chamber for the trial of *caveats*, their decisions on which were regulated by rules established by theuselves. These rules, it is believed, are lost; and it is also believed that the means of ascertaining satisfactorily what they were, are uo longer attainable. The land law of 1779 was framed by men who understood them, and it is not unreasouable to suppose that, iu drawing that law, some respect was paid to them. That law gives a *caveat* against a survey not returned to the land-office within twelve months after it is made, or whose breadth shall not be one-third of its length, but, gives no *caveat* on account of surplus land contained in a survey, nor does it indicate the idea that, on a survey coutaining such snrplus, a *caveat* could not be supported. If such survey

is not absolutely void for the whole, the difficulty of assiguing the exact quautity is sufficient to have induced legislative regulation, had it been coutcmplated as the subject of a *caveat*, It would seem that, for security in this respect, the government trusted to the oaths prescribed for surveyors and chaiu carriers. It is also worthy of remark, that the law of 1779 superadds to the restrictions formerly imposed on taking up surplus lands contained in any patent, that it can only be done during the life of the original pateutee, and before any alienation has been made.

It is also to be observed, that the act of 1779 confirms this survey, aud it is understood that no previous entry was deemed necessary to its validity. The entries made on treasury warrants are most frequently iu such terms that a survey for a greater quautity of land might be considered as being so far contrary to location, and might be restrained by the location; but, where there is no entry, the difficulty of restraining the survey is much increased, because there exists uo standard by which to reduce it. There is, indeed, a standard as to quantity, **251***] but *not as to form and place. The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the government for that purpose, and it would seem that the government receives his plat and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the government to be an appropriation of the land it covers, and it is difficult to discern a rule by which the survey could be reduced on a *caveat* by the owner of an interfering survey, unless the entry on which it was made was in such terms that the excess might be considered as surveyed contrary to location. For to every and to each part of the land surveyed, its owner has an equal right.

Whatever rules might have been established in the tribunal having jurisdiction of the subject, under the regal government, the *caveat* in this cause, had one been entered, must have been regulated by the act of 1779. That act gives validity to both surveys; and although it directs *caveats* depending in the council chamber, at the commencement of the revolution, to be transferred to the general court, and to be tried by the rules which governed when they were entered, it subjects future *caveats* to the law then introduced. Under this law, as has already been stated, the court can perceive but one principle on which a survey can be reduced ou a *caveat*, and that principle is inapplicable to this case.

In conformity with this opinion is that of the judges of Kentucky. Not a case exists, so far as the court is informed, in which, on a *caveat*, the quantity of land in the survey of plaintiff or defendant has been considered as affecting the title, upon the single priuciple of surplus. Yet the fact must have often occurred. And in the case of *Beckley* v. *Bryan* and *Ransdale*, the contrary principle is expressly laid down. In that cause the court said, "It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to devest the owner of a survey **252***] *of the surplus included within its boundaries; uamely, where the survey was made posterior to an entry made by another person on the same land; and to do more would be unequal, and unjust, inasmuch as a survey which is too small cannot be enlarged.

This position, it is true, was laid down in a contest between a military survey and a patent on a treasury warrant. But it is laid down in terms equally applicable to a contest between two military surveys; and the court does not understand that the law has ever been otherwise understood in Kentucky.

The opinions delivered by the judges of appeals of Virginia in the case of *Johnson* v. *Buffington* (2 Wash., 116), would incline this court very much to the opinion that the same rule prevailed in the council chamber before the revolutiou. In that case, under a warrant from Lord Fairfax for 300 acres of land, 450 acres had been surveyed, and the excess appeared on the plat. This survey had lain in the office many years, and was clearly forfeitable; but Lord Fairfax had not taken advantage of the forfeiture. After his death a patent issued on a subsequent entry and survey, and the patentee was decreed to convey to the person claiming under the prior entry. In delivering his opinion Judge Fleming said, "The first objection made by the counsel for the appellant is, that the survey does not pursue the warrant; but I think there is no weight in this, as the variance is only in the quantity. If the land had been imperfectly described, it might have been fatal."

Judge Carrington said he did not consider the variance between the warrant and survey, as to the quantity, as being of any consequence.

The President, who had been an eminent practitioner in the council chamber, said he felt no *difficulty about the variance [***253** in the quantity of the land.

The rules established by Lord Fairfax were known to conform to those of the crown, and the declarations of the judges in this case, all of whom were acquainted, in some degree, with the usages under the regal government, make a strong impression on this court in favor of the opinion that, in the council chamber, the law was understood to be, that excess in the survey was not to be regarded.

The law of this case, then, so far as respects the state of title previous to the emanation of either grant, appears to be with the first survey. It remains to inquire whether a court of equity will relieve against the legal title acquired by the first grant.

The principle on which relief is granted is, that the patent, which is the consummation of title, does, in equity, relate to the inception of title; and, therefore, in a court of equity, the person who has first appropriated the land in contest has the best title, unless his equity is impaired by the circumstances of the case.

In this cause, the first patentee is said to be a purchaser without notice. But, for the reasons assigned in a former part of this opinion, the court does not consider him as clothed with that character. His warrant authorizes him to survey waste and unappropriated lands, and he undertakes himself to find lands of that description. The government acts entirely on his information; and the terms of his grant are, that the lands were waste aud unappropriated. It

is not for him to say that he had misinformed the government, and had surveyed appropriated instead of vacant lands, and had thereby entitled himself to be considered as a pnrchaser without notice.

Neither does the court conceive that the **254***] plaintiffs *have forfeited their right to come into a court of equity, by their negligence.

In the case of 1 Wash., 116, the prior right of the plaintiff had been absolntely forfeited, so that the defendant had the first title both in eqnity and law, and the plaintiff's bill was dismissed because he failed to prove the fraud which he alleged, and which was, in that case, necessary to give the court jurisdiction.

In the case of *Picket* and *Dowdale*, and of *Currie* and *Burns*, there were both forfeiture and abandonment.

In the case of *Johnson* and *Brown* (3 Call, 259), more than sufficient time had elapsed between the entry and survey of the plaintiff to prodnce a forfeiture; bnt, by the old law, notice was to be given by the surveyor before a forfeiture could take place, and this fact was not proved. Dnring forty years this entry had been totally neglected; and the court was of opinion that, after snch a lapse of time, the fact of notice by the surveyor might be presnmed. This case then also turned on the principle of forfeitnre. There were, besides, a great many circumstances in Johnson's title which gave a strong bias to the judgment of the court.

The difference between the case nnder consideration, and those cited is apparent. But the case of *Johnson* v. *Buffington* was much stronger than this. The prior survey was actually forfeitable, but had not been forfeited; and in that case, after a much longer time than exists in the present, a conrt of equity supported it against the eldest grant.

The general principles which have been relied on in this branch of the argnment, cannot be considered as applicable to a case in which the act, which constitutes the foundation of the charge of negligence, was performed within **255***] the time allowed by statute *for its performance. The circumstances, which excused the owners of military snrveys for not returning them, were before the legislature and have been declared, by law, to be snfficient.

But it is contended that the plaintiffs can have no equity beyond the 2,000 acres contained in the warrant on which M'Donald's survey was made.

If this court is to consider itself as merely substituted for a court of law, with no other difference than the power of going beyond the patent, this question is already decided. Bnt, in the case of *Bodley* and *Hughes* v. *Taylor*, an opinion was indicated that its jnrisdiction, not being given by statute, bnt assumed by itself, must be exercised upon the known principles of equity. This opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed its being considered as a rule of decision on Kentucky titles, will depend very mnch on the decisions of that country. For, in questions respecting title to real estate especially, the same rule ought certainly to prevail in both conrts.

But, in its equity, this case differs essentially from *Bodley* and *Hughes* v. *Taylor*. In that case Taylor had the eldest entry, as well as the eldest patent. In this, the eldest eqnitable right is with him who holds the eldest[1] grant. In that case the variance between the entry and snrvey of the elder right is established by a set of rules growing ont of expositions subsequent to the survey. In this, the eldest grant is fonnded on a survey made on land which, in point of fact, was previously appropriated. Bnt, which is of great importance in that case, the terms of the subseqnent location prove that the locator considered himself as comprehending Taylor's previous entry within his location, and, consequently, did not suppose so much of the land covered by his entry as being then snbject to appropriation. *He either [***256** did not mean to acqnire the land within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; bnt it does not follow that equity will aid his views, and give more than the law gives him, by allowing him to hold what he has legally gained, while he demands what is legally lost.

In this case, M'Donald supposed himself to be appropriating, and in fact was appropriating, land to which no other had, at the time, any pretensions.

In addition to these strong differences, in eqnity, between the two cases, no decision of Kentncky was shown to the conrt, which was applicable to the case of *Bodley* and *Hughes* v. *Taylor*. Bnt the case of *Beckley* v. *Bryan* and *Ransdale* is conceived to be an authority in point for this case. The decision of the Court of Appeals of Virginia in the case of *Buffington* and *Johnson* is also considered as expressly in point, and is to be respected, because both these snrveys were made while the conntry in which they were made formed a part of Virginia.

It is thought not absolutely unimportant, in a court of eqnity, that one of the circumstances has occnrred, which, at law, rescues, the surplns land in M'Donald's patent from the possibility of being acquired by any other person. An alienation has taken place. The decree, therefore, of the Court for the District of Kentucky, is to be reversed, and the defendant must be decreed to release to the plaintiffs, respectively, the lands within Sumner's patent which lie within the lines of the land conveyed by M'Donald's heirs to them respectively.

Distinguished—3 Pet. 339, 340,
Cited—6 Pet. 296; 3 Wheat, 597,

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*THE UNITED STATES [*257
v.
JOHN ARTHUR AND ROBT. PATTERSON.

The want of oyer of the condition of a bond in plea of performance is fatal.

Upon demurrer, the judgment of the court must be against the party who commits the first error.

ERROR to the Kentncky District Court of the United States, in an action of debt on a bond for 6,000 dollars.

1.—*Quære*, youngest?

The *capias ad respondendum* issued on the 28th of June, 1803, returnable to the first Monday of July in the same year, and was served on the 30th of June.

The declaration was in the usual form of an action of debt for the penalty of the bond with a *profert*, but without setting forth its condition or any breach thereof.

The defendants, without praying oyer, pleaded as follows: "And the defendants, by their attorneys, come and defend the wrong and injury when and where, &c., and for plea say they have well and truly kept and performed, and have faithfully executed and discharged, all and singular the duties enjoined on them by the laws of the United States, and the conditions in the writing obligatory in the declaration mentioned, and this they are ready to verify," &c.

The plaintiffs replied, that they ought not to be barred, &c., because they say "that the said defendants have not well and truly kept the several conditions in the said writing obligatory, as they in pleading have alleged, but have broken the same in this, to wit, that the said John Arthur, although duly appointed to the office of collector of the revenue for the first division of the first survey of the District of Ohio, as stated in the said condition, had not, at the time of executing the said writing obligatory, executed and discharged, nor after **258***] the execution *thereof, did he continue to execute and discharge faithfully, all the duties of said office; and also failed to settle his accounts with the proper officer, according to law, for more than six months previous to the institution of this suit, and also failed to pay over to the proper officer the duties which were collected, or the duties which by law, and the accounts rendered by the said John, he was bound to collect and pay over; and is in arrear to the said United States in the sum of sixteen thousand one hundred and eighty-one dollars and fifteen cents, due from and unpaid by him in his said office of collector as aforesaid; and this the said plaintiffs pray may be inquired of by the country.

To this replication the defendants demurred specially, "Because this suit is prosecuted under the 14th section of the act of Congress passed in the month of July, 1798 (c. 88), entitled, 'An act to regulate and fix the compensation of the officers employed in collecting the internal revenues of the United States, and to insure more effectually the settlement of their accounts,' which section is in the following words, to wit; 'The bond of any supervisor or other officer of the revenue, who shall neglect or refuse, for more than six months, to make up and render to the proper officer, his accounts of all duties collected or secured, pursuant to such forms and regulations as have been, or shall be, prescribed, according to law, or to verify such accounts on oath or affirmation, if thereto required, or to pay over the moneys which shall have been collected, shall be deemed forfeited, and judgment thereon shall and may be taken at the return term on motion, to be made in open court, by the attorney of the United States, unless sufficient cause to the contrary be shown to, and allowed by, the court; provided always, that the writ or process in such case shall have been executed at least fourteen days before the return day thereof;"

"And the plaintiffs, in assigning the breach in the following words, to wit, 'And also failed to pay *over to the proper of- [***259** ficer the duties which were collected, or the duties which by law, and by the accounts rendered by the said John, he was bound to collect and pay over,' have assigned the said breach neither within the letter nor the meaning of the said section of the said act of Congress; but the same is calculated to charge the said defendants with the amount of the duties due within the said first division of the first survey of the District of Ohio, whether the same is collected or secured, or not, or whether they could or might have been collected or not."

This demurrer being joined, the judgment of the court below was in favor of the defendants; and the United States brought their writ of error.

Rodney, Attorney General, for the United States.

Whether the replication be good, or not, the defendants have committed the first error in pleading, and therefore the judgment of the court below ought to have been against them. The plea is bad for want of oyer of the bond, and of the condition, the performance of which is pleaded; as in the case of *Wallace* v. *The Duchess of Cumberland* (4 Term Rep., 370), where the defendant, after praying oyer of the bond and condition, omitted to set forth the recital which preceded the condition; and the court said that the plaintiff might have signed judgment as for want of a plea.

But the replication is good in substance; and if it contain more than is necessary, the surplusage will not vitiate it. (4 Dal., 440.) A replication may be bad in part, but good upon the whole. This replication states matter sufficient to entitle the plaintiffs to maintain an action upon the bond; and even if it afterwards states something which is inaccurate, it will not vitiate the whole. (3 Term Rep., 376, *Duffield* v. *Scott; Buller's* opinion.) The breach need not be assigned in the words of the condition. It *is sufficient if a substantial breach be [***260** set forth. (Doug., 367; Esp. N. P., 209.)

A demurrer admits all matters of fact although informally pleaded, if the right of the matter sufficiently appears. (1 Tidd's Prac., 649 [London edit.] Hob., 233.)

The action is not necessarily brought under the 14th section of the act of July, 1798. That section does not prevent the United States from bringing actions in any other manner.

Pope, contra.

The first error is in the declaration. No action can be maintained upon an official bond until the condition be broken; and unless the declaration show the condition to be broken, it shows no cause of action in the United States. The act of Congress only authorizes a suit to be brought upon such a bond when the obligor has failed in his official duty, and such failure is a part of the plaintiff's title to sue.

In the case of *Stoddert v. M'Clanaghan*, in the Court of Appeals of Kentucky, (Sneed's Cases, 359,) the court said, as the plaintiff could only sue in his own name, upon a bond given to the governor, by virtue of the act of assembly which gives a right of action upon such a bond to a person injured, the plaintiff ought in his

declaration to have averred himself to be a person injured; otherwise he does not show a title in himself to sue.

LIVINGSTON, *J.* How does it appear that this is an official bond, and not a bond for a debt simply?

Pope. The bond of a public officer upon which a suit is brought is always a part of the record.

Rodney, in reply.

This case is not like that of *Stoddert and* **261***] *M'Clanaghan.* *In that case the name of the plaintiff did not appear in the bond, and the only fact which could give him a right to sue upon the bond was that he was a person injured. But in the present case the plaintiffs are the obligees of the bond, and the defendants under their hands and seals have acknowledged themselves to stand indebted to the plaintiffs in the amount of the penalty of the bond. If they would take advantage of the condition of the bond they must show it.

February 24. MARSHALL, *Ch. J.*, delivered the opinion of the court, to the following effect:

If this case depends upon the replication, the judgment of the court must be in favor of the defendants. It is certainly bad, inasmuch as it charges the defendants with moneys not collected. But upon a demurrer the judgment is to be against the party who committed the first error in pleading.

The want of oyer is a fatal defect in the plea of the defendants; and the court cannot look at any subsequent proceeding. The plea was bad when pleaded. The judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

Cited—7 Wall. 93.

262*] *HEPBURN AND DUNDAS,
PLAINTIFFS IN ERROR,
v.
COLIN AULD, DEFENDANT IN ERROR;
AND
HEPBURN AND DUNDAS, APPELLANTS,
v.
COLIN AULD, APPELLEE.

After a long possession in severalty a deed of partition may be presumed.

In equity, time may be dispensed with if it be not of the essence of the contract.

A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed.

But a court of equity will not compel a specific performance unless the vendor can make a good title to all the land contracted to be sold.

THE first of these cases was a writ of error to the judgment of the Circuit Court of the District of Columbia, in an action of debt at common law brought by Auld, agent and attorney in fact for Dunlop & Co., against Hepburn and Dundas for 45,000 dollars, the penalty of the same articles of agreement which are recited in the case of *Hepburn and Dundas,* v. *Auld* (ante, vol. 1, p. 321).

The second of these cases was an appeal from a decree of the same court dismissing the bill in equity brought by Hepburn and Dundas against Colin Auld, to compel him to accept the land, and pay the difference between the agreed value of the land and the award.

The questions in the two cases being substantially the same, they were heard and argued together.

The breaches assigned in the declaration, in the action of debt by Auld were, that Hepburn and Dundas did not, on the 2d of January, 1800, pay the amount of the award in cash, nor bills of exchange, and did not on that day assign and transfer to Auld the contract of Graham, with full powers, &c.

Hepburn and Dundas pleaded a tender of the assignment of Graham's contract in three different pleas, the pleadings upon which ended in demurrers. The first raised the question whether Auld was obliged to accept a deed of assignment, the preamble of which stated a part of the consideration of the assignment to be "a full acquittance and discharge *of all [***263** the claims and demands of the said John Dunlop & Co., against them being made and executed by the said Colin Auld." The other two demurrers brought into view the title of Hepburn and Dundas to the land sold to Graham.

The bill of Hepburn and Dundas alleges that the agreement by Auld to accept an assignment of Graham's contract towards the discharge of the debt due from them to Dunlop & Co., and to give an acquittance and discharge of that debt, and of all demands, was the inducement for them to submit the accounts to arbitration. It also states the acts and letters of Auld subsequent to the tender, to show that he considered himself bound to accept the assignment. That on the 27th of June, 1801, after recovering judgment in ejectment against Graham's heirs, Hepburn and Dundas offered to make him a deed for the land, but he refused to accept it.

The answer of Auld denies that he was bound to accept an assignment of Graham's contract which should bind him to give an acquittance and discharge of all demands of Dunlop & Co. against Hepburn and Dundas. He endeavors to explain his conduct and letters subsequent to the tender by saying that he was induced to do it by the representations of Hepburn and Dundas that it was necessary, and that the money due to them by Graham might be sooner recovered, or raised, by sale of the land, than by any contest at law relative to the transaction of the 2d of January, 1800. He denies that he ever considered the tender as good, but was willing to co-operate with them in bringing to an end the suit with Graham, until which time it would be doubtful whether a sufficient title in fee-simple could be obtained from them.

He avers that the compromise made with Graham's heirs was without his consent, and may be set aside when they come of age.

He says the offer of a deed on the 27th of June, 1801, was after he had brought suit against them *upon the award, and [***264** when it was apparent that their title was bad, or at all events doubtful.

In an amended answer, he states that he had requested them to exhibit to him their title papers, which they refused to do; and requires

that they should produce them in court. He avers his belief that their title is defective.

Hepburn and Dundas filed a supplemental bill which states their title. It avers possession ever since 1773, and refers to certain title papers; they say that they verily believe their title to be good, and never heard a doubt till long after the tender of the assignment; that as soon as the objections were made known they took pains to remove them, and have lately obtained deeds of confirmation from the surviving patentees. That the title of Sarah, one of the co-devisees of John West, after her death in 1795, descended upon her brothers, Thomas, John and Hugh, and her sister Catharine, and that John, Hugh, and Catharine have lately confirmed their title, and refer to the deeds; and they suppose that Thomas had passed all his title to Sarah's part by a deed executed before her death.

The title which they show in their supplemental bill is as follows, viz.:

The six thousand acres were included in a patent for 51,302 acres of land, granted on the 15th of December, 1772, by the State of Virginia to George Muse, Adam Stephen, Andrew Lewis, Peter Hog, John West, John Polson, and Andrew Waggoner. This tract of 51,302 acres was in 1773 divided between the patentees who have occupied in severalty ever since. One of the shares containing 6,000 acres, was allotted to John West, who died seized thereof, and devised all his Ohio lands to be equally divided among his children, Thomas, John, Hugh, Catharine, Sarah and Francina, excepting that Hugh was to have 1,000 acres more than any of the other children. The testator had but two tracts **265***] on the waters of the *Ohio, viz., that of 6,000 acres on the banks of the Ohio, and one of 1,400 acres on Pokitallico Creek. The devisees made a partition among themselves; Francina's one thousand acres were allotted to her out of the 1,400 acres on Pokitallico Creek, and she, and those claiming under her, have ever since held and enjoyed the same exclusively.

The tract of 6,000 was divided between the others; Hugh having 2,000 and the other four having 1,000 each.

Thomas, by deed of 20th of May, 1788, conveyed his 1,000 acres to Hepburn and Dundas.

John, by deed of 21st of February, 1790, also conveyed his 1,000 acres, in which deed Thomas was a party.

Hugh, also, by deed of 24th of April, 1788, conveyed his 2,000 acres.

Catharine intermarried with Baldwin Dade, who, with her and Thomas West, by deed of 20th of June, 1788, conveyed to Hepburn and Dundas her 1,000 acres.

Sarah intermarried with John Bronaugh, who, with her and Thomas West, conveyed to Hepburn and Dundas her 1,000 acres, by deed of 21st of February, 1790.

Thomas, also, by deed of 25th of April, 1788, quit-claimed to Hepburn and Dundas the 2,000 acres conveyed by Hugh.

By virtue of these deeds Hepburn and Dundas aver that they were seized of the 6,000 acres, and so continued seized and possessed until the contract with Graham.

They then proceed to answer some objections to their title which had been suggested by Auld. *They say that he had objected that the [***266** original patentees were joint tenants, and that it does not appear that partition was made among them by deed.

To this they answer, first, that after such a lapse of time a deed ought to be presumed. And, secondly, that upon inquiry they found that George Muse, Andrew Lewis, and Peter Hog died before 1787; that Adam Stephen died since 1787, and Andrew Waggoner and John Polson were still alive, who made deeds of confirmation to Hepburn and Dundas. That they also obtained a like deed from the residuary devisee of Adam Stephen.

They also state that Auld had objected that the partition between the devisees of John West, not being by deed, was not valid; and that Francina, although she had consented to take her thousand acres on Pokitallico Creek, might yet claim a share of the 6,000 acres.

To this they answer, that a parol partition among the devisees was valid.

They state that it was further objected by Auld, that Sarah Bronaugh had never duly conveyed her 1,000 acres to Hepburn and Dundas, and that she was not privily examined according to the laws of Virginia.

To this they answer, that they believe she was privily examined, but the commission is lost or mislaid so that they cannot find it. And further that Sarah Bronaugh died in 1795, without issue; and Francina, who had intermarried with Charles Turner, died without issue in 1796, and her husband in 1802, by which deaths the interest of those ladies in the 6,000 acres, if any they had, devolved upon their brothers Thomas, John, and Hugh, and their sister Catharine Dade, whereupon Hepburn and Dundas obtained from John and Hugh, and Baldwin Dade and Catharine Dade, deeds of confirmation as to the shares of Sarah and Francina. They did not get such a deed from Thomas, because he *had before [***267** conveyed to them his interest in those lands.

Auld's answer to the supplemental bill denies that any division ever took place between the devisees of John West, under his will, and avers that Francina always refused to sell her interest in the Ohio lands to Hepburn and Dundas, and that it was settled upon her husband, Charles Turner, who died, leaving two children by a second marriage.

That the interest of Sarah Bronaugh never passed from her to Hepburn and Dundas, for want of her privy examination.

That the deeds from Hugh West and Thomas West were not recorded within the eight months, so as to be valid against creditors or subsequent purchasers without notice. That Thomas was embarrassed in his circumstances for many years previous to his death, and there are still debts due from him by bonds and judgments, which bind any lands which descended to him from his sisters Sarah and Francina.

Swann and *P. B. Key*, for the appellants.

E. J. Lee and *C. Lee*, for the appellee.

On the part of the appellants, it was contended,

1. That Hepburn and Dundas had done everything on their part necessary to entitle them to a specific execution of the agreement, and to compel Auld to accept the land and

give a release of all demands of Dunlop & Co. against them.

That they were entitled to such a release upon making the assignment of Graham's contract.

Upon this point the argument took nearly the same course as in the case between the same parties (ante, vol. 1, p. 324).

268*] *They further attempted to show, from the evidence, that it was the intention of the parties that such a release should be given in case of the assignment of Graham's contract, and that instructions to that effect were given to the scrivener who drew the articles of agreement. In support of their right to prove those facts by parol evidence, they cited 1 Fonb., 188; 2 Atk., 203; 3 Atk., 388; 1 Ves. Jun., 456.

2. That it was not necessary that Hepburn and Dundas should have had a complete legal title in fee-simple at the time of the agreement, nor at the time of the tender of the assignment of Graham's contract. But it is sufficient to entitle them to a specific execution of the agreement if they can now give a good title. (Sugden's Law of Vendors, 249, 250.)

Where time is not of the essence of the contract, the lapse of time is no bar to a specific execution. (1 Atk., 12; Sug., 246, 248; 2 P. Wms., 630; *Longford* v. *Pitt*; 2 Pow., 266; Newland, 230, 236, 238, 241.)

Even if in this case time were material, Auld has waived it by his subsequent conduct. He never objected on account of defect of title. He never asked for the title papers till 1804, nor has the defect of title caused any delay. The title was never questioned until March, 1805, long after the present bill was filed.

The title is now complete. The only question which can possibly be raised is as to any supposed interest which may have descended from Sarah Bronaugh and Francina Turner upon Thomas West. But Thomas West, by joining in the deed from Mrs. Bronaugh, as well as by his own deed, has estopped himself from claiming any title. (5 Bac. Abr., 440, 445, tit. Warranty.)

A deed of partition between the original **269*]** patentees *ought now to be presumed after thirty-six years' possession in severalty. (Sug., 213; 4 Term. Rep., 482; Cowp., 216, 217.)

It is not necessary under the law of Virginia that a deed of partition should be recorded.

For the appellee, it was said,

That Auld is a defendant. He does not come here to ask anything. A court of equity will not decree that to be done which in equity and conscience ought not to be done. He is a mere agent. The intention of the parties was to pay a debt, not to purchase land. The agreement was that Graham's contract should be so assigned to Auld that he should either have the land, or the money, at his option. In order to do that, Hepburn and Dundas ought then to have had a good title; for Auld could not compel Graham to pay the money, if Hepburn and Dundas had not a good title. Auld did everything that he ought to have done. He offered to receive such an assignment, and to give such a receipt, as were conformable to the agreement.

If the vendor has not a good title at the time when the agreement is to be performed, and the vendee brings an action at law upon the articles, the vendor cannot have a decree for a specific performance, although he afterwards obtain a good title before judgment in the suit at law.

In April, 1801, Auld brought his suit at law upon the articles, and, as late as 1806, Hepburn and Dundas had not a good title.

The original patentees were joint tenants. The will of John West did not sever the joint tenancy, but all his interest vested in the survivors. They could only sever by deed. (2 Bl. Com., 186.)

Neither joint tenants nor tenants in common in *Virginia, could make partition by [***270** parol since the statutes for recording deeds.

That the completion of the title in Hepburn and Dundas, after suit brought by Auld upon the articles, was too late to entitle them to a specific execution. The counsel for Auld cited Newland on Contracts, 206, 207, 227; Sugd., 90, 91; 2 Pow., 19, 37, 69, 75, 79, 221, 267; 4 Ves. Jun., 849; 5 Ves. Jun., 818; 3 Atk., 388, 573; 1 Hen. & Munf., 131; 2 Bro. Chan. Cas., 343; 1 Bro. Chan. Cas., 93, 440; 2 Pow., 14; 2 Ves., 389; Sugd., 165; 5 East, 198; 1 Wash., 14; 1 Vern., 366; 1 Ves., 319; 1 Fonb., 107; 7 Ves., 211.

Even if there be only doubts about the title, a court of equity will not compel the purchaser to take it.

Parol testimony cannot be admitted to vary the written agreement. (1 Ves., 319, 426; 3 Call, 139; 2 Bro. Chan. Cas., 343; 4 Ves. Jun., 849; 1 Fonb., 129.)

The title as to Thomas West's part of Sarah Bronaugh's and Francina Turner's shares of the 6,000 acres, is clearly defective. He is not estopped by his deed to claim under a title which he has since acquired.

March 14. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

By the agreement of the 27th of September, 1799, the plaintiffs bound themselves, in the event of not paying, on the 2d of January, in bills of exchange, or money, the amount of the award to be rendered between the parties, to assign and transfer, on that day, to the defendant, a contract they had made with Graham, by which they had sold to him a tract of land containing 6,000 acres for the sum of 18,000 *dollars, payable at different times, [***271** with interest. They also bound themselves to execute an irrevocable power of attorney enabling the defendant, in their names, to recover the possession of the land, or to enforce the payment of the purchase money, at his election.

The defendant covenanted to accept this assignment, towards the discharge of the award, and, if it should exceed the amount thereof, to pay the excess.

On the part of the defendant it has been contended that this assignment was to be received as security for, and not as payment of, the debt due to Dunlop & Co. But on this point it is impossible to entertain a doubt. The contract itself is conclusive. The word "towards" was obviously introduced because, the award not being then made, it was uncertain whether the assignment would completely discharge its amount. But the words of the agreement admit of no other construction than that it was to be received either in part or in full payment,

as the sum awarded might be of a greater or less amount than the stipulated value of the contract to be assigned. All the testimony connected with the agreement of September, 1799, tends to confirm this construction.

The next inquiry respects the transactions of the 2d of January, 1800. The plaintiffs insist, and the defendant denies, that the tender made by Hepburn and Dundas on that day was a legal offer to do what they had covenanted to perform.

The efficacy of the assignment itself is not questioned; but it is contended on the part of the defendant that the instrument is vitiated by the clause which is introduced into it, reciting, as a part of the consideration on which it was made, that a release of all claims and demands whatsoever, on the part of John Dunlop & Co. against them, had been given.

272*] *The contract of September, 1799, certainly does not, in terms, stipulate for such a release; and if this recital in the deed of assignment could possibly prejudice John Dunlop & Co. that circumstance would unquestionably invalidate the tender. But if it should be deemed an unimportant recital, then the tender is a substantial performance of the contract, so far as it was to be performed on the 2d of January, 1800, and at least imposed on Colin Auld the duty of preparing an unexceptionable deed, and demanding its execution.

It has already been stated that, under the agreement of September, 1799, the assignment of Graham's contract was to be received in payment, and consequently that assignment, accompanied with a proper power of attorney, would discharge the award as fully as a payment in bills of exchange or money. Had the deed, therefore, limited its recital to a discharge of all claims and demands under the award, it would have been strictly correct; for to such a discharge Hepburn and Dundas were entitled. The deed of assignment, properly executed and received, and the power of attorney would, in law, have been a full payment of the award; and the subsequent claims of John Dunlop & Co. would grow out of the agreement of September, 1799.

The inquiry, whether the general terms of the recital affords any substantial objection to the deed, produces two questions.

1. Could John Dunlop & Co. have had any other claims and demands on Hepburn and Dundas than were comprehended in this award?

2. Would this recital in the deed of assignment impair those claims which grew out of the agreement?

1. The papers themselves sufficiently show that every claim whatever of John Dunlop & Co. on Hepburn and Dundas was settled in the **273***] award. The *general complexion of the agreement of September, 1799, proves this; but the particular stipulation to give "a full receipt and discharge of all claims and demands of John Dunlop & Co. against them," in the event of payment of the award being made in money or bills of exchange, places the subject beyond any doubt. Dunlop & Co. had no claims and demands on Hepburn and Dundas which were not settled in the award.

2. Could this recital impair the rights of Dunlop & Co. under the agreement of 1799?

The covenants of that agreement which were not completely satisfied were, 1st. That Hepburn and Dundas would not, after executing the deed of assignment, interfere with the measures which Colin Auld might think proper to pursue for the recovery of either the land sold to Graham, or the money due under Graham's contract; 2d. That they would convey the said lands in fee-simple, after the termination of the suit then depending, to the person who should be decided to be entitled to them.

1. The covenant not to interfere was not a present duty. The obligation it created did not come into existence until after the execution of the deed of assignment. It was to be a consequence of that deed. At the time of its execution, this was not a claim or a demand. Taking the words in their most literal sense, the covenant not to interfere would not, in the opinion of the court, be released by them; but the court is also of opinion that, if this was in any degree doubtful, these general terms would be restrained by the manifest intent of the parties, apparent on the face of the papers.

2. This release could not discharge the obligation to convey the lands, after the termination of the suit with Graham, for the reasons assigned against the foregoing objection, and for this additional reason; the deed intended to transfer to *Auld all the rights of Gra- [***274**
ham under the contract, and is so expressed; and one of the covenants in the contract assigned was, to make a conveyance with a general warranty of a title free from all encumbrances.

The recital, then, presents no solid objection to the deed of assignment, because it could not impair the rights of Dunlop & Co. Yet it is unusual and unnecessary, and had Colin Auld prepared a deed which was perfectly unexceptionable, and Hepburn and Dundas had refused to execute it, this court, although the tender might have been good at law, would probably have held them responsible for any injury which might have been sustained in consequence of such refusal.

The power of attorney, which was tendered at the same time with the deed of assignment, appears entirely unexceptionable.

It is, then, the opinion of the court that, on the 2d of January, 1800, Hepburn and Dundas offered to do everything which it was at that time incumbent on them to do; and that the tender made on that day, with the refusal of that tender, do in law amount to a performance, so far as to place Hepburn and Dundas in the same situation, with regard to the claims of Dunlop & Co. under the award, as if Colin Auld had accepted the deed. This, however, did not discharge them from the duty of executing a proper deed when required, nor from the duty of making conveyances for the land which was the subject of the agreement of September, 1799.

If a doubt existed on this point, the subsequent conduct of Colin Auld would, in a court of equity, amount to a waiver of the day, so far as respects the tender of the deed, and a consent to accept such deed at an after day within a reasonable time.

The subsequent demand of a deed by Colin Auld, when he tendered the money which was due on account, *of the excess of value [***275**

in the estimated price of the land over the sum awarded to John Dunlop & Co. was made in a manner, and under circumstances, which are not deemed reasonable. Hepburn and Dundas had a right to consider and to take counsel on the deed they were required to execute; and although their delay was unnecessarily great, yet the offer they made might have been acceded to. In fact, they might reasonably insist on leaving the transaction on the ground on which it was placed by the contract of September, 1799, which would have been done in a manner free from all exception by executing such a deed as that tendered on the 2d of January, 1800, after striking out that part of the recital which respected the release.

The interference of Hepburn and Dundas, in accommodating the suit with Graham, is also urged as an objection to their conduct. They had certainly no right to interfere without the consent of Colin Auld. But when the correspondence is inspected, and it is perceived that they interfered only to effect the object he had himself desired, and which he had avowed his own inability to effect without their consent, the interference must be considered as innocent in point of intention, and unproductive of injury in fact.

The court, then, perceive nothing in the conduct of the plaintiffs, up to the decision of the suit with Graham, which ought to defeat their right to demand a specific performance of this contract. Could they at that time have conveyed a good title, Colin Auld ought to have accepted it.

It is alleged that the title, sold by the heirs of West to Hepburn and Dundas, was not a title to 6,000 acres of land in severalty, but an undivided interest in a much larger tract, and that, as this purchase was made, not for the purpose of acquiring an estate, but for the purpose of immediately selling and paying a debt which Auld was authorized to collect, the time of executing the contract is very material.

276*] *It is not to be denied that circumstances may render the time material; and the court does not decide that this case is not of that description. But the majority of the court is of opinion that the estate is to be considered as an estate held in severalty.

That a complete partition was made by an agreement, binding on all the parties who were interested, is in full proof. This partition would unquestionably have been protected in equity, and the majority of the court conceive that after such a lapse of time, and such a long separate possession, a deed of partition ought to be presumed; and that the court, in which the verdict in the ejectment against Graham was found, might so have directed the jury.

It remains, then, only to inquire whether Hepburn and Dundas hold a title under West, which is so free from exception that the defendant ought to be decreed to take it.

Long previous to the contract with Colin Auld, Hepburn and Dundas had obtained deeds from all the devisees of John West, Jun., who were entitled to undivided parts of the 6,000 acres lying on the Ohio. But the deeds from Thomas West, and Hugh West, were not recorded, and the privy examination of Mrs. Bronaugh, one of the devisees, does not appear. By her deed, therefore, nothing passed, and the deeds of Thomas and Hugh West were liable to very serious objections.

Had Colin Auld refused to receive a conveyance from Hepburn and Dundas after the termination of Graham's suit, because they were unable to make a good title, the objection would certainly have been entitled to very serious consideration. But his rejection of the conveyance then offered was not induced by any defect in the title. He previously determined not to receive a conveyance, because Graham's contract had not been assigned in such manner as he conceived to be a full execution of *the [**277** agreement of September, 1799. These omissions, then, to record the deeds of Thomas and Hugh West, and the total want of title as to Mrs. Bronaugh's part, have produced no real inconvenience to Colin Auld. Had the title been unexceptionable, it would still have been refused; and this contest would still have been carried on with the same determined perseverance which marks the conduct of the parties. Under these circumstances, it is the opinion of the majority of the court that this case ought to be governed by those general principles which regulate the conduct of a court of chancery in decreeing a specific performance, if the defect of title, which existed at the time of contract, be cured before the decree.

Are Hepburn and Dundas now able to convey a perfect title?

Mrs. Bronaugh and Mrs. Turner, two of the devisees of John West, Jun., are dead. On the death of Mrs. Bronaugh, her real estate descended on her brothers and sisters, who were her co-heirs. Deeds of confirmation from Hugh and John West, and from Dade and wife have been obtained. Thomas West joined in the deed from Bronaugh and wife for the purpose of releasing his supposed reversion; but there is no conveyance from Francina Turner.

The court is not satisfied that Thomas West, by uniting in the deed for the purpose of conveying his reversionary interest, has conveyed a title which afterwards descended on him, or has estopped himself from asserting that title. To Thomas West's part of Mrs. Bronaugh's 1,000 acres, then, Hepburn and Dundas have no title.

On the death of Francina Turner, her interest in her sister Bronaugh's estate passed to her brothers and sister, who were her co-heirs. To Thomas West's share Hepburn and Dundas have no title.

*The undivided interest of Thomas [**278** West, which descended on him at the death of Mrs. Bronaugh, is 166 2-3 acres; and the undivided interest which descended on him, at the death of Francina Turner, is 41 1-3 acres; making 208 acres, to which Hepburn and Dundas have, at this time, no title.

The omission to record the deed from Thomas West is not cured; and this court is now to decide whether, under these circumstances, Hepburn and Dundas are entitled to claim a specific performance.

Had there been simply a deficiency of 208 acres, the majority of the court would have considered it as a case for compensation; or had the parties entitled to this land been before the court, a division might possibly have been directed, and compensation for that quantity ordered: but, however this might be, as persons

not before the court hold this interest, no order can be made respecting it; and it may very much embarrass those acts for asserting the title which may possibly be necessary. The part actually conveyed by Thomas West, too, never having been confirmed by a deed from himself or his heirs, properly recorded, might impose on Colin Auld the necessity of bringing a suit in chancery to perfect his title; or of being subjected to the inconveniences constantly attending the establishment of a deed not recorded, and the risks inseparable from such a deed.

This, therefore, is thought by the majority of the court to be a case not proper for a specific performance; and the bill is to be dismissed.

LIVINGSTON, *J.*, expressed his non-concurrence in the reasoning of the court, in the latter part of the opinion just delivered by the chief justice. He would dismiss the bill, even if a good title could now be given by the complainants. This court can no more dispense with punctuality as to time in any case, than with **279***] any other part of the *agreement. But in this particular case, time was of the essence of the contract. The object was payment of a debt; and from the anxiety of the defendant to resist a decree for a conveyance, and the desire of the complainants to urge it upon him, it is to be presumed that the lands have fallen in value during this delay of the title. The remedy by a decree for specific performance is a departure from common law, and ought to be granted only in cases where the party who seeks it has strictly entitled himself to it. It is said that by the English authorities the lapse of time may be disregarded in equity, in decreeing a specific execution of a contract for land. But there is a vast difference between contracts for land in that country and in this. There the lands have a known, fixed, and stable value. Here the price is continually fluctuating and uncertain. A single day often makes a great difference; and in almost every case time is a very material circumstance.

He dissented also from another part of the opinion, which intimates that if this were simply a deficiency of a few hundred acres, it would be considered as a case of compensation. This part of the opinion does not seem to be necessary, and does not affect the present case; but this court can in no case compel a specific performance on terms and conditions. We cannot decree a special execution for part, and assess damages as to the residue.

This is like a contract for 5,000 bushels of wheat. A tender of 4,500 would not be good; and we could not compel the purchaser to take a less quantity than he contracted for. So here the contract was for 6,000 acres. The complainants have a title to a part only; we could not compel the defendant to take that part, and give him damages for the non-conveyance of the residue.

JOHNSON, *J.*, observed, that he had perhaps taken a peculiar view of this subject, but he should be in favor of decreeing a specific per- **280***] formance generally; *leaving Auld to his remedy upon the warranty of the complainants for any defect of title which might appear. Auld, perhaps, thought it would be a good speculation, and had stipulated for a general warranty.

He acquiesced, however, in dismissing the bill, because he considered the judgment in the action at law brought by Auld against the complainants, as equivalent to a decree for a specific execution of the agreement, inasmuch as it prevents him from obtaining satisfaction in any other way for the sum awarded.

MARSHALL, *Ch. J.*, declared the opinion of the court, in the action at law, to be, that the tender of the assignment of Graham's contract, and the power of attorney, was good as pleaded, and that Auld ought to have accepted it.

Judgment reversed.

S. C. 1 Cranch, 321.
Cited—1 Wheat. 184; 2 Wheat. 299, 304 (n); 1 McLean 401; 4 McLean 284; 1 Id. 489; 2 Brock. 247; 3 Wood. & M. 474.

THE UNITED STATES *v.* EVANS.

It is not a ground for a writ of error that the judge below refused to reinstate a cause after non-suit.

ERROR to the District Court for the Kentucky District.

In the court below, the judge at the trial rejected certain testimony which was offered by the attorney for the United States, who thereupon took a bill of exceptions, and became non-suit, and afterwards, at the same term, moved the court to set aside the non-suit and grant a new trial, upon the ground that the judge had erred in rejecting the testimony. But the court overruled the motion and refused a new trial; whereupon the attorney for the United States sued out his writ of error.

The case was submitted by the Attorney General and Rowan, without argument.

*MARSHALL, *Ch. J.*, delivered the [***281** opinion of the court, that in such a case, where there has been a non-suit, and a motion to reinstate overruled, the court could not interfere.

Judgment affirmed.

YEATON AND OTHERS, CLAIMANTS OF THE SCHOONER GENERAL PINKNEY AND CARGO, *v.* THE UNITED STATES.

In admiralty cases, an appeal suspends the sentence altogether; and the cause is to be heard in the Appellate Court as if no sentence had been pronounced.

If the law under which the sentence of condemnation was pronounced be repealed after sentence in the court below, and before final sentence in the Appellate Court, no sentence of condemnation can be pronounced; unless some special provision be made for that purpose, by statute.

THIS was an appeal from the sentence of the Circuit Court for the District of Maryland, which condemned the schooner General Pinkney and cargo, for breach of the act of Congress prohibiting intercourse with certain ports of the island of St. Domingo; passed February 28th, 1806. (Vol. 8, p. 11.) This act was limited to one year; but by the act of February 24th, 1807, it was continued until the end of the then next session of Congress, when it expired on the 26th of April, 1808.

The schooner General Pinkney, on the 23d of August, 1806, was cleared from Alexandria for St. Jago de Cuba with a cargo, but went to Cape Francois in the island of St. Domingo, one of the prohibited ports. On her return, she was seized on the 17th of November, 1806, and libeled on the 5th of January, 1807, and condemned in the District Court on the 23rd of July following, which condemnation was affirmed in the Circuit Court on the 7th of November, from which sentence the claimants immediately appealed, in open court, to the Supreme Court of the United States, then next to be holden on the first Monday of February, 1808, where the cause was continued until the present term.

282*] *The only question now argued was, whether this court could now affirm the sentence of condemnation, inasmuch as the law which created the forfeiture, and authorized the condemnation, had expired?

C. Lee, Martin, Harper and *Youngs*, for the appellants, contended that, in all cases of admiralty and maritime jurisdiction, an appeal suspends entirely the sentence appealed from; and that in the Appellate Court the cause stands as if no sentence had been pronounced. (1 Browne's Civil Law, 495, 501; 1 Br. Parl. Cas., 70, 590, *Rochfort* v. *Nugent;* 2 Domat, 686; 2 Browne's Civil Law, 436, 437; 3 Dall. 87, 114, 118; *Penhallow* v. *Doane*, 4 Cranch, 2; *Jennings* v. *Carson*, Id. 443; *United States* v. *The Betsy & Charlotte*, Parker, 72.)

If, then, the case stands as if no sentence of condemnation has been passed, the question arises, can this court now proceed to condemn the vessel when there is no law authorizing a condemnation?

The act of Congress makes no provision for the recovery (after the expiration of the act) of penalities or forfeitures which had been incurred under that act during its existence.

And in such cases the law has always been understood to be, that the penalty or forfeiture cannot be enforced, nor the punishment inflicted. The court has no longer any jurisdiction in the case. (2 East's Cr., Law, 576, *Jones's case;* 1 W. Bl., 451, *Miller's case;* 4 Dal. 373; 1 Hale, 291, the case of the *United States* v. *The cargo of the Ship Sophia Magdalena*, before Judge Davis, at Boston, and a like case before Judge Hall, at New Orleans; 1 Cranch, 103, *United States* v. *Schooner Peggy.*)

Rodney, Attorney General, on the part of the United States, did not controvert the principles contended for on the other side, but in addition **283*]** to the *authorities produced by the opposite counsel, referred the court to the opinion of Ch. J. Ellsworth, in the case of *Wiscart* v. *Dauchy* (3 Dal., 327), where he says, "an appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and retrial;" and to the opinion of Marshall, Ch. J., in the case of *Pennington* v. *Coxe* (2 Cranch, 61).

March 7. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The majority of the court is clearly of opinion, that in admiralty cases an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the Apellate Court be pronounced. The cause in the Appellate Court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the district to the circuit courts of the United States, but in this court also.

In prize causes, the principle has never been disputed; and in the instance court, it is stated in 2 Browne's Civil Law, that in cases of appeal it is lawful to allege what has not before been alleged, and to prove what has not before been proved.[1]

The court is, therefore, of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.[2]

*The following sentence was then [***284** pronounced by the court:

This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof the court is of opinion, that an appeal from the sentence of a court of admiralty brings the whole case before the Appellate Court unaffected by the sentence of condemnation from which the appeal is made, and that a sentence of condemnation cannot be pronounced on account of a forfeiture which accrued under a law not in force at the time of pronouncing such sentence, unless, by some statutory provision, the right to enforce such forfeiture be preserved.

The court is, therefore, of opinion, that the sentence pronounced in this cause by the Circuit Court of the District of Maryland, affirming the sentence of the judge of the District Court in this cause, be reversed and annulled; and the court, proceeding to pronounce the proper sentence, doth direct that the libel be dismissed, and the property libeled be restored to the claimants, they paying the duties thereon if the same have not been already paid.

And, on the motion of the Attorney General, it is ordered to be certified that in the opinion of this court, there was probable cause of seizure.

Denied—2 Abb. U. S. 501.
Cited—7 Cranch, 112; 9 Wheat. 592; 3 Pet. 66; 3 How. 552; 16 How. 408; 9 Wall. 575; 2 Wall. 465; 4 Biss. 332; 1 Gall. 182, 1 Gall. 14, 24; Id. 25, 102; 1 Wood. & M. 271; 2 Id. 540; 1 Woods, 79.

THE UNITED STATES
v.
POTTS AND OTHERS.

"Round copper bottoms turned up at the edge," are not liable to duties, although imported under the denomination of "raised bottoms."

THIS was a case certified from the Circuit Court for the District of Maryland. The question upon which the judges of that court differed in opinion was,

1.—Clerk's Praxis, tit. 54. "Nam in appellatione a sententia definitiva licet non allegata allegare et non probata probare."

2.—The cases of Wilmot et al. claimants of the schooner Collector, and Lewis, claimant of the schooner *Gottenburgh* v. *United States*, were reversed upon the same principle.

Whether round copper bottoms turned up at the edge are liable to the payment of duty within the meaning of the several acts of Congress.

**285*] *The following facts were admitted, viz., that the defendants imported a certain quantity of round copper plates, under the denomination "flat bottoms;" round copper plates turned up at the edges, under the denomination of "raised bottoms;" and square and oblong copper plates, under the denomination of "sheets." That the round copper plates, and the round copper plates, turned up at the edge, are never used, nor imported for use in the form in which they are imported, although they are capable of being used, but not with convenience or advantage, in that form; but are worked up by the manufacturers in this country into vessels of use after importation. That the round copper plates, as well as the square copper plates, are cut from large sheets which are made by pressure under a roller, but are never imported in the size or shape in which they come from the roller. That it is a great convenience and saving to the manufacturer here that the sheets of copper should come in a round rather than in a square shape, avoiding great waste by clipping and repeated heats. That all the said articles are sold and bought by weight, and the same price paid for the round plates, and the round plates turned up at the edges, as for the square or oblong plates. That the round copper plates turned up at the edge are raised at the edge from four to five inches. That copper plates of this description are sold for eighteenpence sterling per pound, and that copper wrought up into vessels or implements of any kind, are sold at two shillings and fourpence to two shillings and sixpence per pound. That there is no copper imported into this country under the denomination of plates; but that the square and oblong plates, which are commonly called copper plates, and are admitted to be free of duty, are imported under the denomination of sheets.

Harper, for the defendants.

This case differs from that of the *United States* v. *Kid & Watson*, (4 Cranch, 1,) in one circumstance only. In that case it does not ap-

**286*] pear but that the *copper plates turned up at the edge were imported under the denomination of copper plates, and the jury expressly found that they came under that description. But in the present case they were imported under the denomination of "raised bottoms."

The real question is, whether these raised bottoms are to be considered as manufactured copper, or as much a raw material as plain copper plates.

The acts of Congress on this subject are all to be construed together. They are the act of July 4, 1789, c. 2, Oswald's edit., Laws U. S. vol. 1, p. 21. The act of 10th of August, 1790, § 1, Laws U. S., vol. 1, p. 251. The act of May 2, 1792, § 2, Laws U.. S., vol. 2, p. 71. And the act of June 7, 1794, Laws U. S., vol. 3, p. 108.

Rodney, Attorney General.

In the case of the *United States* v. *Kid & Watson*, the jury having found that the articles imported came under the description of copper in plates, there was nothing left for judicial decision.

But a question of revenue ought not to be left to the caprice, or misunderstanding of juries. It ought not to be left to the different customs or names used in different ports of the United States. The decisions on this subject ought to be uniform, and they can only be made so by the opinion of this court.

The case was submitted without argument.

March 7. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The opinion of this court is, that copper plates turned up at the edge are exempt from duty, although *imported under the [*287 denomination of raised bottoms.

It appears to have been the policy of the United States to distinguish between raw and manufactured copper. From the facts stated, the copper in question cannot be deemed manufactured copper within the intention of the legislature.

The opinion certified to the court below was, that round copper bottoms turned up at the edge are not liable to the payment of duty within the meaning of the several acts of Congress.

RUSH *v.* PARKER.

This court will give time to procure affidavits as to the value of the matter in dispute.

ERROR to the Circuit Court of the District of Maryland, in an action of replevin.

I. P. Boyd, for the defendant in error, contended, that the replevin bond being in the penal sum of 1,200 dollars only, was conclusive evidence that the matter in dispute, exclusive of costs, did not amount to 2,000 dollars, and consequently this court has no jurisdiction in the case.

Martin, contra, stated that he did not know till yesterday that this point would be made in the cause, and prayed time to show by affidavits the real value of the matter in dispute. Which

The court granted.

LIVINGSTON, *J.*, thought that leave ought not to be given, on account of the delay it would produce. He had found a practice established here of receiving such affidavits; but he did not know of any case in which time had been given to produce them; and he would not consent to give it now. The case was *brought [*288 up to last term. The party ought to have come prepared to support the jurisdiction.

March 15. This being the last day of the term, and no affidavits having been produced,

The writ of error was dismissed, this court having no jurisdiction in the case.

Cited—21 How. 392; 24 How. 460; 6 Wall. 442.

LOGAN *v.* PATRICK.

The Circuit Court has jurisdiction in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant out of the district in which the court sits.

THIS was a case certified from the Circuit Court for the 7th circuit and District of

Kentucky, in which the judges below differed in opinion upon the following questions:

Whether the complainant (Logan), who is a citizen of the state of Kentucky, and is so stated in the pleadings, can maintain this suit, in this court, against the defendant, who is a citizen and inhabitant of the state of Virginia, and is so stated in the pleadings, upon the following case: John Patrick obtained in this court a judgment in ejectment against David Logan, who filed a bill in equity against him to be relieved against the judgment, and to compel a conveyance of the land, and obtained an injunction to stay proceedings on the judgment; but the subpœna was not served in the District of Kentucky. Can this court entertain jurisdiction of the cause? If not, does the defendant's answering the bill, without insisting upon the objection that the process was not served upon him in the District of Kentucky, authorize the court to entertain the cause?

The court, upon the first opening of the **289***] case, *said there could be no doubt of the jurisdiction of the court below, and ordered it to be certified accordingly.

Cited—10 Wall. 333; 14 Wall. 81; 22 Wall. 252; 24 How. 460; 4 McLean, 114; 3 Mason, 160; 4 Mason, 361; 5 Mason, 571; 3 Blatchf. 15; 6 Blatchf. 219; 1 Pet. C. C. 491; 1 Story. 540; Hemp. 473; 1 Wood. & M. 120.

RADFORD *v.* CRAIG.

If the counsel on neither side appear when the cause is called, the writ of error will be dismissed.

NO appearance having been entered on the docket for either party in this cause, no counsel appearing, the court ordered both parties to be called, and neither of them appearing, the court ordered the writ of error to be dismissed.

The same order was made in the cases of *Banks* v. *Bastrop*, *Tompkins* v. *Tompkins*, and *Buchannan* v. *Yeates*.

HARRISON *v.* STERRY AND OTHERS.

In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee.

An assignment by one partner, in the name of the copartnership, of the partnership effects and credits, is valid.

Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes.

The bankrupt law of a foreign country cannot operate a legal transfer of property in this country.

THIS was an appeal from a decree of the Circuit Court for the District of South Carolina, in a suit in equity, in which Richard Harrison was complainant, and the following parties defendants, viz.: 1. The United States. 2. Sterry and others, assignees of H. M. Bird and Benjamin Savage, under a British commission of bankruptcy. 3. Aspinwall and others, assignees of Robert Bird, under an American commission of bankruptcy. 4. Several American creditors who had attached the effects of Bird, Savage & Bird, in South Carolina. 5. Several British creditors who had also attached the same effects. And, 6. Thomas Parker, who, by consent of the creditors, had been appointed by the Court of Common Pleas in South Carolina, an agent for all the parties concerned, to collect and receive the debts due to Bird, Savage & Bird, which had been attached, and when *received, to hold the same till **[*290** the further order of the court.

The question was, how those attached effects should be distributed.

Harrison, the complainant, claimed them as a trustee for the benefit of certain creditors of the house of Robert Bird & Co., which was the name of the firm by which the house of Bird, Savage & Bird, of London, carried on merchandise at New York. Robert Bird, desirous of aiding and supporting the credit of the house of Bird, Savage & Bird, by raising funds, upon the security of the cargo of the East India ship Semiramis, and certain debts to a large amount due to them in South Carolina, made a deed of trust on the 3d of December, 1802, intending thereby to assign that cargo and those debts to the complainant. The deed purported to be signed and sealed by H. M. Bird and Benjamin Savage, by Robert Bird, their attorney; and by Robert Bird, in his own right. It recited that, "whereas H. M. Bird, Benjamin Savage and Robert Bird, being copartners in trade under the several firms of Bird, Savage & Bird, and Robert Bird & Co., have in consequence of disappointments been obliged to borrow money from the bank of England, and under the firm of Robert Bird & Co. to purchase bills of exchange, public and bank stocks and goods, upon credit in America, in order to furnish means of more effectually supporting the credit of the said Bird, Savage & Bird, of London. And whereas it may be necessary for the purpose aforesaid, that the said Robert Bird & Co. should continue to make such purchases until the present difficulties may be removed; and security having been already given to the persons bound as sureties to the bank of England, for their responsibilities, the said H. M. Bird, Benjamin Savage and Robert Bird, are desirous to secure all persons from whom purchases have been or may be made as aforesaid, for the purpose of aiding the said house or firm of Bird, Savage & Bird. Now, therefore, know ye, that the said Henry M. Bird, Benjamin *Savage and Robert Bird, for the pur- [*291 pose above expressed," &c. The trust expressed was "to apply the same and every part thereof for the equal security and indemnification, in proportion to their just demands, of all persons from whom the said Robert Bird & Co. shall, before the end of the year 1803, have made any such purchases of goods, stocks or bills, or who before that time shall be holders of any bills of exchange drawn or negotiated by the said Robert Bird & Co. for the purpose of giving support to the house of Bird, Savage & Bird, as aforesaid."

Another ground of Harrison's claim was a similar instrument of writing, dated the 31st of January, 1803, not under seal, but signed, "Bird, Savage & Bird," and "Robert Bird & Co.," which signatures were in the handwriting of Robert Bird.

The bill of complaint stated that Robert Bird & Co. before and after the 3d of December, 1802, and before the end of the year 1803, made various purchases of stocks, goods and bills of exchange, and became indebted for bills drawn and negotiated by them for the purpose of giving support to the house of Bird, Savage & Bird, which debts remain unpaid. There was a letter of attorney from Henry M. Bird and Benjamin Savage, to Robert Bird, but it did not authorize him to execute deeds in their names generally.

The claim of the United States rested upon the priority given by the act of Congress of the 3d of March, 1797. (Vol. 3, p. 423, § 5.)

The attaching creditors relied upon their attachments under the laws of South Carolina.

The assignees under the several commissions of bankruptcy relied upon the British and American bankrupt laws.

The United States had proved their claim under the American commission, and had voted **292***] in the *choice of assignees. They had also attached the effects in South Carolina, under the laws of that state, and had arrested Robert Bird, and held him to bail in New York.

The court below decided that the United States were entitled to priority of payment. That after satisfaction of that claim Harrison would be entitled, under the assignment, to Robert Bird's third part or share of the property mentioned in the deed, and the attaching creditors to the other two-thirds. That the assignees under the British commission could take nothing; and that the assignees under the American commission could take nothing but the surplus after all the other classes of creditors were satisfied.

From this decree all the parties, excepting the United States, appealed.

C. Lee, in behalf of the attaching creditors, admitted the priority of the United States, but contended that his clients were entitled to the whole of the surplus after satisfaction to the United States. They have a legal priority by means of their attachments, and they have equal equity. The statutes of South Carolina gives them as good a title at law as if goods were taken under a *fieri facias*.

Robert Bird's letter of attorney did not authorize him to make deeds of conveyance or assignment in the names of his partners; nor did his power as one of the firm extend to sealing deeds in their names, nor to assigning the partnership effects without seal. But a more solid objection to Harrison's deed is, that it was made to cover the property from the other creditors; and was made in contemplation of bankruptcy. It was not to pay a debt to Harrison, but to support the credit of Bird, Savage & Bird. It does not name the creditors, nor mention any sum which it was intended to secure. It could not convey more than an equitable title to Harrison in the choses in action, **293***] but the creditors who attached *gained the legal title, without notice of Harrison's claim. Equity will not deprive them of this legal title. (2 Eq., Cas., Abr., 85.) Nor will equity protect an assignment of a chose in action except for a precedent debt.

The assignees under the British commission must yield to the attaching creditors. If they have any right, it can only be from the date of the assignment, which was subsequent to the attachments. (Doug., 170, *Le Chevalier* v. *Lynch;* 2 H., Bla., *Hunter* v. *Potts*; 1 H., Bla., 665, *Sill* v. *Worswick;* 1 East, 6, *Smith* v. *Buchannan*.)

This case differs from that of the *United States* v. *Hooe* (3 Cranch, 73). That was an assignment of real estate; this is only of a chose in action.

It does not appear when the acts of bankruptcy were committed. The commission against Bird & Savage issued on the 12th of June, 1803; that against Robert Bird on the 5th of December, 1803, and as the act of bankruptcy must be within six months before issuing the commission, it must have been subsequent to the 5th of June, 1803, long subsequent to the attachments.

There is no distinction between the rights of the British and the American attaching creditors. They all come in according to the dates of their attachments.

MARSHALL, *Ch. J.* Does the law of South Carolina create a lien from the time of the attachment without power to release the attached effects?

Harper, for the assignees under the British and American commissions.

The attachment may be dissolved by bail; but if no bail is given, and judgment of condemnation be had, it relates back to the time of the attachment, in the same manner as a *fieri facias* lodged in the *hands of the sheriff, under [***294** the statute of frauds. (Laws of South Carolina, p. 188, § 3 and 8.) But the 31st section of the bankrupt law of the United States (vol. 5, p. 67), destroys all liens created by prior attachments. We admit that the bankrupt laws of England have no such effect in this country.

The case of the *United States* v. *Fisher* establishes the right of the United States to priority of payment. But the United States may waive their right by coming in as a creditor under the bankrupt law. They stand on the same ground with the attaching creditor at St. Kitts in the case from Douglass. If he had afterwards proved under the commission, it would have been a waiver of his priority under his attachment. So if a mortgage creditor would prove under the commission, he must relinquish his mortgage.

The United States have proved their debt under the commission, and voted in the choice of assignees. If in such a case an individual would be excluded, so will the United States, unless they can show that the agent had no authority. It is stated to have been done by the attorney of the United States for the district, who is the proper officer to prosecute for, and recover the debts due to, the United States, in the manner most for the interest of the United States, according to the best of his judgment. The United States are bound even by his mistakes.

The United States have elected to prove under the commission, and are bound by that election.

The commissioners of bankrupt cannot distribute but as the bankrupt law directs. They cannot pay the United States more than their dividend *pro rata*.

The debt from Bird, Savage & Bird was contracted in England, where they were bankers

for the United States. Can the United States claim a preference against British subjects resident in England? Can they claim it in this country, under the commission here against British subjects?

295*] *As to the claim of Harrison. The instrument of January 31, 1803, is not sufficient to transfer even the property of Robert Bird. It could not assign the joint effects, because that was an act which he had no right to do. He had no right to use the name of the firm for that purpose. It does not transfer his own individual right, because it purports to transfer the joint estate in the joint name.

It is an act attempted to be done by the firm. One member of a firm may sell the goods and give a good receipt, because they are acts necessary in the regular course of business. But how far does this power extend? We must look, for an answer, into the law of merchants. It extends to the drawing and accepting bills, making notes, bills of parcels, receipts, bargain and sale of chattels in the course of the trade; but not to the assignment of the property of the firm for the purpose of obtaining more credits, because this is not necessary in the usual course of their business. It is an extraordinary act in which all the members must concur. It is a case not foreseen, nor contemplated, and therefore not provided for, by the law merchant.

In England a copartner cannot bind the firm by a bond: not because there is any magic in a seal, but because it is not necessary in the regular course of business. So with regard to real estate; one partner alone cannot convey. A secret assignment of property is not a regular mercantile transaction; and if one partner were permitted to make it, it might be the instrument of deception, if not of legal fraud.

But such an assignment is void by the bankrupt law. It is a conveyance, on the eve of bankruptcy, to give a preference to a particular class of creditors. It does not appear by the record that this assignment to Harrison was not of the whole estate of the bankrupts, at least the whole in this country.

It cannot operate as the deed of Robert Bird, **296***] *because not executed in his own name, and as his deed. It cannot convey the joint interest of Bird, Savage & Bird, because, not executed in the name of the firm. And if it could, it is void under the bankrupt law.

As to the attaching creditors; the attachment, under the laws of South Carolina, did not change the property. It only gave a specific lien; but if it did change the property, still it is overruled by the express words of the 31st section of the bankrupt law.

The British creditors cannot give a priority by attachment in this country. They must come in under the British commission of bankruptcy; for they as well as the bankrupts were subject to the British bankrupt laws. They were bound by the assignment in England, and must claim under it, if they can claim at all.

P. B. Key, for Harrison.

The assignment to Harrison is legal and valid. It was at least competent to convey Robert Bird's interest.

The instrument of January 31, 1803, was not an act of bankruptcy in itself. It was more than six months prior to the issuing of the commission. It was a disposition of the property for a valuable consideration, not in payment of antecedent debts, but to raise new funds for the benefit of all the other creditors. This was not an unjust preference. It was equivalent to an absolute sale. Robert Bird had the full control over the debts due to the firm in this country. He could release, or assign and transfer, or sell, and, *a fortiori*, he could mortgage or pledge them. These creditors have peculiar merit. They advanced funds upon the credit of this property. The other creditors did not. The funds raised upon this property have been applied for the benefit of the general estate which has suffered no diminution by this exchange of property. *If the other cred-[**297** itors succeed in destroying this assignment to Harrison, they will have a double share, while these creditors will get nothing.

The priority claimed by the United States did not attach until the bankruptcy. The commission issued on the 5th of December, and the act of bankruptcy upon which it issued, must have been committed within six months, next preceding, viz., after the 5th of June. But this assignment was long antecedent to that day. That the priority takes place when the event of insolvency happens, is to be inferred from the opinion of this court in the case of *The United States* v. *Fisher* (2 Cranch, 385, 395).

Rodney, Attorney General for the United States.

The assignment to Harrison was made in contemplation of bankruptcy, and therefore void. It was made on the 31st of January, and on the 6th of February the commission issued in London. The situation of the house must be presumed to be known to all the partners. (Peake's Cas., 200; Burr., 830.) It was not made to secure previous debts; no sum is mentioned; the debts were unascertained. The possession was not delivered, nor even an assignment of the bill of lading.

If it was made to defeat the bankrupt law, or even to secure a creditor, it is void. (Burr., 467, 474; Cowp., 117, 122.) It is not necessary that it should have been of all the estate. An assignment even of one-third is fraudulent. (Cowp., 632; 3 Wils., 47; 4 Burr., 2239.)

The assignees under a separate commission cannot recover the joint effects in their own name, but they may use the joint name. (1 Johns., 123). An assignment under a joint commission transfers the joint and separate property. (2 P. Wms., 500, *Cox's note, ex parte Cooke.*)

Harper*. A joint commission may [298** issue if all the partners be within the jurisdiction; but on a separate commission, nothing of the joint funds passes but the right of the bankrupt in them. (Cowp., 445, 449; 7 Bac. Abr. tit. Merchant, 12 Mod., 446; 1 Ves., 242.)

March 15. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

The object of this suit is to obtain the direction of the court, for the distribution of certain funds in South Carolina, which were the property of a company trading in England, under the firm of Bird, Savage & Bird, and in America, under the firm of Robert Bird & Co. The United States claim a preference to all other creditors, and their claim will be first considered.

Two points have been suggested, as taking this case out of the operation of the preceding

decisions of the court respecting the priority to which the United States are entitled.

1. That the contract was made with foreigners, in a foreign country.

2. That the United States have waived their privilege, by proving their debt under the commission of bankruptcy.

1. The words of the act, which entitle the United States to a preference, do not restrain that privilege to contracts made within the United States, or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle. The law of the place where a contract is made is, generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the con- [*299 tract *itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made. In this country, and in its courts, in a contest respecting property lying in this country, the United States are not deprived of that priority which the laws give them, by the circumstance that the contract was made in a foreign country, with a person resident abroad.

2. Nor is this priority waived by proving the debt before the commissioners of the bankrupt.

The 62d section of the bankrupt act expressly declares, that "nothing contained in that law shall, in any manner, affect the right of preference to prior satisfaction of debts due to the United States, as secured by any law heretofore passed."

There is nothing in the act which restrains the United States from proving their debt under the commission, and the 62d section controls, so far as respects the United States, the operation of those clauses in the law which direct the assignees to distribute the funds of the bankrupt equally among all those creditors who prove their debts under the commission. Omit this section, and the argument of the counsel for the general creditors would be perfectly correct. The coming in as a creditor under the commission might then be considered as electing to be classed with other creditors. But the operation of this saving clause is not confined to cases in which the United States decline to prove their debt under the commission. It is universal. It introduces, then, an exception from the general rule laid down in [*300 the 29th and 30th sections of the *act, and leaves to the United States that right, to full satisfaction of their debts to the exclusion of other creditors, to which they would be entitled, had they not proved their debt, under the commission.

The priority of the United States is to be maintained in this case, unless some of the creditors can show a title to the property anterior to the time when this priority attaches.

The assignment made to Richard Harrison is, it is contended, such a title.

To this assignment several objections have been made.

1. It is said that Robert Bird was not authorized to make it, because it is not a transaction within the usual course of trade. But this court is of opinion that it is such a transaction. The whole commercial business of the company in the United States was necessarily committed to Robert Bird, the only partner residing in this country. He had the command of their funds in America, and could collect or transfer the debts due to them. The assignment under consideration is an act of this character, and is within the power usually exercised by a managing partner. In such a transaction he had a right to sign the name of both firms, and his act is the act of all the partners.

2. It is the assignment of a chose in action; and is, therefore, to be considered rather as a contract than an actual transfer, and could be of no validity against the several claimants in this case.

The authorities cited at bar, especially those from 1 Atk., and Williams's Law Cases, are conclusive on this point, to prove that equity will support an equitable assignment.

3. But a third exception has been taken to this instrument, which the court deems a substantial one. *It is made under cir- [*301 cumstances which expose it to the charge of being a fraud on the bankrupt laws.

Considered as the act of Bird, Savage & Bird, it is dated but a few days before their bankruptcy; and considered as the act of Robert Bird & Co., it is but a short time before they stopped payment, and is made at a time when there is much reason to believe, from the face of the deed, as well as from extrinsic circumstances, that such an event was in contemplation.

Money actually advanced upon the credit of this assignment, subsequent to its date, might perhaps be secured by it; but there is no evidence that any money was actually advanced upon it, and the face of the instrument itself would not encourage such an opinion. It might be caught at by those who were already creditors, but holds forth no inducements to become creditors. It was impossible for any person viewing it to judge of the sufficiency of the fund, or of the pre-existing liens on it.

This assignment, therefore, under all its circumstances, many of which are not here recited, is no bar to the claim of the United States, or of the attaching creditors.

This being the case, there exists no obstacle to the priority claimed by the United States, and their debt is to be first satisfied out of the fund to be distributed by the court.

2. The attaching creditors are next in order.

By the bankrupt law of the United States, their priority, as to the funds of the bankrupt, is lost. They can only claim a dividend with other creditors. So far, then, as the effects attached are the effects of the bankrupt, their lien is removed by the bankruptcy.

Robert Bird alone has become a bankrupt under *the laws of the United States. [*302 Consequently, only his private property and his interest in the funds of the company pass to his assignees. This interest is subject to the

claim of his copartners, and if, upon a settlement of accounts, Robert Bird should appear to be the creditor or the debtor of the company, his interest would be proportionably enlarged or diminished. But he is not alleged to be either a creditor or a debtor; and of consequence, the court consider his interest as being one undivided third of the fund. This third goes to the assignees.

As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two-thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments.

The court thinks it equitable to order that those creditors who claim under the deed of the 31st of January, 1803, and who have not proved their debts under the commission of bankruptcy, should be now admitted to the same dividend out of the estate of the bankrupt as they would have received if, instead of relying on the deed, they had proved their debts. The assignees, therefore, take this fund subject to that equitable claim, and in making the dividend, those creditors are to receive, in the first instance, so much as will place them on an equal footing with the creditors who have proved their debts under the commission.

With respect to any surplus which may remain of the two-thirds, after satisfying the United States, and the attaching creditors, it ought to be divided equally among all the creditors, so as to place them on an equal footing with each other. The dividends paid by the British assignees, and those made by the American assignees, being taken into consideration, this residuum is to be so divided between them as to produce equality between the respective creditors.

S. C. Bee. 244.
Distinguished—8 Bank. Reg. 200.
Cited—4 Cranch C. C. 35, 37; 4 Wheat. 120 (n); 12 Id. 361, 362; 5 Pet. 576; 5 Pet. 523; 1 Pet. C. C. 198; 1 How. 280; 17 How. 337; 6 How. 330; 4 How. 278; 22 Wall. 406; 16 Wall. 627; 1 Biss. 132; 3 Biss. 512; 11 Bank. Reg. 504; 9 Bank. Reg. 261; 1 Id. 99; 10 Id. 515; 13 Id. 41; 14 Id. 68; 1 Bald. 301; 1 Curt. 172; 1 Ware 237; 3 Wood. 186; 2 Wood. & M. 465, 467; 1 Id. 137; 2 Id. 466; 1 Wood. & M. 131; 2 Id. 454; 1 Gall. 429; 1 McLean 316; 1 Brock. 65; 2 Otto. 622.

303*] *BROWNE AND OTHERS *v.* STRODE.

The courts of the United States have jurisdiction in a case between citizens of the same state, if the plaintiffs are only nominal plaintiffs for the use of an alien.

THIS was a case certified from the Circuit Court for the District of Virginia, the judges of that court being divided in opinion upon the question whether they had jurisdiction of the case.

It was an action on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia. The object of the suit was to recover a debt due from the testator in his life-time to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs were the justices of the peace for the county of Stafford, and were all citizens of Virginia.

The question being submitted without argument,

The Court ordered it to be certified, as their opinion, that the court below has jurisdiction in the case.

Distinguished—14 Pet. 300; 2 How. 24, 26; 20 Wall. 123.
Cited—14 Pet. 298; 2 How. 15; Id. 24, 27; 2 How. 14; 17 Id. 499; 18 Id. 469; 11 Wall. 176, 177; 13 Wall. 67; 2 Brock. 523; 1 Abb. U. S. 372; 1 Dill. 294; 4 Mason 438; 1 Paine 412; 2 Id. 419; Wood. & M. 233; 2 Wood. & M. 233; Hemp. 545.; 11 Otto, 589.

HODGSON AND THOMPSON *v.* BOWERBANK AND OTHERS.

Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the United States. Otherwise the courts of the United States have not jurisdiction in the case.

ERROR to the Circuit Court for the District of Maryland. The defendants below were described in the record as "late of the District of Maryland, merchants," but were not stated to be citizens of the state of Maryland. The plaintiffs were described as "aliens and subjects of the king of the united kingdom of Great Britain and Ireland."

Martin contended, that the courts of the United *States had not jurisdiction, it [*304 not being stated that the defendants were citizens of any state.

C. Lee, contra. The judiciary act gives jurisdiction to the circuit courts in all suits in which an alien is a party. (Laws U. S., vol. 1, p. 55, § 11.)

MARSHALL, *Ch. J.* Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution.

(The words of the constitution were found to be "between a state, or the citizens thereof, and foreign states, citizens, or subjects.")

The court said the objection was fatal.

The record was afterwards amended by consent.

Cited—2 How. 22; 16 How. 340; 18 How. 467; Hemp. 424; 1 Sawy. 156; 1 Abb. U. S. 579.

KEENE *v.* THE UNITED STATES.

The trial of seizures under the act of the 18th February, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," is to be in the judicial district in which the seizure was made; without regard to the district where the forfeiture accrued.

ERROR to the Circuit Court of the District of Columbia, in a case of seizure of certain merchandise, being part of the cargo of the schooner Sea Flower, Matthew Keene, claimant, imported from the Havanna, in the island of Cuba, into the port of Vienna, in the District of Maryland, the vessel having sailed on a foreign voyage under a coasting license. The goods having been landed at Vienna, were

transported to Alexandria, in the District of Columbia, where they were seized by the collector of that port, and libeled and condemned in the District Court of that district, whose sentence was affirmed by the Circuit Court.

Swann and *Martin*, for the plaintiff in error, contended,

That there was no law which authorized the **305***] seizure, *or the trial and condemnation out of the district into which the goods had been first imported.

The goods were condemned under the 8th section of the act of Congress, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," passed February 18, 1793, (vol. 2, p. 174), which enacts, "that if any ship or vessel, enrolled or licensed as aforesaid, shall proceed on a foreign voyage without first giving up her enrollment and license to the collector of the district comprehending the port from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel and furniture, and the goods, wares and merchandise so imported therein, shall be liable to seizure and forfeiture."

By this act the forfeiture arises upon importation. The importation was complete at Vienna, in the District of Maryland, where only the trial can be lawfully had.

By the 35th section of the act, it is enacted, "that all penalties and forfeitures which shall be incurred by virtue and force of this act, shall and may be sued for, prosecuted and recovered in like manner as penalties and forfeitures incurred by virtue of the act entitled 'An act to regulate the collection of the duties imposed by law on goods, wares and merchandise, imported into the United States, and on the tonnage of ships or vessels,' may be sued for, prosecuted and recovered, and shall be appropriated in like manner."

There is no act in the statute book with such a title. The only act then in force regulating the collection of duties on goods imported, and on tonnage, was the act of August 4, 1790, entitled "An act to provide more effectually for the collection of the duties imposed by law on **306***] goods, wares and merchandise, *imported into the United States, and on the tonnage of ships or vessels."

By the 67th section of this act, it is enacted, "that all penalties accruing by any breach of this act shall be sued for, with costs of suit, in the name of the United States of America, in any court proper to try the same, and the trial of any fact which may be put in issue, shall be within the judicial district in which any such penalty shall have accrued; and the collector, within whose district the seizure shall be made, is hereby authorized and directed to cause suits for the same to be commenced and prosecuted to effect, and to receive, distribute and pay the sum or sums recovered, after first deducting all necessary costs and charges, according to law. And that all ships or vessels, goods, wares or merchandise, which shall become forfeited by virtue of this act, shall be seized, libeled and prosecuted as aforesaid in the proper court having cognizance thereof," &c.

Here the words "as aforesaid" refer to the trial of the fact in the judicial district where the forfeiture was incurred.

This provision is also analogous to that contained in the 8th amendment of the constitution of the United States, which provides for the trial of all offenses in the state and district where they were committed.

The property could not lawfully be seized out of the district of Vienna, unless by the collector of that port. But if the collector of Alexandria had a right to seize it, he ought to have sent it back to the District of Maryland for trial.

Congress need not have recited the title of the act to which they intended to refer, but having undertaken to do so, and not having recited it truly, it is as if no mode of trial had been provided; so *that there is no court compe- [***307** tent to condemn the property.

Rodney, Attorney General of the United States, contra.

The act referred to in the 35th section of the act of the 18th of February, 1793, is the act of the 31st of July, 1789, entitled "An act to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States." This act is not in the common edition of the laws, having been repealed by the act of the 4th August, 1790; but it is found in Oswald's edit. of the Laws, (vol. 1, p. 25.)

The title contains precisely the same words with the title recited in the 35th section of the act of the 18th of February, 1793. They are a little transposed, but the sense is the same. Whereas the title of the act of the 4th August, 1790, varies very essentially from the title recited. It is "An act to provide more effectually for the collection of the duties," &c.

It is no objection that the act of the 31st of July, 1789, was repealed before the act of the 18th of February, 1793, was passed. It remained in the statute book, and answered every purpose of reference as to the mode of recovering forfeitures, as well as if it had remained in force as a law respecting the collection of duties. It was referred to merely to prevent the necessity of transcribing its provisions respecting a particular subject.

But even the act of the 4th of August, 1790, section 67, does not require the trial of forfeitures to be in the district where the cause of forfeiture arose. It only declares that in actions for penalties (not in suits for forfeitures), "the trial of any fact which may be put in issue, shall be within the judicial district in which such penalty shall have accrued." But when it speaks of forfeitures, it says the goods, &c., *"shall be seized, libeled and pros- [***308** ecuted as aforesaid, in the proper court having cognizance thereof;" which are precisely the same words with those contained in the 36th section of the act of the 31st of July, 1789.

It was not necessary by the common law that prosecutions on penal laws should be in the counties where the offenses were committed. (3 Inst., 194.) And the stat. of 21 Jac., c. 4, making it necessary in general cases, does not apply to revenue cases. (1 Anst., 220, 221.) In such cases, when the proceedings are *in rem*, the place of seizure always designates the place of trial; and the thing must always be within

the jurisdiction and power of the court where the trial is had, otherwise it can neither enforce a sale after condemnation, nor restore the goods upon a decree of restitution. It is said that the collector of Alexandria ought to have sent the goods back to the District of Maryland, for trial. But at whose risk and expense should they be transported? No provision is made by law for such a case. If he had sent the goods back to Maryland, and upon trial they had been acquitted, would the government take the risk and expense of retransportation to Alexandria? Nothing could be more unreasonable and inconvenient.

But if the act of the 18th of February, 1793, refers neither to the act of July 31, 1789, nor to that of the 4th of August, 1790, there is no mode of prosecution particularly specified in the act of 1793, and the question of jurisdiction must be decided by the judiciary act of September 24, 1789, the 9th section of which enacts that the district courts of the United States shall have exclusive original cognizance of all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on certain waters, or on land, within their respective districts, as well as upon the high seas.

The collector of Alexandria not only had a **309***] *right, but it was made his duty to seize the goods under the 70th section of the collection law of 1799. (Vol. 4, p. 390.) But whether the collector had a right to seize or not, the seizure having been made, it was the duty of the court to take cognizance of it.

March 15. LIVINGSTON, *J.*, delivered the opinion of the court as follows, viz.:

This is a seizure on land, by the collector of the port of Alexandria, for a breach of the act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, passed 18th February, 1793.

The breach alleged is, that a certain schooner called the Sea Flower, duly enrolled and licensed, sailed to a foreign port, without having first given up her enrollment and license, and without being duly registered. That, on her return voyage, there were imported in the said schooner, from the Havanna into the port of Vienna, in the District of Maryland, certain goods, and thence transported to the town of Alexandria, in the District of Columbia, and within the collection district of Alexandria. The goods were condemned by the Circuit Court, and the only error relied on is, that there is no law authorizing a condemnation in a district different from that in which the forfeiture accrued.

The 35th section of the act under which the seizure was made, declares that all penalties, incurred thereby, shall be sued for in the same manner as penalties incurred by virtue of an act entitled "An act to regulate the collection of the duties imposed by law on goods, wares and merchandises imported into the United States, and on the tonnage of ships or vessels."

On examining the different acts of Congress on this subject, there is none whose title exactly corresponds with the reference here made. It **310***] is contended *by the counsel for the United States, that the act here intended, although it does not bear, in terms, the same title, is the one regulating duties, which passed the 31st of July, 1789, and that this does not render it necessary that the trial should be within the district where the forfeiture accrued; while the plaintiff insists that, as this act had been repealed several years prior to the passing of the law under which this seizure was made, it is more probable that a reference was intended to another act, on the same subject, of the 4th of August, 1790, which requires that the trial of any fact which may be put in issue shall be within the judicial district in which any penalty shall have accrued. It is not improbable that this was the law intended; but as the title of neither corresponds with the one given in this act, the court thinks that the proceedings on forfeitures accruing under it, may well be governed by the 9th section of the act to establish the judicial courts of the United States, which confers, on the district courts, jurisdiction of all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective districts; and also of all seizures on land, or other waters, than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States. It is a fair construction of this section, taking the whole together, that nothing more is necessary to give jurisdiction in cases of this nature, than that the seizure should be within the district, without any regard to the place where the forfeiture accrued. It would, in many cases, be attended with much delay and injury, without any one advantage, were it necessary to send property for trial to a distant district, merely because the forfeiture had been incurred there. The court feels no disposition to impose these inconveniences on either of the parties, unless where it be positively directed by an act of Congress. There being no provision of that kind in the law under which this forfeiture accrued, the court cannot perceive any error in the proceedings below; and *therefore orders that [*311 the judgment of the Circuit Court be affirmed with costs.

Cited—1 Abb. U. S. 578; 1 Sawy. 155; 2 Cliff. 69; 3 Sum. 284.

THE UNITED STATES *v.* RIDDLE.

The law punishes the attempt, not the intention, to defraud the revenue by false invoices.

A doubt concerning the construction of a law may be good ground for seizure, and authorize a certificate of probable cause.

ERROR to the Circuit Court of the District of Columbia, which had affirmed the sentence of the District Court restoring certain cases of merchandise which had been seized by the collector of Alexandria, under the 66th section of the collection law of 1799 (vol. 4, p. 388), because the goods were not "invoiced according to the actual cost thereof, at the place of exportation," with design to evade part of the duties.

The goods were consigned by a merchant of Liverpool, in England, to Mr. Riddle, at Alex-

andria, for sale, accompanied by two invoices; one charging them at 67*l.* 5*s.* 6*d.* the other at 132*l.* 14*s.* 9*d.*, with directions to enter them by the small invoice, and sell them by the larger. Mr. Riddle delivered both invoices and all the letters and papers to the collector, and offered to enter the goods in such manner as he should direct. The collector informed him that he must enter them by the larger invoice, which he did. But the collector seized them as forfeited under the 66th section of the collection law of 1799, which enacts, "that if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods," &c., "shall be forfeited." The same section contains a provision for the appraisement of the goods by two merchants in case the collecter shall suspect that the goods are not invoiced at a sum equal to that at which they have been usually sold in the place from whence they were imported, **312***] with a proviso *that such appraisement should not, upon the trial, be conclusive evidence of the actual and real cost of the said goods at the place of exportation.

Rodney, Attorney General for the United States, contended, that as the goods were invoiced lower than their actual cost, with intent to defraud the revenue, they were not invoiced according to their actual cost with the like intent, and the goods having been actually entered, although not by the fraudulent invoice, they were within the letter of the law, and ought to be condemned. Besides, it does not appear that the higher invoice was according to the actual cost.

Swann, contra.

The lower invoice was probably what the goods cost the consignor, who manufactured them. The higher invoice was what such goods were then selling for at that place.

But even if a fraud was contemplated, it was not carried into effect. No entry was made, nor attempted to be made by the consignee, upon the false invoice. It was made upon the true invoice, and in conformity with the directions of the collector.

In this case we hope there will be no certificate of probable cause. The conduct of the consignee has been fair and honorable in every respect. A doubt concerning the construction of a law is not "a reasonable cause of seizure."

MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The court thinks this case too plain to admit of argument, or to require deliberation. It is not within even the letter of the law, and it is certainly not within its spirit. The law did not intend to punish the intention, but the attempt to defraud the revenue.

313*] *But as the construction of the law was liable to some question, the court will suffer the certificate of probable cause to remain as it is. A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact.

Sentence affirmed.

Cited—17 Wheat. 92; 7 Otto, 646.

HIMELY *v.* ROSE.

It is not necessary to take exceptions to the report of auditors, if the errors appear upon the face of the report. If the property, ordered to be restored, be sold, interest is not to be paid.

THIS was an appeal from so much of the final sentence of the Circuit Court for the District of South Carolina, rendered upon the mandate from this court issued upon the reversal of the former sentence of that court (see ante, vol. 4, p. 292), as affirmed the report of auditors appointed by the court "to inquire and report whether any, and if any, what deductions are to be allowed for freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States, and also to ascertain and report the interest to be paid by the claimant to the appellant," so far as that report allowed interest to the appellant, and disallowed the expense of insurance to the claimant.

This court, in reversing the former sentence of the Circuit Court, decreed as follows: that the Sarah and her cargo "ought to be restored to the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States; which equitable deductions the defendants are at liberty to show in the Circuit Court. This court is therefore of opinion, that the sentence of the Circuit Court of South Carolina ought to be reversed, and the cause be remanded to that court in order that a final decree may be made therein conformably to this opinion."

*Upon receiving the mandate from [**314** this court to carry its sentence of reversal into effect, the Circuit Court directed a reference to auditors in the terms above stated; and the auditors reported "that the claimant is not entitled to any insurance, but that he ought to be allowed freight on the cargo at the rate of one cent per pound for such of it as was in bags, and one and a half cent per pound for such of it as was in casks, and also the sum of 500 dollars for expenses incidental to the landing, wharfage, storage, &c., of the cargo, which sums being deducted from the amount of the decree, the claimant must pay the appellant two years' interest on the residue at the rate of seven per cent. per annum."

Martin and *Jones*, for Himely, the appellant.

After the express mandate of this court, directing the allowance of freight and insurance, the court below ought not to have referred it to auditors to say whether anything should be allowed for insurance.

The mandate was silent as to interest; indeed, as the proceeding was *in rem*, and the decree for restitution, interest could not have been given.

LIVINGSTON, *J.* Can this court take notice of these errors in the report, if no exception were taken in the court below?

Martin. There were no particular items to which an exception was necessary. The error appears palpably upon the face of the proceedings. And this court, in the case of *Murray* v. *The Charming Betsy* (ante, vol. 2, p. 124), decided, that exceptions are not necessary if the error appear upon the face of the report itself.

Besides, in an appeal from a sentence of a court of admiralty, the question of fact is opened as well as the question of law.

MARSHALL, *Ch. J.* Nothing is before this court but what is subsequent to the mandate. **315***] **Martin.* The auditors have allowed nothing for the expenses of the cargo at St. Jago de Cuba; Himely was as much entitled to those expenses, under the decree of this court, as to those incurred in this country.

C. Lee, contra.

There were no exceptions to the report in the court below. It was there regularly confirmed by that court, whose decree ought to be affirmed in this, unless the directions of the mandate have been counteracted in one or both the particulars of which the appellant complains.

The mandate left the claim of insurance open to be adjusted in the Circuit Court, and unless insurance was proved to have been actually made, nothing should be allowed on that account.

It is now to be presumed and taken as an admitted fact, that no insurance was made by the appellant.

The interest was properly allowed, unless good reason can be shown in equity why it should not be paid. According to modern usage in commercial controversies, interest is deemed an inseparable incident to the principal debt, the payment whereof is wrongfully delayed. This being the general rule, and the mandate being silent, the allowance of interest is unobjectionable. As the claimant was to have the benefit of equitable deductions, he ought to be subjected to equitable charges. He has had the use of the money, and the other party has lost the interest of it.

The freight and other charges, as well as the value of the cargo, having been amicably arranged by the parties, and there being no appeal as to them, they are not now to be the subject of inquiry or decision.

Upon the question of interest, Mr. Lee cited 3 Dal., 332, *Hills* v. *Ross*, and 4 Dal., 289, *Crawford* v. *Willing and Morris*.

316*] *March, 10. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

A decree having been formerly rendered in this cause, the court is now to determine whether that decree has been executed according to its true intent and meaning.

That decree directed "the cargo of the Sarah to be restored to the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by them in bringing the cargo into the United States."

In carrying this decree into execution, an allowance has been made for freight, and for expenses incurred at the port of importation; but no allowance has been made for expenses at the port of lading, nor for insurance. The appellants, too, were charged with interest on the money into which the cargo had been converted.

No exception having been taken to this report, it is now liable to those exceptions only which appear on its face.

So far as respects freight, and the expenses at the port of entry and delivery, the report must be considered as correct; but in those items of the claim which were disallowed, the error, if it be one, is apparent on the face of the proceedings, and may therefore be corrected.

The court has not considered the appellants as infected by the marine trespass committed by the captors of the Sarah and her cargo. Their operations commence with their purchase at St. Jago de Cuba; and the decree designed, and is thought to have been so expressed as to charge the owners with all the expenses which they would have incurred, had they made the purchase themselves. Had they *done [**317** so, they must have incurred some expenses at the port of lading. Among these is certainly not to be estimated the price of the cargo; but any expense necessarily attendant upon the transaction, such as putting the cargo on board, may properly, under this decree, be charged to the owners.

It is obvious, too, that the owners, or the underwriters, if they represent the owners, had they been the purchasers, must have insured the vessel and cargo from St. Jago de Cuba to the United States, or must themselves have stood insurers; in which latter case, the risk is deemed equal to the insurance. The decree, therefore, formerly rendered by this court, is understood to have entitled the appellants to insurance,

The question of interest is more doubtful; but this court is of opinion that the appellants ought not to be charged with interest.

Restitution of the cargo was awarded. The property having been sold, the money proceeding from the sales is substituted for the specific articles. If this money remains in possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest, or otherwise, as the court shall direct. But it is not supposed that the party, to whom restitution is awarded, receives interest in such case, unless it be decreed by the court. This court did not decree interest; nor would interest have been decreed, in this case, had the particular fact of the sale been brought before them.

The circumstances of the case were such as to restrain the court from inserting in its decree anything which might increase its severity. The loss was heavy; and it fell unavoidably on one of two innocent parties. The court was not inclined to add to its weight, by giving interest in the nature of damages. The allowance of interest, therefore, in the court below is overruled.

The sentence of the Circuit Court is reversed.

*JOHNSON, *J.* When the mandate of [**318** this court was received in the court below, auditors were nominated, by consent, to report what would be the usual mercantile allowance between the parties; and to state an account accordingly. Those auditors reported against the allowance of insurance, and in favor of interest. The supposition that the expense of transportation was not allowed, I am convinced, must be incorrect; for insurance and interest were the subject of the only two exceptions taken to their report. Upon hearing argument on these two exceptions, the court affirmed their report upon both these points, and I have since heard no reason to alter the opinion which I entertained on the argument below.

It is contended that the mandate of this court was peremptory as to the allowance of insurance, and did not sanction the charge of interest.

The words of the mandate so far as relates to these points are the following: "subject to those charges for freight, iusurance, aud other expenses, which would have been incurred by the owners in briuging the cargo iuto the United States; which equitable deductions the defendants are at liberty to show to the Circuit Court," &c. These words imperatively require two things; viz., that the deductions, to be allowed to Himely, should be equitable in their nature, and should be shown to the court. Upou what ground could an allowauce for iusurance have been deemed just or equitable? It could ouly have beeu upou Himely's having actually paid au insurance, which he was at liberty to show, or upon his having himself incurred that risk which would have been covered by iusurance. The fact was admitted that he had not insured, and as to having incurred any risk himself, I caunot understaud in what possible view he could have iucurred a risk, when this court has decided that if the property had been lost, he would have lost nothing. It was uot the property of Himely, it was the property of Rose; had it beeu sunk in the oceau, it would uot have been the loss of **319***] Himely, it would have *been the loss of Rose; there can be no reason, then, why Rose, who ran all the risk, should be adjudged to pay an insurauce to Himely, who incurred no risk: but such is the effect of deducting it from the sum to be paid to Rose. After deciding that the property was not changed, that it still continued in Rose, and was never vested in Himely, I feel confused by the inquiry on what possible grouud the allowance for insurance can be sanctioned.

With regard to interest, the question is not so clear, but the difficulty does uot arise upon the abstract equity of the charge. In equity, iuterest goes with the principal, as the fruit with the tree. Rose is now to be considered as the rightful owuer of the property, and ought to have had the possession and use of it during the existence of this contest. But Himely, having given stipulation bonds, was, by the order of the District Court, admitted to the possession and use of it, added it to his capital, traded upou it, and made such profits and advantages of it as his skill or ingenuity suggested. Rose, in the mean time, was kept out of the use of it, aud lost those emoluments and mercantile advantages which might have resulted from the use of it. It was uot a case in which the property is locked up in a warehouse, or the proceeds thereof deposited in the hands of the register of this court, but a case in which the goods were, in fact, converted into money by the effect of the stipulation bond, and the use of it given to Himely, to the prejudice of Rose: there could, therefore, be no radical objection to the charge, on the ground of equity. Had the maudate issued to restore to the party a flock of sheep, or stock, or bonds bearing interest, it is presumed that it would have been construed to authorize the delivery of their uatural or artificial increase without any express words to carry them. But it is said that the mandate does uot expressly authorize this allowance. This is true; but it must be recollected that the mandate of this court enjoins the allowance of equitable deductions. Now a variety **320***] of deductions *may be, in the abstract, equitable, but may lose that character by its being made to appear that ample compensation has been already made for them. It was in this light that the court below sustained the charge of interest: because having had the usufruct of the property concerning which those charges on his part, which merited the denomination of equitable deductions, were incurred, it appeared to the court in fact that he had been compensated in part for those advances by the use of the money. If this court had not made use of the terms equitable deductions, that court probably would not have thought itself sanctioned in doing what appeared so equitable between the parties.

March 15. *Martin* and *Jones*, for the appellant, moved to open the principal decree; and stated that they were prepared to show that this court had been misinformed as to the law of St. Domingo. That they had further *arrêtes*, or ordinances, of the French government explanatory of that upon which the sentence was founded; and showing that the seizure of the property was the exercise of a belligerent, not of a municipal right.

They contended that while the property remained out of the jurisdiction of the United States, it was lost to the libellants, and that Himely was entitled to a compensation for bringing it within their reach. That he ought to be reimbursed at least what he paid for the property.

C. Lee, contra.

The appeal as to the execution of the mandate gives no right to open the original decree.

No further order was taken in consequence of the motion.

Cited—10 Wheat. 442, 446; 9 Pet. 290; 12 Pet. 492; 3 How. 424, 425; 15 How. 466; 20 How. 481; 17 Wall. 284; 4 Otto, 499; 7 Otto, 362.

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*WELSH [*321
v.
MANDEVILLE AND JAMESSON.

This court will not compel a cause to be heard, unless the citation be served thirty days before the first day of the term.

YOUNGS, for the defendant in error, objected to the hearing of the cause at this term, the citation not having been served thirty days before the first day of the term. The service was on the 12th of January, and the first day of the term was the 6th of February.

E. J. Lee, contra, contended, that it was to be inferred from the case of *Lloyd* v. *Alexander* (ante, vol. 1, p. 365), that if the defendant appears within the thirty days, the court will hear the case; or they will hear the case, after the expiration of the thirty days, even if the party does not appear.

Youngs. The 22d section of the judiciary act (vol. 1, p. 62), requires that the defendant in error should have thirty days' notice by the service of the citation.

The citation is to appear on the first day of the term, consequently thirty days' notice must be by service of the citation thirty days before the first day of the court.

The Court refused to take up the case without consent, although thirty days had then (March 9, when the cause was called for hearing) elapsed since the service of the citation; and observed, that the case of *Lloyd* v. *Alexander* only decided that the court will not take up the case until thirty days have expired since the service of the citation; but it did not decide that the court would then take it up without consent.

Distinguished—5 Pet. 394; Id. 598; 12 Bank. Reg. 395.
Cited—5 Wheat. 283; 6 Pet. 297; 1 Curt. 241. 242; 11 Bank. Reg. 301, 159; Id. 300; 2 Ben. 13; 2 McLean, 236; 3 Wood. & M. 386; 1 Sum. 141, 142.

322*] *RIDDLE & CO.

v.

MANDEVILLE AND JAMESSON.

The indorsee of a promissory note, in Virginia, may recover the amount from a remote indorser, in equity, though not at law.
Equity will make that party immediately liable who is ultimately liable at law.
The remote indorser has the same defense in equity against the remote indorsee as against his immediate indorsee.
The defendant has a right to insist that the other indorsers be made parties.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in a suit in chancery, brought by Riddle & Co. against Mandeville and Jamesson, remote indorsers of a promissory note, dated March 2, 1798, at sixty days, for 1,500 dollars, drawn by Vincent Gray, payable to the defendants or order, and by them indorsed in blank. Upon its face it was declared to be negotiable in the bank of Alexandria. The note so drawn and indorsed was by Gray put into the hands of a broker who passed it to D. W. Scott for flour, which he sold for 1,200 dollars in cash, and paid the money to Gray. Scott passed it, without his own indorsement, to M'Clenachan in the purchase of flour, and M'Clenachan indorsed it to Riddle & Co., the complainants, in payment of a precedent debt; Gray failed to pay the note, and was discharged under the insolvent act of Virginia, upon an execution issued upon a judgment in favor of the complainants upon the same note. The complainants then brought a suit at law against the defendants upon their indorsement, and obtained judgment in the court below, which was reversed in this court, upon the principle that an indorsee cannot maintain a suit at law against a remote indorser of a promissory note. (1 Cranch, 290.) Whereupon the complainants brought the present bill in equity, which was decreed to be dismissed in the court below; that court being of opinion that there was no equity in the bill. From that decree the complainants appealed to this court.

The only facts stated in the bill were, that Gray made the note payable to the order of Mandeville and Jamesson, who put it in circulation. That it was afterwards delivered and transferred, for a valuable consideration, to **323***] M'Clenachan, who, for a *valuable consideration, indorsed and transferred it to the complainants. That Gray failed to pay it, and was discharged from execution under the insolvent act, whereby the complainants were unable to recover from him any part thereof; in consequence of which the defendants became liable in equity to pay the same, but have refused so to do.

Among the interrogatories contained in the bill, it is asked "with what view was the note made and indorsed?" and whether one of the defendants did not, upon inquiry, declare that the note was good, and would be punctually paid?

The defendants pleaded the judgment at law in their favor in a suit brought upon the same note, in bar of the relief in equity.

To this plea the complainants demurred, and the court sustained the demurrer, and ruled the defendants to answer.

The answer states, that the note was indorsed by them for the purpose of being discounted at bank for the use of the collector's office, in which Gray was the chief clerk or deputy, and had the whole management of the business. That the defendants refused to indorse it until Gray promised to deliver to the defendants, as security, their bond to the United States, given for duties, to the amount of 1,168 dollars, which he never did, and they had to pay it. That they never received any value from any person for their indorsement; that they never gave circulation to the note, otherwise than by indorsing it and delivering it to Gray to be discounted at bank, for which purpose only they indorsed it. They deny that they ever made any contract with any person touching the note, and say they have no recollection of any conversation with any person respecting the note before it became due.

The deposition of D. W. Scott stated, that he gave 200 barrels of flour for the note, but before he *concluded the bargain, he [***324** asked Jamesson, one of the defendants, if the note was good, and whether there was any objection to it, and informed him it was offered to him for flour. Jamesson told him it was a good note, and observed that whenever he saw the name of Mandeville and Jamesson on any paper he might be sure it was good. That Scott sold the note to M'Clenachan for 207 barrels of flour, but did not indorse it, and it was expressly agreed that he should not be answerable for it in any event.

The deposition of M'Clenachan stated, that before he would take the note of Scott, he informed Jamesson that he intended to deal for it, and inquired whether it was an accommodation note, or a note given upon a real transaction. Jamesson told him it was a real transaction note, and not an accommodation note, and that it would be punctually paid. The deponent further stated, that the complainants had released to him all claim on account of the note, and of the debt intended to be paid by the note; and that he had also been discharged under the bankrupt act.

These witnesses were objected to by the defendants as interested.

E. J. Lee, for the plaintiffs in error.

1. The court below did right in overruling the plea in bar.

Where, by the principles of law, a party has a right, but the forms of law do not give a remedy, a court of equity will grant relief.

(Mitf., 103.) And in some cases it has a concurrent jurisdiction with the courts of law. (Mitf., 108, 109; 3 Atk., 215; 1 Fonb., 204.)

2. The court below erred in dismissing the bill.

The plaintiffs are entitled to recover in equity against the defeudants. It was the intcn-
325*] tiou of the *defendants to make themselves responsible to any person who should be the holder of the paper. They intended it to be a negotiable instrument. This appears from the note itself, which is expressly made negotiable in the bank of Alexandria, and from the answer of the defendants, who state that they indorsed it for the purpose of being discounted at the bank. Their indorsement was intended to give credit to the uote. If they did not intend to become responsible, they were guilty of a fraud. The complainants, upon the credit of the note, granted iudulgence to M'Clenachan. The defendants were undoubtedly answerable at law to M'Clenachan. That liability was a chose in action which he had a right in equity to assign, although this court has decided that it was uot assignable at law. (1 Atk., 124; 1 Fonb., 201, 204; 1 Term Rep., 622.) In the case of *Violet v. Patton*, at this term, this court has decided that a person who indorses merely to give credit to the note, is liable at law to his immediate indorsee. If the complainants had brought a suit iu the name of M'Clenachan for their use against the defendants, a court of law would have protected the equity of the complainants. (2 Skin., 6, 7; 1 Term Rep., 622; *Winch* v. *Keely*, 4 Term Rep., 341.) And if in such a suit the defendants had a set-off against the complainants, Riddle & Co., a court of law would have allowed it. (2 H. Bla., 1271; *Bottomly* v. *Brooke*, 1 Term Rep., 621.) If a court of law will recognize and protect an equitable assignment, *à fortiori* will a court of equity. In the case of *Harris* v. *Johnston* (ante, vol. *3*, p. 319), this court said that "the holder of a note may incontestably sue a remote indorser in chancery, and compel payment of it."

Youngs, contra, contended,

1. That the plea in bar ought to have been sustained. A judgment at law against a party in an equitable action of *assumpsit*, when all the facts are susceptible of proof at law, is conclusive against the jurisdiction of a court of chancery, if it ever had any. If a court
326*] of chancery and a court of law *have a concurrent jurisdiction, an election to proceed in one concludes the party from going into the other. If a person is under no legal obligation to pay money, a court of chancery cannot compel him. It can only enforce the performance of legal contracts, and where there is no contract at law, a court of chancery cannot make one. As no privity exists at law between the holder and a remote indorser, that privity cannot be created by a court of equity.

2. That the court below was correct in dismissing the bill.

The contract was usurious. A note for 1,500 dollars having only sixty days to run was sold for 1,200 dollars' worth of flour.

There was uo valuable consideration flowing to the defendants; and such a consideration alone can make au indorser liable even to his immediate indorsee.

The liability of the indorser is not a complete chose in action. A chose in action is a right of action. No right of action exists against an indorser of a promissory note, in Virginia, until it is ascertained that the money cannot be recovered from the maker. Until that time it is a mere possibility, which is not the subject of assignment even in equity. The liability of the indorser is not assignable under the statute, and cannot be made so by a court of equity.

In the case of a joint obligatiou by principal and surety, if the surety be discharged at law, he can never be made liable in equity, for his equity is equal to that of the obligee. (2 Wash., 136, *Harrison* v. *Field*.)

The note was indorsed by the defendants to be discounted at bauk. Gray committed a breach of good faith, an act of fraud, in sending it into the market.

*The complaiuauts can only claim as [*327
creditors of M'Clenachan. But they are no longer his creditors, having released him from the debt, according to his own deposition which they have produced.

If it should be compared to a letter of credit, it is a letter of credit to a particular person for a particular purpose. It is not like a general letter of credit.

Swann and *C. Lee*, on the same side.

The suit at law was decided against the complainants on account of a defect of right, not for want of a remedy at law.

The money in the hands of Gray was like any other property in his hands. If it had been a horse which Mandeville and Jamesson had transferred to M'Clenachan, with warranty, and M'Clenachan had sold the horse to the complainants, he could not have transferred to them the warranty of Mandeville aud Jamesson. No case can be found in which a suit in chancery has been maintained against a remote warrantor of personal property.

The complainants demand the whole amount of the note; but in equity they can claim only what they paid for it; and how much that was does not appear. The indorsers must sue each other in succession. No case can be found where a holder has recovered in equity against a remote indorser.

C. Simms, in reply,

In the case of *Violet* and *Patton*, this court has placed the liability of an indorser upon a much more correct principle than that of privity of contract. It was there decided that an indorsement was equivalent to a general letter of credit; if so, it enables anyone to recover upon it who has parted with his property upon the faith of it. If A gives a letter *of [*328
credit to C, and B afterwards also gives a letter of credit to C, A is not discharged from his liability because B is also liable.

What was said by the chief justice in the case of *Harris* v. *Johnston*, cannot be considered as a mere *dictum*, but must be taken to be the delibcrate opinion of the court, for it is the only answer given to a strong argument urged by the counsel for Johnston to show that the outstanding note was no bar to a recovery upon the open account, viz., that the defendaut, being a remote indorser, could never be compelled to pay the note. The answer of the court was: "It is supposed that the holder of a note may

incontestably sue a remote indorser in chancery, and compel payment of it." And during the argument of that case, when this idea was suggested by *Mr. Jones*, the chief justice said: "True; we shall consider that point. I have always been of opinion that in such cases a suit in chancery can be supported; though I do not recollect any case in which the point has been decided." When, therefore, the chief justice afterwards, in delivering the opinion of the court, repeats the same idea in stronger terms, it must be supposed that the point had been well considered, and that he spoke the opinion of the whole court.

March 13. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit is brought by the holder of a promissory note to recover its amount from a remote indorser. In a suit between the same parties, this court had previously determined that the plaintiff was without remedy at law. It is now to be decided whether he is entitled to the aid of a court of equity.

If, as was stated by the counsel for the defendants, the question is, whether a court of chan-
329*] cery *would create contracts into which individuals had never entered, and decree the payment of money from persons who had never undertaken to pay it, the time of this court has been very much misapplied indeed in attending to the laborious discussion of this cause. The court would, at once, have disclaimed such a power, and have terminated so extraordinary a controversy.

But the real questions in the case are understood to be, whether the plaintiffs, as indorsees of a promissory note, have a right, under the laws of Virginia, to receive its amount from the indorser on the insolvency of the maker; whether the defendants, as the original indorsers of the note, are ultimately responsible for it; and whether equity will decree the payment to be immediately made, by the person ultimately responsible, to the person who is actually entitled to receive the money.

This note came to the hands of M'Clenachan, indorsed in blank by Mandeville and Jamesson. M'Clenachan had a right to fill up the indorsement to himself, and he has done so. The law, as understood in Virginia, immediately implied an *assumpsit* from Mandeville and Jamesson to M'Clenachan to pay him the amount of the note, if he should use due diligence, and should be unable to obtain payment from the maker. M'Clenachan indorsed this note to the plaintiffs, and, by so doing, became liable to them in like manner as Mandeville and Jamesson were liable to him.

The maker having proved insolvent, the plaintiffs have a legal right to claim payment from M'Clenachan, and, on making that payment, M'Clenachan would be re-invested with all his original rights in the note, and would be entitled to demand payment from Mandeville and Jamesson.

If there were twenty successive indorsers of a note, this circuitous course might be pursued,
330*] and, *by the time the ultimate indorser was reached, the value of the note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the indorsers into that court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. The creditor has no action at law against the legatees. Yet it has never been understood that the creditor is compelled to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. If the executor and his securities should be insolvent, so that a suit at law must be unproductive, the creditor would have no other remedy than in equity, and his right to the aid of that court could not be questioned.

If doubts of his right to sue in chancery could be entertained while the executor was solvent, none can exist after he had become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may, in a court of equity, be asserted by the creditor, and, as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible.

In the present case, as in that which has been stated, the insolvency of M'Clenachan furnishes strong additional motives for coming into a court of chancery. Mandeville and Jamessou are ultimately bound for this money, but the remedy at law is defeated by the bankruptcy of an intermediate indorser. It is only a court of equity which can afford a remedy.

*This subject may and ought to be [*331
contemplated in still another point of view. It has been repeatedly observed that the action against the indorser is not given by statute. The contract on which the suit is maintained is not expressed, but is implied from the indorsement itself, unexplained and unaccompanied by any additional testimony. Such a contract must, of necessity, conform to the general understanding of the transaction. General opinion certainly attaches credit to a note, the maker of which is doubtful, in proportion to the credit of the indorsers, and two or more good indorsers are deemed superior to one. But if the last indorser alone can be made responsible to the holder, then the preceding names are of no importance, and would add nothing to the credit of the note. But this general opinion is founded on the general understanding of the nature of the contract. The indorser is understood to pass to the indorsee every right founded on the note which he himself possesses. Among these is his right against the prior indorser. This right is founded on an implied contract, which is not, by law, assignable. Yet if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note. No reason is perceived why such an interest should not, as well as an interest in any other chose in action, be transferable in equity. And if it be so transferable, equity will of course afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder as effectually as he could defend himself against his immediate assignee in a suit at law.

The case put, of the sale and delivery of a personal thing, is not thought to be analogous to this. The purchaser of a personal thing does not, at the time of the contract, look beyond the vendor. He does not trace the title. It passes by delivery. But suppose the vendor held it by a bill of sale containing a warranty of title, and should assign that bill to his vendee; is it clear that, on loss of the property for **332***] defect of title, no recourse could *be had to the warrantor of that title? The court is not prepared to answer this question in the affirmative.

It is contended that the indorsee of the note holds it subject to every equity to which it was liable in the hands of the indorser.

If this be admitted, it is not perceived that the admission would, in any manner, affect this case.

It is also contended that the plaintiff can only recover what he actually paid.

Without indicating any opinion on this point, the court considers it as very clear that the indorsement is *prima facie* evidence of having indorsed for full value, and it is incumbent on the defendant to show the real consideration, if it was an inadequate one.

Usury has been stated in the argument, but it is neither alleged in the pleadings nor proved by the testimony.

It is urged that Mandeville and Jamesson are securities who have received no actual value, and that equity will not charge a security who is discharged at law. In support of this argument the case of a joint obligation is cited.

It is true, that, in the case of a joint obligation, the court has refused to set up the bond against the representatives of a security. But, in that case, the law had absolutely discharged them. In this case, Mandeville and Jamesson are not discharged. They are not released from the implied contract created by the indorsement. It is the legal remedy which is obstructed; the right is unimpaired, and the original obligation is in full force.

It is, then, the opinion of this court that, without referring to the depositions to which exceptions have been taken, a right exists in the **333***] holder of a promissory *note, at least where he cannot obtain payment at law, to sue a remote indorser in equity.

Certainly, in such a case, the defendant has a right to insist on the other indorsers being made parties, but he has not done so; and, in this case, the court does not perceive that M'Clenachan is a party so material in the cause that a decree may not properly be made without him.

The decree is reversed, and the defendants directed to pay the amount of the note to the plaintiffs.

The decree of the court was as follows:

This cause came on to be heard on the transcript of the record of the Circuit Court for the county of Alexandria, and was argued by counsel. On consideration whereof, the court is of opinion, that the decree of the said Circuit Court, dismissing the bill of the plaintiffs, is erroneous, and ought to be reversed; and this court doth reverse the same; and this court, proceeding to give such decree as the said Circuit Court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of 1,500 dollars, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due.

S. C. 6 Id., 86; 1 Cranch, C. C. 95.
Cited—2 Pet. 347; 15 Wall. 229; 3 Mason, 129, 131; Id. 313; 4 Id. 36.

DULANY *v.* HODGKIN.

The indorser of a promissory note, who indorses to give credit to the note, and who is counter-secured by property pledged, is not liable upon the note, nor in an action for money had and received, unless the plaintiff show that the maker is insolvent, or that he has brought suit which has proved fruitless. It is not sufficient to show that the maker of the note is out of the reach of the process of the court.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an action of *assumpsit* by the indorsee of a promissory note against his immediate indorser. The note was made by Wellborn, on the first of January, 1806, for 200 dollars, payable to Hodgkin or order 120 days after date, negotiable at the bank of Alexandria. On the *trial, the [***334** plaintiff did not produce any evidence of a suit against the maker, nor evidence of his insolvency, but proved that the maker never was an inhabitant of the District of Columbia, but resided in Albemarle county, in the state of Virginia; whereupon the court, upon the prayer of the defendant, instructed the jury that it was still necessary for the plaintiff to prove, to the satisfaction of the jury, that he had brought suit upon the note against the maker, or that a suit against him would have been fruitless, before he could resort to the indorser. To which instruction the plaintiff excepted.

The plaintiff also excepted to the refusal of the court to instruct the jury that if they should be satisfied by the evidence, that at the time the note was given, it was indorsed by the defendant with a view of giving credit to the maker with the plaintiff, and that it was so understood; and if they should be further satisfied by the evidence, that the maker left in the hands of the defendant funds to pay the note, or otherwise counter-secured him for becoming indorser of the note, the plaintiff is entitled to recover in this action, although the maker should not be proved to have been insolvent before the note became due.

The declaration contained two counts; one upon the note, the other for money had and received.

The case was submitted, without argument, to the court, who, after inspecting the record, on the next day,

Affirmed the judgment, with costs.

Cited—3 How. 515.

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*YEATON *v.* FRY. [***335.**

If the insurance be "against all risks, blockaded ports and Hispaniola excepted," a vessel sailing ignorantly for a blockaded port is covered by the policy.

The exception is not of the port, but of the risk of capture for breaking the blockade.

Copies of the proceedings in the vice-admiralty court of Jamaica are admissible in evidence when certified under the seal of the court by the deputy registrar, who is certified by the judge of the court, who is certified by a notary public.

Depositions, taken under a commission issued at the instance of the defendant, may be read in evidence by the plaintiff, although the plaintiff had not notice of the time and place of taking the same.

A vessel sailing ignorantly to a blockaded port, is not liable to capture under the law of nations.

ERROR to the Circuit Court of the District of Columbia, in an action on the case upon a policy of insurance on the brig Richard, at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk. The following clause was inserted in the body of the policy. "This insurance is declared to be made against all risks, blockaded ports and Hispaniola excepted." And at the foot of the policy was the following memorandum: "Warranted by the assured free from any charge, damage or loss, which may arise in consequence of seizure or detention of the property, for or an account of illicit or prohibited trade."

On the trial of the general issue, four bills of exception were taken in the court below by the plaintiff in error.

1. The first was to the admission in evidence of certain copies of the proceedings and decree of the Vice-Admiralty Court at Jamaica, ordering a sale to pay the salvage of the brig. The copies were authenticated by the following certificates, viz.: "Jamaica, *ss.* I, Adam Dolmage, Esq., deputy of Owsley Rowley, Esq., chief registrar and scribe of the acts, causes and businesses of the court of vice-admiralty within the said island, duly constituted, appointed and sworn, do hereby certify and make known to all whom it doth or may concern, that the several sheets of paper writing hereunto annexed, in number fifteen, and marked or numbered from No. 1 to No. 15, inclusive, do contain a true copy and transcript of certain process and proceedings, had, moved, and prosecuted to interlocutory decree in the said court, in a certain cause therein lately depending, entitled, "Brig Richard, Jacobs, master." In which cause Benjamin Jacobs hath duly **336***] *filed his claim thereto in the said court; and I further certify, that I have carefully compared and examined the same with the originals remaining of record in my office.

"In faith and testimony of the truth whereof, I, the said Adam Dolmage, have hereunto set my hand; and the seal of the said Court of Vice-Admiralty hath been caused to be hereunto affixed in the city of Kingston, in the said island, the seventh day of January, one thousand eight hundred and seven.

"ADM. DOLMAGE,
"*Dep. Reg. Vic. Cur. Adm.*"

"Jamaica, *ss.* I, Henry John Hinchliffe, Esq., judge and commissary of the Court of Vice-Admiralty, in the island of Jamaica, do hereby certify and make known to all whom it may concern, that Adam Dolmage, Esq., who has signed and attested the certificate hereunto annexed, is deputy registrar of the said court of vice-admiralty, and that to all acts and instruments by him signed and attested, in such his capacity, due faith and credit is and ought to be given in judgment, court, and without. In testimony whereof, I have hereunto set my hand, and caused the seal of the court of vice-admiralty aforesaid to be affixed, this sixteenth day of September, 1807.

(Seal.) "HENRY JOHN HINCHLIFFE."

"Jamaica, *ss.* I, Robert Robertson, secretary, and notary public, of this, his majesty's island of Jamaica, duly admitted, allowed and sworn, dwelling in the city of Kingston, in the county of Surrey, and island aforesaid, do hereby certify and make known to all whom these presents may concern, that Henry John Hinchliffe, Esq., by whom the annexed certificate is signed, is judge and commissary of the Court of Vice-Admiralty of the island of Jamaica aforesaid, and that to all acts and instruments in writing by him, the said Henry John Hinchliffe, Esq., attested, due faith and credit is and ought to be given. In testimony whereof, I, the said notary, have hereunto *affixed [***337** my hand and seal of office, at Kingston aforesaid, this fifth day of October, *Anno Domini*, one thousand eight hundred and seven.

(Seal.) "ROB. ROBERTSON,
"*Sec. and N. Pub.*"

It was further testified by competent witnesses, examined upon oath by the court, that the said Henry J. Hinchliffe, in the year 1804, publicly sat as a judge of, and held the Court of Vice-Admiralty in Jamaica, and in that capacity condemned the vessel of one of the witnesses, who, in the island of Jamaica, received from his proctor a copy of the proceedings in the said court in his cause, which copy was authenticated in the same manner as the paper now offered in evidence, and under a similar seal; and that upon producing that copy to the underwriters in Alexandria and in Philadelphia, the loss was paid without delay. That similar papers, purporting to be copies of proceedings in the same Court of Vice-Admiralty in other cases, had been received in this country by other persons, and had been considered by both insurers and insured as authentic papers, and losses had been paid thereon; and that the present paper was shown to the defendant, who did not object to its authentication, but refused to pay the loss for other reasons. But neither of the witnesses had ever seen the judge write, nor the act of affixing the seal of the court to any paper.

2. The second bill of exceptions stated, in substance, that the defendant (the plaintiff in error) prayed the court to instruct the jury, that if at the time the brig Richard sailed from Tobago for Curracoa, the latter island was actually blockaded, and the brig turned away by the blockading force, and afterwards lost, without again attempting to enter Curracoa, and in the prosecution of her voyage to Norfolk, the plaintiff below was not entitled to recover, although no official notification of such blockade was ever published, and although the master of the brig was ignorant of such blockade *until he met with the blockading force. [***338** Which instruction the court refused to give.

3. The third bill of exceptions stated, that the plaintiff below offered to read in evidence certain depositions taken in Tobago, under a commission issued at the instance of the defendant, and the court, being satisfied that the plaintiff's attorney had agreed to receive, and did re-

ceive and transmit to the plaintiff, notice of the time and place of taking such depositions, suffered the plaintiff to read them in evidence to the jury.

4. The fourth bill of exceptions was to the opinion of the court given to the jury at the request of the plaintiff, that if at the time the brig sailed from Tobago for Curracoa the latter island was not a blockaded port by notification of the British government to the American nation, but was blockaded in fact, and if the master was ignorant of such blockade until he was warned off by the blockading force, and being so warned he did not again attempt to enter the blockaded port, but changed his course intending to come directly to Norfolk, and in the prosecution of such voyage to Norfolk was captured by a French crusier, and recaptured by an English vessel, carried into Jamaica, libeled, condemned and sold under a decree of the Vice-Admiralty Court of that island, then such sailing from Tobago for Curracoa, and from thence to Norfolk, was a lawful voyage within the meaning of the contract of insurance, and not within the exception in the policy, and the plaintiff was entitled to recover against the underwriters an indemnity for the loss sustained by such capture, recapture and sale.

Youngs, for the plaintiff in error, contended.

1. That blockaded ports were absolutely excepted from the policy, and, consequently, there was no insurance if the vessel sailed for a blockaded port. The exception amounts to a warranty that the vessel shall not sail for a **339***] blockaded port; and the insured *takes upon himself the chance of the port being blockaded. (Park, 322, 367, *Kenyon* v. *Berthon*.)

2. That the copy of the proceedings of the Court of Vice-Admiralty, at Jamaica, was not sufficiently authenticated to be admitted in evidence. The act of Congress does not designate any mode of authentication of foreign papers, but has left that subject entirely to the state legislatures. As the court below was sitting at Alexandria, it ought to have been governed by the act of assembly of Virginia of December 8, 1792 (Revised Code, 168, fol. ed.), which requires, besides the attestation of a notary public, "a testimonial from the proper officer of the city, county, corporation, or borough where such notary public shall reside, or the great seal of such state, kingdom, province, island, colony, or place beyond sea."

In the case of *Church* v. *Hubbart* (2 Cranch, 238), this court said, that foreign judgments were to be authenticated, either by an exemplification under the great seal, or by a proved copy, or by the certificate of an officer authorized by law, which certificate itself must be properly authenticated. The proper authentication, under the laws of Virginia, is the testimonial mentioned in the act of assembly, or the great seal of the colony or island.

3. With regard to the depositions taken on behalf of the defendant, and which the plaintiff wished to use on the trial, they ought not to have been read for the plaintiff, because they had not been taken in such a manner as to authorize the defendant to use them against the plaintiff.

This court has determined that notice to an attorney at law is not such notice as is required by the act of assembly of Virginia, for taking depositions, and the attorney could not admit, or waive notice but upon record.

E. J. Lee* and *C. Lee*, contra, were [340** stopped by the court as to the first point.

2. As to the copy of the proceedings in the Court of Vice-Admiralty, they took a distinction between the proceedings of municipal courts and courts of the law of nations. The seals of courts of admiralty, in cases under the law of nations, are admitted in evidence without further authentication, because they are courts of the whole civilized world, and every person interested is a party. (1 Rob., 296, *The Maria;* Gilb. Law of Ev., 22, 23.) This was admitted by the counsel on both sides in the case of *Church* v. *Hubbart*, referred to by the opposite counsel.

Besides, these proceedings are authenticated in the manner provided by the 19th article of the British treaty of 1794.

Jones, in reply.

The exception in the policy was not intended merely to exclude the risk of attempting to enter a blockaded port, but excluded all risks if the vessel should sail for a port actually blockaded. The trade with a blockaded port is an illegal trade, and there is an express warranty at the foot of the policy against all losses arising from seizure for or on account of illicit or prohibited trade. The exception, therefore, must have been intended to provide for something else. Can it be contended that if the vessel had sailed for Hispaniola, the underwriters would have been liable for a loss, happening in any manner whatsoever? Yet blockaded ports and Hispaniola are equally excepted, and in the very same words. A voyage to such a port is as much excluded from the policy as a voyage to Hispaniola. The exclusion of particular ports amounts to a warranty that the vessel shall not sail to such ports; and if a warranty be not complied with, the underwriters are not bound, whatever may be the cause of the *non- [**341** compliance, and whether the loss happened in consequence of such non-compliance or not. It is a condition precedent; and an innocent, an ignorant, or a compulsive violation of a warranty, however immaterial, avoids the contract of insurance. (Park, 318, 326, 363, 369; Marshall, 348, 354.)

March 13. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

The material question in this case grows out of an exception in a policy of insurance.

The plaintiff insured a specified sum on the brig Richard, belonging to the defendant, "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk;" and the insurance is declared to be made against "all risks, blockaded ports and Hispaniola excepted."

The Richard sailed from Tobago for Curracoa, which was then blockaded in fact, but the blockade was not known at Tobago when the vessel sailed, nor was it known to the captain until he was warned off by a British ship of war. He then sailed for Norfolk; but on his voyage was captured by a French privateer, by whom the vessel was plundered to a considerable extent, and ordered to St. Domingo for trial.

The question is, whether this risk comes within the exception contained in the policy.

The counsel has considered the exception as a warranty; but the court cannot so consider it. The words are the words of the insurer, not of the insured; and they take a particular risk out of the policy which, but for the exception, would be comprehended in the contract. **342***] *What is that risk?

Policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained.

In that part of the policy on which the present controversy depends, a few words are given, to which others must be subjoined in order to complete the sense, and give a full description of the risk against which the underwriters were unwilling to insure. These words are, "blockaded ports and Hispaniola excepted."

It is reasonable to suppose that a voyage to Hispaniola was not insured. The assured has notice of this, and if he sails for Hispaniola, the voyage is entirely at his own risk. Against the risks of such a voyage, whatever they may be, the underwriters will not insure. It is a specified place, excluded, by consent, from the policy. The perils attending the voyage are understood, whether they arise from the sea, or otherwise, and are all excepted. The motives for making the exception do not appear, nor can they be inferred from the instrument.

The plaintiff in error contends that the same reasoning applies, in its full extent, to the exception of blockaded ports; but the court does not think so.

Hispaniola is excepted absolutely from the policy; but other ports are within the terms of the voyage insured, if they be not blockaded. It is their character, as blockaded ports, which excludes them from the insurance. Their being excepted by this character is thought to justify the opinion, that it is the risk attending this character which produces the exception, and which is the risk excepted. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This **343***] is defined *by public law. Sailing from Tobago for Curracoa, knowing Curracoa to be blockaded, would have incurred this risk, but sailing for that port, without such knowledge, did not incur it.

The underwriter had no objection to a voyage to Curracoa, other than might arise from its being blockaded. The dangers of the blockade, therefore, were the particular dangers which induced the exception, and it seems to the court that the exception ought not to be extended beyond them. If this be correct, the Circuit Court committed no error in refusing to give the opinion which was required by the counsel on this point.

The sentence in this case is sufficiently authenticated to be received as evidence. Being a court acting under the law of nations, its proceedings may be proved according to the mode observed in the present case; and were this doubtful, that doubt would be removed by the circumstance that it is the form stipulated by treaty.

The defendant is not at liberty to except to his own depositions, because he does not produce proof of his having given notice to the plaintiff. The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary, to enable him to use the defendant's deposition.

The fourth bill of exceptions depends on the principles stated by the court, in the first part of this opinion.

There is no error in the judgment of the Circuit Court, and it is affirmed with costs.

Cited—2 Wall. 151; 4 Bank. Reg. 653; Blatchf. Pr. 134, 135; 6 Blatchf. 325; 5 Bank. Reg. 281; 1 Dill. 109, 110; 1 Story, 364, 366, 368; 1 Wood. & M. 226.

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*OWINGS [*344
v.
NORWOOD'S LESSEE.

In an action of ejectment between two citizens of Maryland, for a tract of land in Maryland, if the defendent set up an outstanding title in a British subject which he contends is protected by the treaty, and therefore the title is out of the plaintiff; and the highest state court in Maryland decides against the title thus set up; it is not a case in which a writ of error can lie to the Supreme Court of the United States.

It is not "a case arising under a treaty." The judiciary act must be restrained by the constitution of the United States.

ERROR to the Court of Appeals of Maryland, being the highest court of law and equity in that state, in an action of ejectment brought by the defendant against the plaintiff in error, both parties being citizens of Maryland, for a tract of land in Baltimore county, called "The Discovery," being part of a tract of land called Brown's Adventure, originally patented for 1,000 acres to Thomas Brown, in the year 1695, who conveyed to John Gadsby, who conveyed to Aaron Rawlins in 1703, who mortgaged in fee to Jonathan Scarth, a London merchant, by deed of bargain and sale, in 1706, with a proviso to be void upon payment of 800*l.* sterling, with interest, on the 13th of May, 1709. Scarth and his heirs were always British subjects resident in England, and never were in Maryland; but Scarth was charged with the quit-rents, in the Lord Proprietor's debt-books, up to the time of the revolution. Rawlins, however, by his will, in 1741, devised the land specifically to some of his children, without taking any notice of the mortgage. In 1732, Littleton Waters attached, and obtained judgment of condemnation against the land, for a debt due to him from Scarth, but never took out any execution upon the judgment; and by deed of lease and release assigned all his right in the land to the Baltimore company, under whom the plaintiff in error claims.

In October, 1794, Norwood obtained an escheat warrant to affect the tract called Brown's Adventure, upon suggestion of a defect of heirs of Brown, the original patentee. In June, 1800, he obtained a patent from the state founded upon the proceedings under that warrant, for 520 1-2 acres, being part of Brown's Adventure, with an addition of 26 acres of vacant land, and thereupon brought his action of ejectment against Owings. Upon the trial the original

345*] defendant, *in order to show an existing title out of the plaintiff, contended that the mortgage to Scarth was protected from confiscation by the British treaty of 1794, and was still a security for the money to the representatives of Scarth, who were proved to be still living in England. "But the court were of opinion that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee liable to confiscation: and was vested in the state by virtue of the act of confiscation of October session 1780, (c. 45), and the act of the same session (c. 49), (to appoint commissioners), subject to the right of redemption in the mortgageor and his heirs, and that the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment."

The verdict and judgment of the general court being affirmed in the Court of Appeals of Maryland, and being against the right claimed under the treaty, Owings sued out his writ of error under the provisions of the 25th section of the judiciary act (vol. 1, p. 63), which enacts, that a final judgment in the highest court of a state, in a suit "where is drawn in question the construction of any clause of a treaty, and the decision is against the right claimed under such clause of the treaty, may be re-examined and reversed or affirmed in the Supreme Court of the United States."

Harper, for the plaintiff in error.

The question in this case is, whether Scarth's interest in the land was protected by the treaty of peace with Great Britain. By the fifth article of that treaty "it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." The case of *Higginson and Mein*, decided by this court (ante, vol. 4, p. 415), was, in substance, the same as this. In both, the time of payment had passed before the confiscation; and the legal **346***] estate *was in a British subject. The court in that case decided that the confiscation did not destroy the lien which the British creditor had in the land under the mortgage.

LIVINGSTON, *J.* Could the mortgageor, sixty or seventy years after the time of payment, maintain a bill to redeem?

Harper. The mortgagee never was in possession of the land; the lapse of time, therefore, would rather operate as a bar to foreclosure than redemption.

Ridgely, contra.

By the act of assembly of Maryland, passed at October session, 1780 (c. 45 and c. 49), all the property in that state belonging to British subjects, except debts, was confiscated and vested in the state, without inquest of office, or entry, or any other act to be done. The statute operated a complete change of property and possession.

This was not at that time a debt due to Scarth. Nearly a century had elapsed since the mortgage was forfeited. There was no covenant in the mortgage for payment of the money; no bond taken, or other evidence of a debt. Rawlins never took any measures to redeem, but abandoned the pledge as an absolute sale. It is a general principle in equity that the mortgageor shall not redeem if the mortgagee has been in possession twenty years after forfeiture of the mortgage. It was not necessary for Scarth to file a bill to foreclose; because the right to redeem was barred by his twenty years' possession. If Rawlins could not have redeemed in 1780, the estate was absolute in Scarth, and the confiscation was complete. There is no case in England, or Maryland, where the mortgagor has been permitted to redeem after twenty years, if no interest has been paid, or account kept between the parties. (Pow. on Mort., 152; 3 P. Wms., 287; 2 Atk., 496; 2 Vern., *418; 3 Bac. Abr., 655; 1 [***347** P. Wms., 272; 15 Vin., 467.)

But if Scarth's heirs might avail themselves of the treaty, it is not competent for a third person to set it up. Or if it is, it will not give this court jurisdiction.

Johnson, Attorney General of Maryland, on the same side.

If the judgment below be not against a right claimed under the treaty, if it be not a case arising under the treaty, this court has no jurisdiction.

In this case Owings claims no right under the treaty. Scarth's right, whatever it may be, is not affected by the decision of this case. It is he only who could claim the benefit of the treaty. But he is not a party in the suit. It is, therefore, not a case arising under the treaty.

MARSHALL, *Ch. J.* There are only two points in this case.

1. Whether Scarth had such an interest as was protected by the treaty; and,

2. Whether the present case be a case arising under a treaty within the meaning of the constitution.

This court has no doubt upon either point.

The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due.

The 25th section of the judiciary act must be restrained by the constitution, the words of which are, "all cases arising under treaties." The plaintiff in error does not contend that his right grows out of *the treaty. Whether [***348** it is an obstacle to the plaintiff's recovery is a question exclusively for the decision of the courts of Maryland.

Harper, on the next day, having suggested to the court that he understood the opinion to be that this court had no jurisdiction to revise the decisions of the state courts, in cases where the construction of a treaty was drawn in question incidentally, and where the party himself did not claim title under a treaty, was about to make some further observations on those points, when

MARSHALL, *Ch. J.*, observed, that Mr. Harper had misunderstood the opinion of the court, in that respect. It was not that this court had not jurisdiction if the treaty were drawn in question incidentally.

The reason for inserting that clause in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. The words of the constitution are, "cases arising under treaties." Each treaty stipulates something respecting the citi-

zens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause.

Harper. The opinion is more limited than I apprehended. But in this case the land is claimed as confiscated, and the question is, **349***] whether the plaintiff's *title, by confiscation, is good under the treaty. The defendant has a good title against every body who cannot show a better. He has a right to protect himself, by showing that the plaintiff has no title. In order to do this, he insists that the title of the plaintiff is inconsistent with the treaty. He has a right to set up the treaty in opposition to the confiscating act of Maryland.

Martin, on the same side.

The reason of the clause in the constitution was, that there might be uniformity of decision upon all questions arising upon the construction of the constitution, and laws and treaties of the United States. In every case, the question concerning a treaty must come on incidentally. The intention was, that wherever a state court should decide against a claim, set up under the construction of a treaty, such decision should be examinable in this court.

This was the cotemporaneous exposition given to the constitution by the first Congress, convened under that constitution, and which was composed of a great number of the leading members of the convention by which the constitution was framed; and who must have well known what was the intention of that body in adopting that article.

The right of the plaintiff to recover in this suit, and the right of the defendant to retain the possession as against this plaintiff, depend upon the treaty.

The property having been once granted, the state could not again acquire the title but by escheat or confiscation. The court below decided, that it was not a case of escheat, because the heirs of Scarth were living. Whether the property was confiscated within the meaning of the treaty, is therefore the only remaining question upon the merits of the case. That question, however, is not before this court, until this court shall decide whether they are *competent to consider it in this case. [***350** We consider the judiciary act as a correct exposition of the constitution in this respect, and that this is clearly a case within the provisions of the 25th section of that act.

This argument produced no alteration in the opinion of the court; and the

Writ of error was dismissed.[1]

Cited—7 Wheat. 208 (n); 5 Pet. 257; 10 Pet. 392; 10 How. 323, 327; 11 How. 549; 20 How. 5; 1 Black. 474; 1 Otto 113; 4 Dill. 246.

1. As this cause occupied a considerable portion of the time and talents of the courts and bar of Maryland, and as it decided several important points in that state, it is deemed not improper to give a short abstract of the case as it appears in the bills of exception.

Upon the trial, the defendant Owings took 10 bills of exception.

The 1st bill of exceptions stated that the plaintiffs offered in evidence a patent from the lord proprietor of Maryland to Thomas Brown, dated November 10, 1695, for a tract of land called Brown's Adventure, containing 1,000 acres. Also a patent from the state of Maryland to Edward Norwood, the original plaintiff in this action, dated 25th June, 1800, for a tract of land called "The Discovery," containing 520½ acres, included within the lines of Brown's Adventure. The defendant offered evidence that the heirs of Brown, the original patentee, were still living in Maryland. The defendant offered in evidence a deed from Brown to Gadsby, dated May 2, 1700, on which was an indorsement dated May 4, 1699, purporting to be a receipt for the alienation fine due to the lord proprietor. And the following "Memorandum: That the date of this was originally according to the date of the above receipt, but altered by consent of the provincial court and parties, to bring it within the act of assembly. "W. TAYLARD."

Whereupon the defendant prayed the court to instruct the jury that if they were of opinion that the indorsements were made at the request of Gadsby the grantee, and with his privity and consent, and that the deed with the indorsements was recorded for his benefit, and with his assent, then the indorsements are competent to be read in evidence to support the facts therein contained against the title of Gadsby to the lands in the deed mentioned. But the court was of opinion that the memorandum of Taylard "was not evidence, being an act done by the said W. Taylard without authority, and that the said deed was valid and operative in law to transfer the said land to the said Gadsby."

The 2d bill of exceptions states that, in addition to the above evidence, the plaintiff offered in evidence a deed from Gadsby to Barker, for 130 acres, part of Brown's Adventure, dated 10th of July, 1701. Also a deed from Gadsby to Aaron Rawlins of the residue of Brown's Adventure, dated 2d of October, 1703. Also a deed of mortgage in fee from Rawlins to Jonathan Scarth, dated the 13th of May, 1706. He also offered evidence that Barker and Scarth died before 1795, without heirs. Also an escheat warrant to the plaintiff, dated 28th of October, 1795, and a certificate of re-survey, and a patent thereupon to the plaintiff, dated 25th of June, 1800. The plaintiff also offered evidence, that the lands are truly located on the plats as directed by the plaintiff. The defendant offered evidence that the heirs of Brown were still living in Maryland; that Scarth's heirs are still living in England, and that he and his heirs were always British subjects, and always resided in England.

The court had directed the jury that if the heirs of Scarth were living in England at the passage of the acts of October session, 1780 (c. 45, c. 49, and c. 51), the warrant of escheat which issued to the plaintiff, issued without authority of law, but that a patent which issued on such a warrant came within the provision of the act of November session, 1781 (c. 20, s. 8), whereupon the defendant offered in evidence the valuation of the land so escheated by the plaintiff, and the sum by him paid into the treasury for the said lands on the 24th of December, 1799, and that the sum so paid was only two-thirds of the appraised value of the said lands so escheated, and prayed the direction of the court, that if the jury should be of opinion that the plaintiff had paid only two-thirds of the appraised value, he could not entitle himself to the benefit of the warranty contained in the act of November, 1781 (c. 20, s. 8). "But the court were of opinion, that if the jury should find the facts as stated, the said patent was good, valid and operative in law to pass the said land to the said Edward Norwood and his heirs, and so directed the jury, notwithstanding the said Edward Norwood had not paid more than two-thirds of the appraised value of the said land. The court considering the case of the said Edward Norwood as coming fully within the provision of the 8th sect. of the act of November session 1781, (c. 20), and that the two-thirds of the value of the said land

351*] *MOSS *v.* RIDDLE & CO.

A bond cannot be delivered to one of the obligees as an escrow.

Fraud consists in intention: and that intention is a fact which must be averred in a plea of fraud.

ERROR to the Circuit Court for the District of Columbia, in an action of debt upon the joint bond of Welsh and Moss for the payment of money.

Welsh, who was the principal debtor, not being found in, and not being an inhabitant of, the District of Columbia, the suit abated as to him.

The defendant Moss, in his first plea, after **352***] protesting *that he did not deliver to any person, unconditionally, as his act and deed, the writing in the declaration mentioned, **353***] averred that he signed and *sealed the same, and delivered it to Joseph Riddle, one of the plaintiffs, as an escrow, to be his act and deed, on condition that the same should after-**354***] wards *be signed, sealed and delivered by some other friend of Welsh, which was not done, and so the said writing is void as to him the said Moss.

To this plea the plaintiffs demurred specially; 1st. Because a bond cannot be delivered to the obligee himself as an escrow; 2d. Because the plea does not state by what other friend of Welsh it was to have been executed; 3d. Because it did not state by whom the execution of the bond, by that other friend was to have been procured, leaving it uncertain whether the condition upon which it was to become the deed of Moss was to be performed by him, or by Riddle, or by Welsh; 4. Because the plea is repugnant, inconsistent and informal. The second plea, after protesting as in the first plea, avers, that Riddle came to the defendant and asked him whether Welsh had not applied to him, Moss, to be his security for a debt due to Riddle & Co.; to which Moss replied he had told Welsh he would not be security alone, but would join Welsh and some other friend of his as security for the debt, whereupon Riddle represented that the greatest confidence was placed in Welsh; that *the partnership of Riddle & Co. [***355** was about to be dissolved; that Riddle would take care to keep that paper, if it was executed, in his dividend of the debts; that Welsh and Moss might sign the bond at that time, and some other person might sign it afterwards; that in regard to the debt he would look only to Welsh, and would also give Welsh a credit for goods, when he, Riddle, should open and commence business on his private and individual account. The plea further avers, that Moss being induced by that representation and promise, did sign, seal and deliver the writing, upon condition that some other friend of the said Welsh should also sign, seal and deliver the same, and not otherwise; which was never done. That Riddle did afterwards carry on trade and merchandise, on his own separate and individual account, but never afterwards credited Welsh with any goods or merchandise; "and so the said writing made and executed as

was as much as the said Edward Norwood was liable to pay; to which last opinion, and to so much of the former opinion as declares the said patent to come within the provisions of the act of November, 1781 (c. 20, § 8), the defendant excepted.

The 3d bill of exceptions, in addition to the foregoing evidence, stated, that the defendant offered evidence of a judgment of condemnation of these lands upon an attachment from the provincial court in 1732, for a debt of 397*l.* 9*s.* 6*d.* sterling, due from Scarth to one Littleton Waters. The plaintiff offered in evidence duplicate writs of attachment to other counties issued by Waters for the same debt, upon which sundry sums of money were attached and condemned in the hands of garnishees, amounting altogether to 226*l.* 8*s.* 4*d.* sterling.

To show that the lands attached by Waters was the 386 acres located on the plats as being in the possession of the Baltimore Company, the plaintiff read in evidence the lord proprietor's old rent-roll, stating 870 acres to be in possession of Rawlins, and 130 in the possession of John Barker. And the last rent-roll stating 419 acres to be in possession of Scarth, and 386 in the possession of Charles Carroll & Co.; and the lord proprietor's debt-book for the year 1754 (being the oldest book of that kind remaining), which charges the Baltimore Company with the quit-rents of 386 acres and no more, and Scarth with 419; which charges were continued annually until the Revolution. And the defendant thereupon prayed the opinion of the court, that by virtue of the said judgment and attachment and condemnation by him given in evidence, a legal estate was vested in the said Littleton Waters in the said tract of land called Brown's Adventure. But the court were of opinion, and so directed the jury, that the said Littleton Waters did not acquire a legal estate in the said land by virtue of the said judgment, attachment and condemnation.

The 4th bill of exceptions stated the same facts, and further that the defendant read the act of assembly passed at November session 1797, (c. 119), and prayed the opinion of the court, that by virtue of that act the right of the state was so far vested in the persons possessing the land called Brown's Adventure under the condemnation aforesaid, that the plaintiff could not in virtue of his said warrant, certificate and patent, have any right or title to the said land; or, if any, then no more than the proportion or compensation to which a discoverer of confiscated property is entitled. But the court were of opinion that the right of the plaintiff to Brown's Adventure attached upon his obtaining the warrant of escheat, and that his right was saved and protected by the proviso in the 2d section of the said act of November 1797, (c. 119). And that the grant transferred to him the interest the state had in the land called "The Discovery" from the time of his obtention of his said warrant of escheat.

The 5th bill of exceptions states the same facts, whereupon the defendant prayed the opinion of the court, and their direction to the jury, that if the warrant of escheat which issued in this case, issued without authority of law, then the warranty contained in the act of November, 1781 (c. 20, § 8), did not operate to give title to the plaintiff, and that there can be no relation to a warrant which issues without authority of law, or to a certificate made in pursuance of such warrant.

But the court were of opinion, that the act of 1781 (c. 20, § 8), did secure to the plaintiff the said land so by him escheated on his paying two-thirds of the value of the said land, being what the plaintiff was liable to pay for the same as confiscated British property; and that the grant obtained by the plaintiff did operate to pass the land to him by relation from the date of the said warrant.

The 6th bill of exceptions also stated the same facts, and that the defendant thereupon prayed the court to direct the jury that if the said tract of land called Brown's Adventure belonged to a British subject at the time of passing the act for confiscating British property in the state of Maryland, and if no actual possession had been taken thereof by the said state or its agents, and no sale or disposition made thereof by the state to any person at any time before the treaty between the United States and Great Britain dated the 19th of November, 1794, took effect, the plaintiff could make no title thereto by his said warrant, certificate and patent.

But the court refused to give that direction to the jury, being of opinion that the state of Maryland, by their commissioners, was in possession of all British property within the limits of the said state, under and by virtue of the act of confisca-

aforesaid is void as to him the said Robert Moss."

To this plea the plaintiff also demurred specially, for the causes stated in the first demurrer; and further, because the plea is multifarious, argumentative, and offers to put in issue a number of matters unconnected with the defense set up and immaterial in themselves.

The court below gave judgment for the plaintiffs upon both demurrers.

Before the judgment was entered by the clerk, the defendant below prayed leave to amend his first plea, by striking out the words "delivered to Joseph Riddle, one of the plaintiffs in this cause," and inserting in lieu thereof the words "placed in the hands of Joseph Riddle, one of the plaintiffs in this cause." But the court refused leave to make the amendment. To which refusal the defendant excepted.

Afterwards, and after the court had pronounced judgment in the cause, the defendant moved the court for leave to file an amended **356***] plea, which was in *all respects like the 2d plea, except that it averred that Riddle stated it to be the rule of the plaintiffs to take specialties for their debts if they could be obtained, and that the bond was delivered to Riddle in the absence of the other plaintiff, and except also that the conclusion was as follows: "And so the said defendant saith that the said writing, made and executed as aforesaid, was obtained by deception and fraud, as aforesaid, as to him the said Robert Moss, and, by reason of the said deception, is void as to him the said Robert Moss; and this he is ready to verify." But the court refused to suffer the plea to be filed, being of opinion that it would be bad upon demurrer. To this refusal also the defendant took a bill of exceptions.

C. Lee and *Swann*, for the plaintiff in error.

The plea of escrow was good. An instrument may be delivered to one of the parties as an escrow. *Pawling* v. *United States*, in this court.

It was not delivered to the plaintiffs, but to one of them only. It was not delivered absolutely, but upon condition that it should also be executed by another person also.

The plea of fraud also was good. It is not necessary to aver fraud in a plea. If the facts themselves show fraud, it is sufficient. Anything that avoids the deed may be pleaded; and the conclusion, "and so the said writing is void," is proper and sufficient. It is not necessary to say it is not his deed. (2 Wils., 352, *Collins* v. *Blantern.*)

E. J. Lee and *Jones*, contra.

An instrument cannot be delivered as an escrow to a party who is to derive benefit under the deed. It must always be to a stranger. (Shep. Touch., 55, 56, 57; Hob., 246; 3 Bac. Abr., 320, 694; Esp. N. P., 221.)

The 2d plea is not a plea of fraud. It is an attempt *to set up as a discount or set- [***357** off against a bond, an unliquidated claim for damages for breach of a promise.

The facts stated do not amount to fraud. Fraud consists in the intention, the *quo animo*,

tion, October, 1780, (c. 45), and the act of the same session (c. 49), to appoint commissioners, &c. And that the possession of the said land was in the state of Maryland at the time the plaintiff obtained his escheat warrant; and that no British subject could hold land in the state of Maryland on the 19th of November, 1794, the time when the treaty was entered into between the United States and Great Britain.

The 7th bill of exceptions, in addition to the facts before mentioned, stated, that the defendant offered evidence that the heirs of Rawlins were still living in Maryland. That Rawlins, in the year 1741, made his will and devised Brown's Adventure by name to some of his children. That the heirs of Littleton Waters are still living in Maryland That the Baltimore Company, under whom the defendant claims, have been for fifty years past in the actual possession and use of the whole land called Brown's Adventure, by clearing and cutting the wood off the said land for their iron works, and claiming the said land; and that there has been no actual or mixed possesion of any part of the said land by Scarth, or by any person claiming under him, or by any person claiming adversely to the Baltimore Company. Whereupon the defendant prayed the court to direct the jury, that if they find the facts stated by the defendant to be true, and that no payment of principal or interest due on the said mortgage, or acknowledgement of the said mortgage, was at any time paid, made or done, on or after the 13th of May, 1709, the jury may and ought to presume the said mortgage satisfied before the year 1780, and that the plaintiff is not entitled to recover. But the court were of opinion that the facts stated in the above case will not warrant the jury in presuming the said mortgage was satisfied before the year 1780, and refused to give the direction prayed.

The 8th bill of exception states the same facts, and that the defendant further prayed the court to direct the jury, that if the facts are found true as stated by the defendant, the act of confiscation of October session, 1780, (c. 45 and c. 49), vested no beneficial interest in the state of Maryland, in the lands in the mortgage from Rawlins to Scarth, but that the same, if it vested in the state under the act of confiscation, was liable to the equity of redemption in the heirs of Rawlins the mortgageor, and that by operation of the British treaty, so far as the mortgagee could claim an interest in the said mortgaged lands, the same was saved from confiscation by the said treaty, and, consequently, the lessor of the plaintiff is not entitled to recover.

But the court were of opinion, that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee liable to confiscation, and was vested in the state in virtue of the act of confiscation of October session, 1780, (c. 45), and the act of the same session (c. 49), to appoint commissioners, subject to the right of redemption in the mortgageor and his heirs, and that the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment, and refused to give the direction prayed.

The 9th bill of exceptions, in addition to the same facts, states, that the defendant offered in evidence a lease and release from Littleton Waters to Benjamin Tasker and others, dated June 20 and 21, 1738, of so much of Brown's Adventure as, according to a valuation upon oath returned to the provincial court, would amount to 145*l.* 1*s.* 5*d.* sterling, and thereupon prayed the court to instruct the jury, that if they find the facts as stated by the defendant, the deeds of lease and release from Waters to Tasker and others conveyed a legal title in the lands therein mentioned; and that if a legal title did not pass, then the jury may and ought to presume a title in the said Tasker and others to the whole of an undivided 386 acres of land, being an undivided part of the 870 acres of land mortgaged to Jonathan Scarth, called Brown's Adventure. But the court refused to give the direction prayed.

The 10th bill of exceptions states, that upon the same facts the defendant prayed the court to direct the jury that as to all that part of Brown's Adventure contained in the deed from Waters to Tasker and others, under whom the defendant claims, the patent granted to the plaintiff does not give him a title thereto, or enable him to recover the same, which direction the court refused to give.

which is not averred in the plea; and fraud can never be presumed, especially if it be not averred. (1 Vent., 9, 210; 3 Bac., 320; 1 Fonb.)

March 13. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

It is admitted by the counsel in this case, that a bond cannot be delivered to the obligee as an escrow. But it is contended that where there are several obligees constituting a copartnership, it may be delivered as an escrow to one of the firm. The court, however, is of opinion that a delivery to one is a delivery to all. It can never be necessary to the validity of a bond that all the obligees should be convened together at the delivery.

Upon the other point the counsel for the plaintiff in error has insisted that the plea is sufficient.

But the court thinks it so radically defective as to be bad even upon general demurrer.

There is no allegation of fraud, and the circumstances pleaded do not, in themselves, amount to fraud.

Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable.

Upon what was the plaintiff below to take issue? Upon all the circumstances stated in the plea which are mere inducement, or upon the conclusion that "the bond is void?" If he had traversed the inducement, the issue would **358*]** have been immaterial; *if he had traversed the conclusion, it would have been putting in issue to the jury matter of law.

Judgment affirmed with costs.

C. Lee suggested that there was also an exception to the refusal of the court to allow an amended plea to be filed, after the court had adjudged the pleas bad.

But the Chief Justice said that the court had, in an early part of this term,[1] decided that such refusal was no error for which the judgment could be reversed.

Cited—4 Biss. 285.

BRENT *v.* CHAPMAN.

Five years' adverse possession of a slave in Virginia, gives a good title upon which trespass may be maintained.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an action of trespass brought by Chapman against Brent, marshal of the District of Columbia, for taking in execution, on a *fi. fa.* against the estate of Robert Alexander, deceased, a slave named Ben, who was claimed by Chapman as his property.

The jury found a verdict for the plaintiff, subject to the opinion of the court upon a statement of facts agreed by the parties, which was in substance as follows:

The slave was the property, and in possession of the late Robert Alexander the elder, at the time of his death. His sons, Robert Alexander and Walter S. Alexander, were named executors of his will, but never qualified as such. On the 17th of December, 1803, Walter S. Alexander took out letters of administration with the will annexed. No division was *ever [***359** made, by the order of any court, of the personal estate of the deceased among his representatives; but previous to August, 1800, a parol division of the slaves was made between Robert Alexander the younger, and his brother, Walter S. Alexander, the latter being then under the age of twenty-one years. Robert Alexander the younger being possessed of the slave, and being taken upon an execution for a debt or debts due from himself in his individual character, in August, 1800, took the oath of insolvency under the laws of Virginia, and delivered up to the sheriff of Fairfax county, in that state, the slave as a part of his property included in his schedule. The sheriff sold him at public sale, and the plaintiff, knowing the slave to belong to the estate of the deceased Robert Alexander as aforesaid, became the purchaser for a valuable consideration, and took possession of the slave, and continued possessed of him under the sale and purchase until July, 1806. The plaintiff in the winter usually resided in Maryland, and in the summer in Virginia, on his farm, where he kept the slave, and has never resided in the District of Columbia.

Dunlop & Co. obtained judgment against Robert Alexander the younger, as executor of his father Robert Alexander, and, upon a *fieri facias* issued upon that judgment, the marshal seized and took the slave as part of the estate of the testator Robert Alexander, there being no other property belonging to his estate in the county which could have been levied except what Robert Alexander the younger had sold and disposed of for the purpose of paying his own debts. The agent of the creditors, Dunlop & Co., as well as the marshal, had notice, prior to the sale, that the plaintiff claimed the slave.

Upon this state of the case, the court below rendered judgment for the plaintiff according to the verdict. And the defendant brought his writ of error.

C. Lee, for the plaintiff in error, contended, that, *under the circumstances of this [***360** case, five years' possession did not give a good title to Chapman. The possession was not adverse, for there was no administration upon the estate of Robert Alexander, Sen., consequently no person legally competent to claim the possession. Besides, Chapman knew that the slave belonged to the estate of the testator.

This debt was a legal lien on the slave.

Robert Alexander, Jun., could only transfer his right to the sheriff of Fairfax. The goods of the testator cannot be taken in execution for the debt of the executor. (4 T. R., 625, *Farr* v. *Newman.*) Chapman could therefore only purchase the right of Robert Alexander, Jun., in the slave.

The parol partition was void for the infancy of one of the parties. There was no executor qualified to assent to the legacy. By the law of Virginia, an executor cannot act until he has given bond. (1 Cranch, 259, *Fenwick* v. *Sears;* 3 Cranch, 319, *Ramsay* v. *Dixon.*)

It is very doubtful whether five years' possession of a slave in Virginia is itself a good title for a plaintiff. It may protect the possession of a defendant; and that is the only effect of the statute.

1.—See the case of *Mandeville and Jamesson* v. *Wilson*, at this term, (ante, p. 15).

Swann, contra.

Robert Alexander the younger did not hold the slave as executor of his father's will, but under the legacy.

It is immaterial whether Chapman did or did not know that the slave belonged to the estate of the testator. Five years' possession by Chapman was a good title against all the world.

In England twenty years' possession is a good bar in ejectment, and it is also a good positive title in itself, upon which an ejectment may be maintained.

361*] *MARSHALL, *Ch. J.* Can an executor distribute the estate before he has qualified and obtained letters testamentary?

LIVINGSTON, *J.* In England, an executor, before probate, can do everything but declare.

WASHINGTON, *J.*, mentioned the case of *Burnley* v. *Lambert* (1 Wash., 308), in which it was decided, by the Court of Appeals of Virginia, that, "after the assent of the executor, the legal property is completely vested in the legatee, and cannot be devested by the creditors."

March 13. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

This court is of opinion that the possession of Chapman was a bar to the seizure of the slave by the marshal, under the execution stated in this case. The only objection of any weight was, that there was no administration upon the estate of Robert Alexander, Sen., and, consequently, that the possession of Chapman was not an adverse possession.

But there was an executor competent to assent, and who did assent, to the legacy, and to the partition between the legatees, and who could not afterwards refuse to execute the will.

Judgment affirmed.

Cited—3 Cranch C. C. 249; 10 Wheat. 371; 16 Pet. 301; 9 How. 419; 20 How. 434; 1 Cliff. 433; 13 Nott. & H. 56.

AULD *v.* NORWOOD.

If the owner of a slave permit her to remain in the possession of A for 4 years, and A then without the assent of the owner delivers her to B who keeps her 4 years more, the possession of B cannot be so connected with the possession of A as to make it a fraudulent loan within the act of assembly of Virginia, in regard to B's creditors.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an action of *detinue* for a female slave named Eliza.

362*] Upon the *trial of the general issue in the court below, the plaintiff in error, who was defendant in that court, took a bill of exceptions, which stated that evidence was offered of the following facts: The slave, in November, 1798, was the property of John Dabny, against whom a *fieri facias* was issued at the suit of Norwood, the present defendant in error, upon which the slave was seized and sold by the proper officer; that one Charles Turner bought her for the said Norwood, and held her, as Norwood's property, until November, 1802, when he delivered her, without authority from Norwood, to one R. B. Jamesson, who held her until September, 1806, when he became insolvent under the insolvent act of the District of Columbia, and delivered her, as part of his property, to Auld, the plaintiff in error, who was appointed trustee under that act. This suit was commenced on the 19th of September, 1806.

Whereupon the plaintiff in error prayed the court to instruct the jury that if they found the facts to be as stated, the plaintiff below was not entitled to recover. And if the court should not think proper to give that instruction, that they would instruct the jury that the plaintiff's suffering the slave to remain out of his actual possession for so long a time was fraudulent in law as to the defendant. Which instructions the court refused to give, and the defendant Auld excepted. The verdict and judgment being against him, he brought his writ of error.

Swann, for the plaintiff in error, contended,

That it was to be considered as a loan of the slave to Turner; and that the possession of Jamesson, connected with that of Turner, made a period of more than five years, and, by the statute of frauds and perjuries of Virginia (P. P. 16), such possession transferred the property to the person in possession.

That statute declares that "where any loan of *goods and chattels shall be pre- [***363** tended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of five years, without demand made and pursued by due process of law on the part of the pretended lender," "the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan" "were declared by will, or by deed, in writing proved and recorded as aforesaid."

C. Lee and *E. J. Lee*, contra, contended,

That the possession of Jamesson, which was adverse to Norwood, could not be connected with Turner's possession, which was under Norwood, so as to make the case a fraudulent loan within the statute.

And of that opinion was the court.

Judgment affirmed.

SLACUM *v.* SIMMS AND WISE.

A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia. And the discharge so obtained is not a discharge in due course of law.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

The former judgment of the court below having been reversed in this court at February term, 1806, (ante, vol. 3, p. 300), and remanded for further proceedings, the following statement of facts, in the nature of a special verdict, was agreed upon by the parties.

That the defendants executed the bond in the declaration mentioned. That the defendant Simms, being in custody under the execution mentioned in *the condition of the [***364** bond, afterwards obtained his discharge as an insolvent debtor, by authority of the act of assembly of Virginia, entitled "An act for reducing into one the several acts concerning executions, and for the relief of insolvent debt-

ors." That he was discharged from the prison bounds by warrant from Amos Alexander and Peter Wise, Jun., two of the aldermen or justices of the corporation of Alexandria, before whom Simms delivered in a schedule of his estate, and took the oath of an insolvent debtor in the manner prescribed by the act, and being so discharged, he departed out of prison bounds, and not before, or in any other manner. That the defendant, Peter Wise, Jun., is the same Peter Wise who acted as one of the justices, and who signed the warrant of discharge, and that Simms, before taking the oath, executed a deed conveying all his property, real and personal, to John Wise, and the said Peter Wise, in trust, for the benefit of the creditors of Simms, who, notwithstanding the said deed, afterwards, and after his discharge, exercised acts of ownership over the property. That Peter Wise never acted under the deed of trust. That the deed of trust was made by Simms with a view of preventing the effect of the plaintiff's execution, and was fraudulent in law, but such fraud was without the participation of the said Peter Wise; and without his privity, other than that the said deed was exhibited to the said magistrates, and discussed by counsel before them, at the time the schedule was delivered, and the oath administered.

That no escape warrant was ever applied for in consequence of Simms's departing from the prison bounds.

That if the law be for the plaintiff as to both defendants, or either of them, judgment to be entered for 2,570 dollars and 90 cents, to be discharged by the payment of 1,820 dollars and 20 cents, damages and costs against such defendant or defendants severally; but if the law be for either or both of the defendants, **365***] *then judgment to be entered for such defendant or defendants severally.

The schedule referred to in the statement, was as follows: "I have neither real or personal property, but what has been conveyed by a deed of trust to John Wise and Peter Wise, Jun., for the use of my creditors, as will appear, reference being had to said deed.

(Signed) "JESSE SIMMS.

"August 30th, 1800."

The court below decided the law for both defendants; and the plaintiff sued out his writ of error.

Swann, for the plaintiff in error.

The case now presented is different from what it formerly was. It will now be contended that Simms was not discharged by due course of law.

1. Because Simms was guilty of fraud in effecting his discharge, and Wise knew it; and, by his conduct, contributed to assist him in it. Fraud is a question of law and fact. It is not necessary that it should be expressly averred. It is an inference of law from the facts. (*Russell* v. *Hamilton*, 1 Cranch, 309; 1 Bnrr. 396, 474; 3 Co., 77, 79, *Fenner's case;* Esp. N. P., 245; Buller, 172.)

2. Because Wise was not competent to act as a magistrate in discharging Simms. He was directly interested; for by discharging Simms he discharged himself from the obligation of his bond. An interested person is not competent to act as a judge. (12 Mod., 669, *Wood's* case; Com. Dig. tit. Justices, I, 3.)

The defendant must show all the proceedings to be regular and correct. It is not like the case of a *judgment of a compe- [***366** tent court, which will be affirmed unless the error be apparent on the proceedings.

The proceedings are *in pais*, there can be no writ of error. This is the only mode in which the proceedure can be corrected.

C. Lee and *Jones*, contra.

Fraud is never to be presumed; and it is not found. It was a mere ministerial act, which is not void by reason of interest.

This is not the mode by which the plaintiff can avail himself of the fraud, if it be one. The discharge is *prima facie* good.

It is expressly found that Wise did not participate in the fraud which Simms contemplated by his deed. He never acted under the deed as a trustee. His only knowledge of the fact was in his capacity of magistrate. As a magistrate he had no discretion; he was bound to grant the warrant of discharge upon the debtor's taking the oath, and delivering the schedule.

All the authorities cited in Comyns' Digest confine the incompetence to cases where the judge is a party upon record.

If a legal proceeeding of this kind may be vacated at any subsequent time, by showing a remote collateral interest in the magistrate, there can be no security for property. The distinction is between a direct interest as party, and a consequential interest. If the interest do not appear upon the record, the only remedy is by prohibition. As long as the proceeding remains unreversed by a competent tribunal, it is valid. (Hard., 503. *Brooks* v. *Earl of Rivers*, 12 Co., 114; *Earl of Darby's* case, Dyer, 220, a; *Sir N. Bacon's* case, 1 Leon., 184; Cro. Eliz, 717; *Errish* v. *Reeves*, 8 Co., 118; *Bonham's* case, Co. Litt., 141; 4 Com. Dig. tit. Justices, I. & T.; 1 Salk., 398; 12 Mod., 587; 2 Salk., *425; *Queen* v. *Rodgers*, 2 Salk., 607, [***367** Sty., 137; *Smith* v. *Hancock*, Sty., 209.)

Swann, in reply.

It is immaterial whether it be a ministerial or a judicial act. Sheriffs, witnesses, jurors are all rendered incompetent by interest; and *à fortiori* is a judge.

March 15. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The former case between these parties presented the single circumstance of fraud in Simms, the principal debtor, in which Wise had no share as it was then stated.

The decision in that case does not affect the present. It is here stated that the defendant Wise was one of the magistrates who granted the discharge, and who received a conveyance from Simms of all his estate, &c.

It cannot be doubted that if there had been a combination between the surety of the insolvent and the magistrate to grant the discharge, such surety could never plead that discharge in bar of this action. Such would have been the law if Peter Wise the surety had been a different person from Peter Wise the magistrate. But being the same person, he is clearly incompetent. He is directly interested, and his interest appears upon the record.

But the case is stronger when we consider the irregularity of the schedule of property delivered by Simms at the time of his discharge.

The whole schedule is in these words: "I have neither real or personal property, but what has been conveyed by a deed of trust to **368***] John Wise and Peter *Wise, Jun., for the use of my creditors, as will appear, reference being had to the said deed."

He does not directly affirm that it is, or is not, his property. He might have taken the oath although he knew that the property contained in the deed remained in himself. The schedule, therefore, was not such as the law requires. The transaction is fraudulent upon the face of it.

The discharge, being granted by an incompetent tribunal, is wholly void.

Judgment reversed.

THE UNITED STATES
v.
VOWELL AND M'LEAN.

Duties upon goods imported do not accrue until their arrival at the port of entry.

The duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808.

ERROR to the Circuit Court of the United States, for the District of Columbia, in an action of debt upon a bond given by the defendants in error to the United States, for duties on a cargo of salt from St. Ubes, which arrived and came to anchor within the collection district of Alexandria, sixteen miles below the town and port of Alexandria, on the 23d of December, 1807, but did not arrive at the port of Alexandria until the first of January, 1808.

The collector of Alexandria refused to permit the cargo to be landed until the duties were secured. Vowell contended that the salt was not subject to duty.

The facts being specially pleaded, and admitted in the replication, to which there was a general demurrer, the only question was, whether, as the duty upon salt ceased with the 31st of December, 1807, this cargo, which **369***] arrived within the district, but not *at the port of Alexandria before the 1st of January, 1808, was liable to duty.

The court below was of opinion that it was not, and rendered judgment for the defendants, upon the demurrer.

The United States brought their writ of error.

Jones, for the United States.

The duty attached when the salt was imported into the district, and perhaps, when brought into the United States.

By the act of the 10th of August, 1790 (vol. 1, p. 248), a duty of 12 cents a bushel is laid upon salt which, after the 31st of December then next, should be "brought into the United States, from any foreign port or place." So by the act of the 8th July, 1797 (vol. 4, p. 35), an additional duty of 8 cents is laid upon all salt imported into the United States. By the act of March 3, 1807 (vol. 8, p. 290), it is enacted, "that from and after the 31st day of December next, so much of any act as lays a duty upon imported salt, be and the same is hereby repealed; and from and after the day last aforesaid, salt shall be imported into the United States free of duty: Provided that for the recovery and receipt of such duties as shall have accrued, and on the days aforesaid respectively remain outstanding, and for the recovery and distribution of fines, penalties and forfeitures, and the remission thereof, which shall have been incurred before and on the said days respectively, the provisions of the aforesaid act shall remain in full force and virtue."

The laws of the United States take a distinction between importing and entering, between a port and a place. (Vol 4, p. 317, § 23 and 24.) Goods may be imported before they are entered or delivered. So if goods are brought in and destined to be delivered in different districts or ports, they are to be inserted *in [***370** the manifest in successive order, and the law speaks of them as imported. The forfeiture for want of a manifest does not accrue at the time of entry, but at the time of importing or bringing in. So if goods are brought into the United States, to be exported again to foreign ports, the law speaks of them as imported (vol. 4, p. 331, 332, § 32), although they are not intended to be landed.

In vol. 4, p. 327, § 30, is the following expression: "at any port of the United States established by law, or within any harbor, inlet or creek thereof;" which shows that a port established by law, is coextensive with a collection district.

C. Lee, contra.

Until the vessel arrives at the port of entry, neither the duties on the goods, nor on the tonnage, accrue. Yet they both accrue at the same time.

The question is, what is the fiscal meaning of the word imported?

The first collection law, which was passed on the 4th of July, 1789, (Child's edit. Laws, vol. 1, p. 25,) has the same expression, imported into the United States. Yet it afterwards speaks of the time of importation, where it evidently means the time when a permit is applied for at the proper office. Some rule is necessary by which to fix the time of importation; it ought not to depend upon the question at what time the vessel arrived within the jurisdiction of the United States. The same act, when speaking of the *ad valorem* duties, refers to the time and place of importation, for the purpose of ascertaining the value.

If goods should be lost after arrival within the collection district, but before they reach the port of entry, no duties would accrue upon them. So if they are damaged, the value is to be ascertained not *at their arrival with- [***371** in the district, but at the port of entry.

The second collection law (vol. 1, p. 248, Folwell's edition), does not repeal the first, except so far as it is repugnant thereto, but is explained by it.

The duty on tonnage does not accrue until the arrival at the port of entry.

In the act of May 2, 1792, (vol. 2, p. 68), the duties therein mentioned are to be "laid, levied and collected upon the said article at their importation into the United States."

The acts of Congress take a clear distinction between a district and a port. A district may contain several ports. (Vol. 1, p. 162.)

The case of a vessel detained by ice, is the

only case in which an entry of a vessel within the district can be made before her arrival at the port of entry.

By the collection act, in vol. 1, p. 175, the District of Alexandria is created, and a collector is to reside at Alexandria, which is made the sole port of entry; "and the authority of the officers of the said district shall extend over all the waters, shores, bays, harbors and inlets, on the south side of the river Potomac from the last-mentioned cockpit point to the highest tide water of the said river."

If district meant port, a vessel must enter within 48 hours after arrival within the district, or the vessel and cargo will be liable to forfeiture.

Six months' credit is given for duties from the time of importation. The uniform construction of the treasury has been that this six months begins from the time of entry and permit. In this very case the bond is dated on the 2d of January, 1808, the date of the permit.

372*] *In all cases too where additional duties have been imposed, the construction of the treasury has always been, that the additional duties are to be paid if the vessel arrived at the port after the day fixed by law, although she arrived within the district before that day.

March 15, MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The distinction taken by the counsel for the defendants in error, between a district and a port of entry, is correct. The duties did not accrue in the fiscal sense of the term, until the vessel arrived at the port of entry. If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions. It is understood that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the port of entry before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty.

Judgment affirmed.

Cited—9 Cranch, 120; 12 Wheat. 453; 13 Pet. 494; 9 How. 381; 8 Wall. 120; 1 Abb. U. S. 423 (n); Deady, 126; 1 Gall. 208, 354; Id. 358; Id. 353; 2 Id. 208; 2 Curt. 437; 3 Story, 71; 2 Ware (Dav.), 180; 1 Mason, 499; 3 Cliff. 76.

SLOOP SALLY
v.
THE UNITED STATES.

An appeal from the District Court of the District of Maine, in a case of admiralty jurisdiction, does not lie directly to the Supreme Court of the United States, but to the Circuit Court for the District of Massachusetts.

In all cases where the District of Maine acts as a District Court, the appeal is to the Circuit Court for the District of Massachusetts.

THIS was an appeal from the sentence of the District Court for the District of Maine, condemning the sloop Sally and cargo for violation of the revenue laws of the United States. The appeal was directly to this court.

****Rodney*, Attorney General. [***373**

No appeal lies from that court directly to this in a case where that court acts in the capacity of a district court. In such cases the appeal is expressly given to the Circuit Court for the District of Massachusetts.

By the 10th section of the judiciary act of 1789 (vol. 1, p. 54), it is enacted that the "District Court in Maine district, shall, besides the jurisdiction herein before granted, have jurisdiction of all causes (except of appeals and writs of error) herein after made cognizable in a circuit court, and shall proceed therein, in the same manner as a circuit court; and writs of error shall lie from decisions therein, to the Circuit Court in the District of Massachusetts, in the same manner as from other district courts to their respective circuit courts." And by the 21st section it is enacted, "that from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next Circuit Court to be held in such district. Provided, nevertheless, that all such appeals from final decrees as aforesaid, from the District Court of Maine, shall be made to the Circuit Court, next to be holden after each appeal, in the District of Massachusetts."

By the act of March 3d, 1803, (vol. 6. p. 315, § 2), it is enacted, "that from all final judgments or decrees rendered, or to be rendered in any circuit court, or in any district court acting as a circuit court, in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States," &c.

In this case the court below could only act in its capacity of a district court, because such causes of *admiralty and maritime [***374** jurisdiction are exclusively cognizable in a district court.

C. Lee, contra, contended, that there was a repugnance between the act of 1789, and that of 1803, the latter declaring that appeals in such cases should be directly to the Supreme Court.

But the court was of opinion that this not being a case where the District Court was acting as a circuit court, the appeal ought to have been to the Circuit Court of Massachusetts.

Appeal dismissed.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl.	Atlantic Reporter,	**So.**	Southern Reporter,
Pac.	Pacific Reporter,	**S. E.**	Southeastern Reporter,
N. E.	Northeastern Reporter,	**S. W.**	Southwestern Reporter,
N. W.	Northwestern Reporter,	**S. Ct.**	Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

V CRANCH.

5 Cr. 1, 3 L. 19, UNITED STATES v. WEEKS.

Appeal and error.—Writ of error lies to District Court of Maine from Massachusetts Circuit Court, not the United States Supreme Court, p. 1.

No citations.

5 Cr. 1–11, 3 L. 19, ALEXANDER v. MAYOR, ETC., OF ALEXANDRIA.

Statutes.— Meaning of doubtful phrase in statute may be established by a subsequent clause or statute, p. 7.

Rule applied in United States v. Morton, 65 Fed. 210, 24 U. S. App. 531, adopting the construction sanctioned by a subsequent act, where first statute was ambiguous; Saltonstall v. Birtwell, 66 Fed. 975, 33 U. S. App. 52, construing words "payment under protest" in custom law; Supervisors v. Ehlers, 45 Wis. 295, construing statute providing for liability of official bondsmen; dissenting opinion, Haseltine v. Hewitt, 61 Wis. 139, 20 N. W. 684, majority held second act unconstitutional.

Statutes.— Representation in preamble, that town is laid off in half-acre lots is immaterial, if enacting clause comprehends lots within its limits not so subdivided, p. 9.

Cited in Weatherhead v. Bledsoe, 2 Overt. 355, holding words in statute of limitation not restrained by preamble.

Municipal corporations.— Municipality can tax lots of nonresidents, pp. 7, 8.

Taxes.— Taxes cannot be recovered by motion, unless in case of person holding land, who has no other property in the town, pp. 9, 10.

5 Cr. 11–13, 3 L. 22, HENDERSON v. MOORE.

Payment.— Receipt in full upon part payment is presumptive evidence of payment in full and will support such a plea, pp. 12, 13.

Cited and principle applied in Blanchard v. Noyes, 3 N. H. 519, holding agreement to accept a less sum in satisfaction may be left to the jury as evidence that the rest has been paid; Reid v. Reid, 2

Dev. L. 250, 18 Am. Dec. 572, holding a receipt for specific sum stated to be in full is prima facie evidence of a settlement; Chesnut v. Strong, 1 Hill Eq. 128, holding creditor bound by receipt in full, though it afterwards turn out he was entitled to more; Trimmier v. Thomson, 10 S. C. 190, holding receipt for a smaller sum expressed to be in full is presumed true; Steele v. Atkinson, 14 S. C. 161, 37 Am. Rep. 731, holding such a receipt by sheriff a satisfaction of the execution.

Distinguished in Howe v. Mackey, 5 Pick. 48, holding that to maintain plea of payment one must prove thing received was of full value of debt, or was received as such; Seely v. Spencer, 3 Vt. 335, holding agreement of creditor to discharge several debtors from whom he received part, did not relieve others from liability.

Appeal and error.— Refusal of court below to grant new trial is not error, p. 12.

Principle affirmed and applied in following citing cases: Walden v. Craig, 9 Wheat. 578, 6 L. 164, holding writ of error will not lie to the refusal to grant an amendment to the declaration; Wright v. Hollingsworth, 1 Pet. 169, 7 L. 98, holding allowance of amendment to declaration is not error; Pomeroy v. Bank, 1 Wall. 598, 17 L. 640, holding overruling a motion for a new trial is not proper subject of a bill of exceptions; Ewing v. Howard, 7 Wall. 502. 19 L. 295, and Insurance Co. v. Barton, 13 Wall. 604, 20 L. 709, refusing to consider overruled motion for new trial, or one in arrest of judgment; likewise in Indianapolis R. R. Co. v. Horst, 93 U. S. 301, 23 L. 901; Jones v. Buckell, 104 U. S. 555, 26 L. 841; Edge, etc. v. Fields, 58 Fed. 173, 8 U. S. App. 449; Walton v. Railroad Co., 56 Fed. 1008, 12 U. S. App. 511. Cited in Earnshaw v. United States, 146 U. S. 68, 36 L. 889, 13 S. Ct. 15, holding action of appraisers, not abusing their discretion, is final; Texas, etc., Ry. Co. v. Nelson, 50 Fed. 816; 2 U. S. App. 213 holding application for a continuance rests within the discretion of the Circuit Court without regard to the practice of State courts. Rule followed in White v. Church, 5 Conn. 189. Cited and applied in State v. Hunt, 4 La. Ann. 439, holding no appeal lies from order of judge of the first instance overruling an application for a new trial in a criminal case; State v. Brette, 6 La. Ann. 660, holding Supreme Court can only determine questions of law submitted by bill of exceptions; Dibble v. Rogers, 2 Mich. 407, holding decision granting new trial cannot be reviewed; likewise in Romaine v. Norris, 8 N. J. L. 82, as to refusal to hear motion for nonsuit after regular time; McCourry v. Doremus, 10 N. J. L. 249, as to refusal to continue a cause; Crawford v. Railroad Co., 28 N. J. L. 482, as to amending of pleadings; Coleman v. Bell, 3 N. Mex. 497; S. C., 4 N. Mex. 47, 12 Pac. 658, and Law v. Merrills, 6 Wend. 278, as to motion for new trial; and Richards v. Wheeler, 2 Aikens, 369, as to rejection of a report of auditors. Cited in Ringgold's

Case, 1 Bland Ch. 9, discussing right of appeal; approvingly Taylor v. Carpenter, 2 Wood. & M. 3, F. C. 13,785. And see 1 Blackf. (Ind.) 22.

Distinguished in Jones v. Van Zandt, 5 How. 224, 12 L. 126, entertaining the cause since division of opinion did not embrace things urged merely as reasons for a new trial; United States v. Chicago, 7 How. 191, 12 L. 663, entertaining a certified question involving right of the matter whether subject on hearing was one of discretion or not; Sparrow v. Strong, 3 Wall. 105, 18 L. 50, where judgment did not purport to affirm an order overruling a motion for a new trial, but to affirm judgment of District Court in the action of ejectment; Mattox v. United States, 146 U. S. 147, 36 L. 920, 13 S. Ct. 52, holding the question of admissibility of affidavits offered in support of motion for a new trial may be brought up on writ of error, when lower court, in passing upon motion, exercised no discretion in respect to matter in affidavits. Denied in Sorrel v. St. Julien, 4 Mart. (O. S.) 509, holding denial of a new trial may be relieved in Supreme Court; Gilliland v. Rappleyea, 15 N. J. L. 143, holding court having set aside verdict and ordered a new trial, it was error to revive verdict and render judgment thereon at a subsequent term; Fowler v. Colton, 1 Pinn. 340, and Territory v. Doty, 1 Pinn. 404, holding, under statute, Supreme Court has cognizance of questions of law arising upon motions for a new trial.

5 Cr. 13–15, 3 L. 22, COOKE v. WOODROW.

Evidence.— Best evidence which nature of case admits of must be produced, p. 14.

Rule applied in Fresh v. Gilson, 16 Pet. 332, 10 L. 984, rejecting evidence by one witness of testimony of another at a previous trial.

Evidence.— If, after due diligence. subscribing witness cannot be found, his handwriting may be proved, p. 14.

Rule applied in Stebbins v. Duncan, 108 U. S. 44, 27 L. 646, 2 S. Ct. 321, and McVicker v. Conkle, 96 Ga. 586, 24 S. E. 24, allowing proof of handwriting where witness to deed was dead; Bennet v. Robinson, 3 Stew. & P. 238, holding evidence of the subscribing witness is the only admissible evidence, unless he cannot be found or becomes legally incompetent; Ingram v. Plasket, 3 Blackf. 454, holding evidence of handwriting of obligor to bond admissible, before plaintiff had produced evidence that handwriting of subscribing witnesses could not be proved; Kemper v. Pryor, 1 J. J. Marsh. 599, admitting proof of handwriting where witness could not be found; Whittemore v. Brooks, 1 Me. 60, rejecting evidence of handwriting, where there was no proof of diligent search after the other subscribing witness; Farnsworth v. Briggs, 6 N. H. 564, holding where attesting witness cannot be produced, his handwriting may

be proved; as also in Dunbar v. Marden, 13 N. H. 316, where witness was without jurisdiction of court; Patterson v. Tucker, 9 N. J. L. 332, 333, 17 Am. Dec. 476, 477, where witness denied his handwriting. See also 1 Blackf. (Ind.) 48, note.

Distinguished in Wilbur v. Selden, 6 Cow. 165, refusing to admit entries by notary's clerk in register, though latter was without jurisdiction of court.

Appeal and error.— In trover, if judgment is for plaintiff, it determines the value of matter in dispute, but if for defendant the declaration fixes it, pp. 13, 14.

Cited and applied in Walker v. United States, 4 Wall. 164, 18 L. 319, dismissing writ of error; Batchelder v. Richardson, 75 Va. 837, holding if actual amount in dispute does not otherwise appear, the court will look to the whole record; McCrowell v. Burson, 79 Va. 300, holding amount in declaration governed jurisdiction where judgment was for defendant; note to 21 Am. St. Rep. 619, on this subject collecting authorities. Cited in Ringgold's Case, 1 Bland Ch. 24, discussing in what cases and to what amount appeal bond may be required; Greigg v. Reade, Crabbe, 66, F. C. 5,804, arguendo; Hilton v. Dickinson, 108 U. S. 169, 174, 27 L. 689, 691, 2 S. Ct. 427, 430, discussing appeal not justified by the amount in dispute.

Distinguished in Peyton v. Robertson, 9 Wheat. 528, 6 L. 151, holding in replevin for property distrained for rent, the amount for which avowry is made is the real matter in dispute; Gordon v. Ogden, 3 Pet. 34, 7 L. 592, holding if writ of error be brought by defendant, matter in dispute cannot exceed amount of that judgment, dismissing writ.

5 Cr. 15–19, 3 L. 23, MANDEVILLE v. WILSON.

Statute of limitations.— Exceptions in favor of merchant's accounts extends to all accounts current which concern the trade of merchandise between merchants, p. 18.

Cited in Spring v. Gray, 6 Pet. 167, 8 L. 358, holding charter-party is not an account within the exception; Spring v. Gray, 5 Mason, 524, 527, F. C. 13,259, holding same; McCulloch v. Judd, 20 Ala. 708, holding an account containing several items of debit for goods bought and one item of credit for cash paid is not within the exception; Bradford v. Spyker, 32 Ala. 143, holding where there are mutual accounts between persons, the statute does not bar if one item is within the period; as also in Gunn v. Gunn, 74 Ga. 568, 58 Am. Rep. 456; Brackenridge v. Baltzell, 1 Ind. 334, holding "running accounts" means mutual account, and when between merchants is without the statute; Lansdale v. Brashear, 3 T. B. Mon. 334, holding partners in forming are not merchants so their accounts are not within the exception; Dyatt v. Letcher, 6 J. J. Marsh, 544, 545, and

McLellan v. Crofton, 6 Me. 344, holding the account within the exception; Union Bank v. Knapp, 3 Pick. 112, 15 Am. Dec. 189, holding an account which has been balanced is not within the exception; Murray v. Coster, 20 Johns. 597, holding where one joint purchaser takes all the goods, and agrees to account to the other for his share, this is not within the exception; Jayne v. Mickey, 55 Pa. St. 262, where merchant furnished goods "to be sold on agency and to be accounted for," etc., held this was within the exception; Watson v. Lyle, 4 Leigh (Va.), 249, holding demand barred. Cited in general discussion in Bass v. Bass, 6 Pick. 363; State v. School District, 30 Neb. 523, 46 N. W. 613, 27 Am. St. Rep. 422; Van Rhyn v. Vincent, 1 McCord's Eq. 315, and Blair v. Drew, 6 N. H. 238.

Distinguished in Lowe v. Dowbarn, 26 Tex. 510, holding, under their statute, mutual accounts not between merchants are barred.

Statute of limitations.— Account current does not become an account stated by the cessation of dealings between the parties, p. 18.

Cited in White v. Campbell, 25 Mich. 469, holding presentation of account to party, who remains passive, will not convert it into an account stated; Volkening v. De Graaf, 81 N. Y. 271, and Whittlesey v. Spofford, 47 Tex. 18, holding to maintain action on account stated, it must be shown account was closed with assent of plaintiff; Coalter v. Coalter, 1 Rob. (Va.) 85, 92, holding statute is no bar, where there has been cessation of dealings.

Appeal and error.—Allowance or rejection of amendments to pleadings is not subject to review on appeal, p. 18.

Approved and rule applied in Moss v. Riddle, 5 Cr. 358, 3 L. 125; Cook v. Burnley, 11 Wall. 676, 20 L. 86, holding application to supply a lost record not reviewable; Chapman v. Barney, 129 U. S. 681, 32 L. 801, 9 S. Ct. 427, as to an amendment substituting a plaintiff; Gormley v. Bunyan, 138 U. S. 630, 34 L. 1089, 11 S. Ct. 455, as to granting or refusal of leave to file an additional plea; Heye v. Lieman, 12 Fed. Cas. 90, declaring allowance of amendments rests in the discretion of the court; Poole v. Nixon, 9 Pet. Appx. 770, 19 Fed. Cas. 995, holding granting or refusal of leave to amend pleadings not reviewable; Watkins v. Gayle, 4 Ala. 155, holding an application by officer to correct his return of process, decision of primary court is conclusive; Nicks v. Rector, 4 Ark. 277, holding courts permitting exhibit to be proven vive voce not reviewable; fuller v. Hampton, 5 Conn. 425; Merriam v. Langdon, 10 Conn. 472; Henderson v. Hamer, 5 How. (Miss.) 538, and Austin v. Jordan, 5 Tex. 133, holding allowance or disallowance of amendment to pleadings not a ground of error; Stewart v. Bennett, 1 Fla. 443, declining to revise judgment on ground that court erred in allowing amendments; Brett v. Ming, 1 Fla. 452, holding appellate court may amend error apparent on record; Romaine v. Norris, 8 N. J.

L. 82, holding whether motion for nonsuit shall be heard after regular rests in discretion of the court; State v. Raiford, 2 Dev. 215, holding decision of court below on plea of nul tiel record is conclusive; Fowler v. Colton, 1 Pinn. 337, holding refusal of court to allow a notice to be amended is not error. See note, 89 Am. Dec. 77, 78, on this subject.

Distinguished in Broussard v. Trahan, 4 Mart. (O. S.) 504, holding, where court below improperly denies a continuance, relief may be had in Supreme Court; Avery v. Bowman, 39 N. H. 395, 397, holding refusal to grant amendment, because court has no power to grant it, is error in law, and may be corrected upon exceptions.

Miscellaneous.— Cited in Van Bokkelen v. Cook, 5 Sawy. 593, F. C. 16,831, to point that declaration need not set forth the facts which take case out of statute.

5 Cr. 19–21, 3 L. 24, FAIRFAX v. FAIRFAX.

Pleading.— Upon issue of plene administravit, verdict should be for amount of assets unadministered, p. 21.

Rule applied in Sizlar v. Haywood, 8 Wheat. 679, 5 L. 714; Edmonds v. Crenshaw, 14 Pet. 169, 10 L. 404, holding executor, though responsible only for assets received, cannot discharge himself by paying over these to his co-executor; Smith v. Chapman, 93 U. S. 43, 23 L. 796, holding in action against executor upon contract of testator, where a devastavit is alleged and proved, a judgment de bonis propriis is erroneous; Thomson v. Searcy, 6 Port. 413, declaring sureties liable for amount of assets which came into the hands of the administrator; Moody v. Keener, 7 Port. 234, setting aside verdict because it did not respond to the issue; King v. Anthony, 2 Blackf. (Ind. 132; Johnson v. Hawkins, 2 Blackf. (Ind.) 461, and Porter v. Glenn, 3 Bibb (Ky.), 86, holding upon issue of plene administravit, jury should also find amount of assets in defendant's hands unadministered; as also in Young v. Whitaker, 1 A. K. Marsh. 399; McKinley v. McCall, 1 T. B. Mon. 57; Young v. Wickliffe, 17 Dana (Ky.), 448, and Nixon v. Bullock, 9 Yerg. 416, holding verdict insufficient. Cited in Bishop v. Hamilton, 4 J. J. Marsh. 549, holding precise amount of assets need not be found, when verdict ascertains that assets are sufficient.

Distinguished in Thrash v. Sumwalt, 5 Ala. 16, holding on issue of plene administravit verdict general in its terms is sufficient.

Appeal and error — Service.— Citation upon writ of error is properly served upon husband of defendant marrying after judgment, p. 21.

Cited in Tripp v. Railroad Co., 144 U. S. 129, 36 L. 372, 12 S. Ct. 656, holding mailing citation to defendant's attorney insufficient service; U. S. M. A. A. v. Weller, 30 Fla. 218, 11 So. 788, holding writ of error, duly served, not abated by marriage of female defendant after judgment.

5 Cr. 22–34, 3 L. 25, McKEEN v. DELANCY.

Statutes.— Practical construction of a statute acquiesced in for a long time controls, p. 32.

The following citing cases affirm and apply this principle; United States v. Arredondo, 6 Pet. 715, 8 L. 556, holding courts are bound to notice general customs and usages as the law of the land; Schell v. Fauche, 138 U. S. 572, 34 L. 1043, 11 S. Ct. 380, holding that in cases of ambiguity contemporaneous construction by courts and officials is controlling; United States v. Ship Recorder, 1 Blatchf. 223, F. C. 16,129, holding contemporaneous construction of act corroborated by years of usage must govern; Talcott v. Pine Grove, 1 Flipp. 156, F. C. 13,735, holding contracts based upon State law universally and continuously treated as valid, will be supported by Federal courts notwithstanding late State decisions to contrary; dissenting opinion, Northern Pac. R. R. Co. v. Barden, 46 Fed. 623, construing grants by congress to railroads; Panaud v. Jones, 1 Cal. 499, refusing to set aside verdict because evidence of custom was received; Hughes v. Lane, 11 Ill. 131, 50 Am. Dec. 440, construing statute providing for acknowledgment of deed by married woman; State v. Harrison, 116 Ind. 308, 19 N. E. 149, construing doubtful statute, according to practice and usage; Harriman v. State, 2 G. Greene, 275, in case of doubt, long practice under a statute favors its validity; Clark v. Mowyer, 5 Mich. 468, following practical construction of statute; and also in Westbrook v.Miller,56 Mich. 152, 22 N. W. 257, as to statute providing for signing of tax deed; Franklin v. Kelley, 2 Neb. 87, holding conveyance by pre-emptor before issuance of patent valid; State v. Grey, 21 Nev. 389, 32 Pac. 194, construing Constitution as to publication of proposed amendments; Den v. Geiger, 9 N. J. L. 231, holding a certified acknowledgment of a deed valid, if it shows a substantial compliance with statute; Shinn v. Roberts, 20 N. J. L. 450, holding order of sale made by Orphans' Court valid; Jackson v. Gumaer, 2 Cow. 567, holding certificate of acknowledgment in usual form sufficient; Meriam v. Harsen, 2 Barb. Ch. 270, certificate of acknowledgment substantially complying with the statute sufficient; Bank v. Mersereau, 3 Barb. Ch. 577, 49 Am. Dec. 205, holding deed in customary form sufficient; Moore v. Vance, 1 Ohio, 12, holding deed without subscribing witnesses valid; Chesnut v. Shane, 16 Ohio, 603, 47 Am. Dec. 390, holding if construction is doubtful, usage will control; McFerren v. Powers, 1 S. & R. 106, holding acknowledgment of deed before associate judge of a country other than that in which land lay, valid; Harrington v. Smith, 28 Wis. 68, and State v. Timme, 54 Wis. 340, 11 N. W. 793, declaring that great weight is to be given to the practical construction of a statute by officials. Cited approvingly in Beals v. Hale, 4 How. 51, 11 L. 870. Cited arguendo, in McCall v. Hinkley, 4 Gill, 160; dissenting opinion, McArthur v. Porter, 1 Ohio, 108.

Distinguished in Love v. Hinckley, Abb. Admr. 441, F. C. 8,548, holding proof did not establish the custom; O'Donnell v. Glenn, 9 Mont. 461, 463, 23 Pac. 1019, 1020, that the use of erroneous form of verification of location notice was not generally enough to make it sufficient; Cuming Co. v. Tate, 10 Neb. 196, 4 N. W. 1047, where there was no evidence of deviation or universality of a custom; Gray v. Askew, 3 Ohio, 479, refusing to follow a practice neither old nor general.

Statutes.— Federal courts follow State courts' construction of State statutes, p. 32.

This proposition is affirmed, followed and applied by the following citations: Jackson v. Chew, 12 Wheat. 168, 6 L. 167, adopting local law of real property as ascertained by decisions of State courts; Green v. Neal, 6 Pet. 296, 8 L. 404, holding Federal courts adopt State courts' construction of State statutes; Webster v. Cooper, 14 How. 504, 14 L. 517, following State court exposition of State Constitution; Supervisors v. United States, 18 Wall. 82, 21 L. 775, holding that construction of statute of State by its highest court binding on this court; as also in McArthur v. Scott, 113 U. S. 391, 28 L. 1031, 5 S. Ct. 667, as to statute providing for probate of will; Thompson v. Phillips, Bald. 284, F. C. 13,974, law limiting lien of judgments; Merrill v. Portland, 4 Cliff. 144, F. C. 9,470, as to statute prescribing conditions annexed to the right to recover for injury received in consequence of defect in highway; Bowditch v. Boston, 4 Cliff. 341, F. C. 1,719, as to statute rendering city liable for property destroyed to stop a fire; In re Wylie, 2 Hughes, 460, F. C. 18,112, as to "State exemption laws;" Griffing v. Gibb, 1 McAll. 222, F. C. 5,819, construing legislative grants; Mitchell v. Lippincott, 2 Woods, 472, F. C. 9,665, as to "married woman's law;" State v. Railway Co., 3 Fed. 888, statute providing for removal of criminal case; Lookout, etc., R. R. Co. v. Houston, 44 Fed. 450, holding decision of State court on demurrer is binding on Federal court to which case has been removed; Prentice v. Zane, 19 Fed. Cas. 1272, following State courts' construction of negotiable paper law; Bloodgood v. Grasey, 31 Ala. 589, following foreign States' construction of its own statutes; Youley v. Lavender, 27 Ark. 264, holding Federal courts will follow State statute limiting rights of creditor in probate matters; McClure v. Owen, 26 Iowa, 253, holding Federal courts will follow latest adjudications of State courts construing States statutes; Levy v. Mentz, 23 La. Ann. 262, holding that Federal courts will follow State courts' interpretation of State laws, respecting titles; Craig v. Fox, 16 Ohio, 569, refusing to alter construction of statute sanctioned by many decisions; Smith v. Power, 23 Tex. 33, holding decisions of this court, construing local statutes affecting titles to real property, are binding on all courts; Derby v. Jacques, 1 Cliff. 439, F. C. 3,817, holding Federal courts follow State practice in law cases.

Distinguished in Burgess v. Seligman, 107 U. S. 34, 27 L. 365, 2

S. Ct. 22, refusing to follow decision of State court, rendered after Circuit Court had construed State statute; Ryan v. Staples, 76 Fed. 727, 40 U. S. App. 427, holding Federal courts not bound by single decision of State court applying principles of common law to question as to validity of judgment, where rights of party became vested before decision was made; Blanchard v. Sprague, 1 Cliff. 290, F. C. 1,516, holding that in equity cases State laws do not furnish rules of evidence to Federal courts.

Deed.— If land in two counties be conveyed, by one deed, it need be recorded only in one county, p. 33.

This rule is cited and applied in Wilt v. Cutler, 38 Mich. 194, holding deed covering land in different counties is properly recorded in anyone of them; Leazure v. Hillegas, 7 S. & R. 318, holding an exemplification certified by the recorder of a county of a deed conveying lands in that and in another county is evidence in dispute concerning the latter; Hancock v. Lumber Co., 65 Tex. 233, holding valid registration of deed in one county establishes prima facie its execution everywhere. Cited arguendo, in Beals v. Hale, 4 How. 54, 11 L. 873.

Distinguished in Penn v. Preston, 2 Rawle, 18, holding the covenant on part of grantor to procure recording of a power is not fulfilled in relation to lands in one county by recording it in another.

5 Cr. 34–45, 3 L. 29, TUCKER v. OXLEY.

Bankruptcy.— A joint debt under bankrupt law may be set off against the separate claim of the assignee of one of the partners, p. 40.

In the following citing cases this principle is affirmed and applied: Mead v. Bank, 6 Blatchf. 187, F. C. 9,366, holding creditor, taking for partnership debt, note of co-partnership and individual notes of partners, indorsed by co-partners, was entitled, after bankruptcy, to dividends out of the several estate, joint or several; In re Jewett, 7 Biss. 337, F. C. 7,306, declaring that a partnership creditor could prove his debt against the estate of an individual partner; Wilkins v. Davis, 2 Low. 514, F. C. 17,664, holding that a joint creditor may prove against the separate estate of the bankrupt and will receive dividends from joint assets and surplus of separate assets after separate debts are paid; In re Webb, 4 Sawy. 328, F. C. 17,317, holding joint creditor, in case of bankruptcy of one partner, has a right to prove his joint debt and vote for assignee; In re Carrier, 39 Fed. 198, holding, where one of two joint debtors becomes bankrupt, the creditor may set off the debt against his separate indebtedness to the bankrupt; In re Lloyd, 15 Nat. Bank Reg. 257, 15 Fed. Cas. 713, holding in involuntary

proceedings against a separate partner, creditors of partnership must be counted in computing legal quorum; In re Melick, 16 Fed. Cas. 1328, 4 N. B. R. 97, holding an adjudication of bankruptcy may be made against one partner only upon a joint debt; In re Rice, 20 Fed. Cas. 655, holding firm creditors can participate in a dividend without showing they have exhausted the individual estate of the retiring partner; Harris v. Peabody, 73 Me. 268, holding, if there is no joint estate and no solvent partners, joint and separate creditors share the separate estate together; Allen v. Wells, 22 Pick. 455, 33 Am. Dec. 761, holding separate property may be attached for partnership debts and a lien so acquired will not be defeated by subsequent attachment by separate creditor; Bullard v. Dorsey, 7 S. & M. 13, holding individual debt due a joint creditor could not be set off against joint debt; Dahlgren v. Duncan, 7 S. & M. 294, holding, under statute, individual and partnership debts stand on equality as to insolvent's estate; Simpson v. Schulte, 21 Mo. App. 644, holding partnership creditor may have judgment against any partner without joinder of the others; Lathrop v. Reed, 13 Allen, 295, holding contract claim for unliquidated damages provable in insolvency; Smith v. Spengler, 83 Mo. 413, and Green v. Conrad, 114 Mo. 664, 21 S. W. 841, holding debt due before assignment by bank may be set off against debt due after it; Pearce v. Cooke, 13 R. I. 187, holding partnership creditor could prove his judgment against separate estate; Higgins v. Rector, 47 Tex. 364, deciding that holder of a claim against a partnership can establish his claim against estate of a deceased partner; Morris v. Morris, 4 Gratt. 312, 323, quære, if joint creditor is entitled to share in separate estate of debtor with separate creditors; Bardwell v. Perry, 19 Vt. 301, 47 Am. Dec. 692, holding all that separate creditors can require, in equity, is that partnership creditors first exhaust partnership funds; Curtis v. Woodward, 58 Wis. 504, 505, 506, 46 Am. Rep. 649, 650, 651, 17 N. W. 331, holding firm debt provable in bankruptcy against individual partner, where there was no partnership property, and other partners had been discharged from liability. Cited in Receivers v. Gas Light Co., 23 N. J. L. 297.

Distinguished in Murrill v. Neill, 8 How. 427, 12 L. 1141, holding that individual property shall first be applied to individual debts of respective partners; Gray v. Rollo, 18 Wall. 633, 634, 635, 21 L. 929, holding, where a bankrupt owes a joint debt and holds a note given by one of the joint creditors and a third person, the two claims cannot be set off; Hitchcock v. Rollo, 3 Biss. 287, F. C. 6,535, holding assignee of claim against an insolvent insurance company, assigned after notice of insolvency, cannot set it off against his previous indebtedness; McKinney v. Bellows, 3 Blackf. 33, holding set-off applies only to debts due in the same right; Gillaspy v. Peck, 46 Iowa, 462, holding lien of subsequent judgment for an individual

debt does not take priority over lien of previously rendered judgment upon a partnership debt, as to separate estate; McCulloh v. Dashiell, 1 Harr. & Gill, 106, 107, 18 Am. Dec. 279, holding joint creditors in equity can only look to the surplus of the separate estate.

Equity.— Rules for marshalling assets are equitable restraints on legal rights, p. 43.

Cited in In re Nims, 10 Ben. 56, F. C. 10,268, holding joint creditors share equally with partnership creditors in the partnership assets.

Distinguished in Cleghorn v. Bank, 9 Ga. 323, holding equity in favor of separate creditors will not be allowed to take away a right acquired by an execution at law on the part of joint creditors against the separate estate.

Statutes.— In adopting and enacting a foreign statute decisions expounding it are adopted with it; this principle followed as to bankrupt law, p. 42.

Rule applied in Warner v. Railway Co., 164 U. S. 423, 41 L. 500, 17 S. C. 149, holding States, in adopting statute of frauds, adopted the settled construction of it; Willis v. Eastern & C. Co., 169 U. S. 307, 42 L. 758, 18 S. Ct. 352, holding that United States, in adopting Massachusetts statute providing "summary process for recovery of land," adopted the settled construction of it; Cronan v. Cotting, 104 Mass. 249, 6 Am. Rep. 235, construing phrase "fiduciary character" in bankruptcy act; Merrill v. National Bank of Jacksonville, 173 U. S. 160, 175, as to bankrupt act adapted from English statute of James.

Miscellaneous citations.— Cited in United States v. Eliason, 16 Pet. 301, 10 L. 972, and Derby v. Jacques, 1 Cliff. 433, F. C. 3,817, as having allowed writ of error upon an agreed case. Cited generally in Greene v. Darling, 5 Mason, 206, F. C. 5,765; Bemis v. Smith, 10 Met. 199, as to the meaning of "debt" in bankrupt law; N. O., etc., R. R. Co. v. Evans, 49 Miss. 788; Adams v. Jeffries, 12 Ohio, 271, 40 Am. Dec. 478.

5 Cr. 45–49, 3 L. 32, YOUNG v. BANK OF ALEXANDRIA.

Trials.— Bank of Alexandria charter provision that trial of its causes be had at the return term is an exception to the common rule in Virginia, p. 49.

No citations.

5 Cr. 49–57, 3 L. 33, YEATON v. BANK OF ALEXANDRIA.

Usages control and regulate general laws as to contracts made under and in reference thereto, p. 52.

Cited, and principle applied, in Renner v. Bank, 9 Wheat. 592,

6 L. 168, where, by custom, four days of grace were allowed. Approved generally in United States v. Arredondo, 6 Pet. 715, 8 L. 556, note, 50 Am. Dec. 97.

Bills and notes — Indorser.— It is generally understood, in Virginia, that accommodation indorser promises to pay, if, by due diligence, payment cannot be obtained from maker, p. 51.

Cited generally in Camden v. Doremus, 3 How. 533, 11 L. 713, discussing what constitutes due diligence.

Promissory notes — Liability of accommodation indorser.— Where consideration moves to maker, on credit of indorser, maker and indorser are charged equally, p. 53.

Rule applied in Jones v. Berryhill, 25 Iowa, 298, where note was transferred to third person who knew there was no consideration for indorsement; Kenworthy v. Sawyer, 125 Mass. 29, holding wife as accommodation indorser cannot question consideration of note when sued by indorsee. Cited generally, in dissenting opinion, Magruder v. McDonald, 3 Cr. C. C. 310, F. C. 8,965; Central Bank v. Davis, 19 Pick. 375, holding accommodation note entitled to no peculiar favor; Love v. Wall, 1 Hawk. 315, arguendo.

Statutory construction.— Under act of incorporation of Bank of Alexandria, accommodation indorser is liable to action on note as soon as it becomes due, p. 53.

Cited generally in Caton v. Lenox, 5 Rand. 42, as bearing on question of right of last assignee to maintain action against any or all assignors; Long v. Pence, 93 Va. 587, 25 S. E. 594, where statute relating to indorsers is construed; Hurd v. Hall, 12 Wis. 136, arguendo.

Construction of statute.— Principle of law cannot be altered by implication drawn from preamble to statute, p. 55.

Cited with approval in Weatherhead v. Bledsoe's Heirs, 2 Overt. 355, 357.

5 Cr. 57–61, 3 L. 36, HOPE INS. CO. v. BOARDMAN.

Constitutional law — Citizen.—A corporation aggregate is not a citizen, p. 86.

This proposition is approved in dissenting opinions in Marshall v. B. & O. Ry. Co., 16 How. 348, 14 L. 968, and Dodge v. Woolsey, 18 How. 364, 15 L. 415, where citizen of one State sued corporation formed in another, the majority of the court holding corporation is a citizen for jurisdictional purposes; Paul v. Virginia, 8 Wall. 178, 19 L. 359, and Ducat v. Chicago, 48 Ill. 176, 95 Am. Dec. 531, holding corporation not to be citizen within meaning of clause providing

"citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" Wood v. Hartford, 13 Conn. 209, 212, 33 Am. Dec. 396, 399, where corporation claimed it must be sued in county in which it has its residence; the court held it had no residence. The general rule is approved in Tatem v. Wright, 23 N. J. L. 442; Smith v. Bank, 5 Serg. & R. 320, and Barrow Co. v. Kane, 170 U. S. 106, 42 L. 966, 18 S. Ct. 528, although all follow Marshall v. B. & O. Ry. Co., supra, and hold, for purposes of jurisdiction, corporation will be considered a citizen. Cited in Lexington Co. v. Dorr, 2 Litt. (Ky.) 257, holding court will look to character of individuals who compose corporation, and if they may sue in any particular court, in right of citizenship, corporation may.

Cited generally in Wilson v. Pierce, 30 Fed. Cas. 153, and in dissenting opinion, B. & O. R. R. Co. v. Cary, 28 Ohio St. 218, as to what is test of citizenship of corporation.

Courts.— Capacity of corporation aggregate to sue in Federal courts depends on citizenship of its members, and this must be shown by proper averments, p. 61.

Rule cited and applied in similar case. Bank of Cumberland v. Willis, 3 Sumn. 473, F. C. 885; Kirkpatrick v. White, 4 Wash. 597, F. C. 7,850, where plea to jurisdiction was sustained, it being shown four of the corporators were residents of same State as plaintiff; North River Co. v. Hoffman, 5 Johns. Ch. 303, where some members of corporation were residents of same State with defendant.

Cited in dissenting opinion, Marshall v. B. & O. Ry. Co., 16 How. 348, 350, 16 L. 968, 969, the majority holding, averment that corporation is formed under laws of particular State sufficient, without any averments as to citizenship of members. This view is adopted and followed in Covington Co. v. Shepherd, 20 How. 233, 15 L. 898; Paul v. Virginia, 8 Wall. 178, 19 L. 359; Shaw v. Quincy Co., 145 U. S. 451, 36 L. 772, 12 S. Ct. 938; St. Louis & S. F. Ry. Co. v. James, 161 U. S. 557, 40 L. 806, 16 S. Ct. 625, holding there is an indisputable presumption that corporation is composed of citizens of State which created it. Cited generally in dissenting opinion, McNutt v. Bland, 2 How. 22, 11 L. 164. Cited in Hollingsworth v. Southern Ry. Co., 86 Fed. 356, where rule in Covington Co. v. Shepherd, supra, is adopted. Cited generally in Middlebrook v. Insurance Co., 14 Conn. 309.

Courts.— Where jurisdiction depends on citizenship of parties, the citizenship of each must be stated positively in pleadings, p. 57.

Cited and principle applied in Speigle v. Meredith, 4 Biss. 126, F. C. 13,227; Bank v. Simonton, 2 Tex. 539, where foreign corporation made no allegations as to capacity in which it sued. Approved in Donaldson v. Hazen, 1 Hemp. 424, 425, F. C. 3,984.

5 Cr. 61–92, 3 L. 38, UNITED STATES BANK v. DEVEAUX.

Corporations.— Capacity of corporation aggregate to sue in Federal courts depends upon the citizenship of its members, p. 91.

Cited and principle applied in Sewing Machine Cases, 18 Wall. 575, 21 L. 918, holding where one of three defendants resides in same State as plaintiff, foreign defendants cannot remove case to Federal courts; Commercial Bank v. Slocomb, 14 Pet. 64, 10 L. 356, holding like rule applies when corporation is defendant; Flanders v. Ætna Co., 3 Mason, 159, F. C. 4,852; North River Co. v. Hoffman, 5 Johns. Ch. 303, holding, if one member of corporation resides in same State as defendant, Federal courts would have no jurisdiction to try case; Hays v. Pennsylvania Co., 17 Pa. St. 12, holding like rule applies in action in State court; Hope Ins. Co. v. Boardman, 5 Cr. 61, note, 3 L. 37, note, reversing judgment for want of necessary citizenship in members of litigating corporation. Cited generally in Bacon v. Robertson, 18 How. 485, 15 L. 502, and dissenting opinion, Marshall v. Baltimore, 16 How. 344, 14 L. 966; Philadelphia R. R. Co. v. Quigley, 21 How. 215, 16 L. 77. Cited and explained in Bank of United States v. Planters' Bank, 9 Wheat. 911, 6 L. 245. Cited generally in Bank of United States v. McKenzie, 2 Brock. 400, 401, F. C. 927, as bearing on question of residence of corporation; Heckscher v. Binney, 3 Wood. & M. 336, 337, F. C. 6,316. Cited in Thornburgh v. Savage Mining Co., 23 Fed. Cas. 1121, and Farfield v. Thorp, 13 Conn. 179, to show that courts will look beyond the charter to determine the rights and liabilities of corporation. Cited generally in Binney's Case, 2 Bland Ch. 148; Bank of Edwardsville v. Simpson, 1 Mo. 185, holding court will look beyond corporate name, and notice individuals who compose corporation, and will, therefore, allow foreign corporation to maintain suit in State courts; Dartmouth College v. Woodward, 1 N. H. 116, note, 12 Am. Dec. 241, note, 12 Am. Rep. 546.

Modified in Park Bank v. Nichols, 4 Biss. 315, F. C. 10,048, holding it is a nonrebuttable presumption that corporators are citizens of State in which corporation has its legal existence. Distinguished in Middlebrooks v. Insurance Co., 14 Conn. 309, 310, where attempt was made to bring foreign corporation into State court by service of summons on resident stockholders; Adams v. Wiscasset Bank, 1 Me. 365, 10 Am. Dec. 90, as presenting an entirely different point; Union Bank v. United States, 4 Hump. 370, case is decided on statutory grounds.

Federal courts.— Right of action given by act of congress does not imply a right to sue in the Federal courts unless it is so expressed, p. 86.

Cited and principle applied in Claflin v. Houseman, 93 U. S. 135, 23 L. 838, interpreting bankruptcy act, holding assignee may sue in

State courts to recover assets of bankrupt; In re Barry, note, 136 U. S. 609, 615, 34 L. 508, 509, 42 Fed. 122, 126, F. C. 1,059, holding Circuit Courts possess no jurisdiction other than that which Constitution and acts of congress concur in conferring; Harrison v. Hadley, 2 Dill. 235, F. C. 6,137, where action was brought in Circuit Court to determine controversy between two citizens of same State involving title to office; United States v. New Bedford Bridge, 1 Wood. & M. 431, 438, 455, F. C. 15,867, holding the Circuit Court has no power to punish for the erection of a bridge over tide water, or the obstruction of navigation in navigable waters; Pettilon v. Noble, 7 Biss. 453, F. C. 11,044, and National Bank v. Hubbard, 49 Vt. 2, 24 Am. Rep. 98, holding further, clause giving United States courts jurisdiction of suits by or against national banking associations, does not invest said courts with exclusive jurisdiction. Principle applied in Robinson v. Bank, 81 N. Y. 391, 37 Am. Rep. 513, holding statute permitting suits to be brought in certain Federal courts is permissive, and does not limit general rule which permits civil cases arising under laws of the United States to be prosecuted and determined in State courts. Cited generally in Cadle v. Tracy, 11 Blatchf. 111, F. C. 2,279. Approved in Magill v. Parsons, 4 Conn. 322; Crocker et al. v. Marine Bank, 101 Mass. 241, 3 Am. Rep. 337.

Bank of United States.— Charter gives corporation capacity to appear as suitor in any court which would, by law, have cognizance of the cause, if an individual were the party, but does not enlarge jurisdiction of any Federal courts, p. 85.

Same construction applied in Central Bank v. Gibson, 11 Ga. 456, where like provision in State charter was under consideration. Cited generally in dissenting opinion, Osborn v. Bank, 9 Wheat. 877, 888, 6 L. 237, 240, where second charter is construed. Cited generally in St. Louis Bank v. Allen, 2 McCrary, 93, 5 Fed. 552, and in National Bank v. Superior Court, 83 Cal. 499, 24 Pac. 160, where that section of national banking law relating to corporation's right to sue and be sued is construed.

Distinguished on ground of wording of second charter, Osborn v. Bank, 9 Wheat. 817, 6 L. 223.

Constitutional law — Citizenship.— A corporation aggregate is not a citizen, p. 87.

The proposition is maintained in dissenting opinion, Rundle v. Delaware Co., 14 How. 99, 100, 102, 14 L. 343, 344, the majority holding it is a citizen for purpose of giving jurisdiction; also, dissenting opinion, Marshall v. B. & O. Ry. Co., 16 How. 348, 14 L. 967, the majority following Rundle v. Delaware, supra; dissenting opinion, Dodge v. Woolsey, 18 How. 364, 15 L. 415, where corporator brought suit against corporation, the majority holding he might bring suit in Federal courts if he resided in different State from

that in which corporation has its domicile. Cited and approved in Wood v. Insurance Co., 13 Conn. 209, 212, 33 Am. Dec. 396, 399, and, therefore, has no residence, but for purpose of maintaining jurisdiction courts will regard residence of stockholders as residence of corporation; Ducat v. Chicago, 48 Ill. 176, 95 Am. Dec. 532, also, Commonwealth v. Milton, 12 B. Mon. 227, 54 Am. Dec. 535, and Tatem v. Wright, 23 N. J. L. 442, 443. holding corporation not a citizen within meaning of clause of Constitution which declares citizens of each State shall be entitled to all privileges and immunities of citizens of the several States. Cited generally in Bank of Augusta v. Earle, 13 Pet. 586, 10 L. 306, and Paul v. Virginia, 8 Wall. 179, 19 L. 359, as bearing on claim of corporation to privileges and immunities of citizens; Society v. New Haven, 8 Wheat. 491, 5 L. 669, where question whether property of corporations was protected by treaty of peace of 1783 in same manner as that of natural persons was determined; in the following: Northern Ind. Ry. Co. v. Michigan Central Ry. Co., 15 How. 249, 251, 14 L. 681, 682; San Mateo Co. v. S. P. R. R. Co., 7 Sawy. 525, 13 Fed. 151; Clarke v. Bank of Missouri, 10 Ark. 520, 521, 522, 52 Am. Dec. 250. 251, 252, and State v. Milwaukee Ry. Co., 45 Wis. 593, as bearing on question of commorancy of corporation; Goshen Turnpike Co. v. Sears, 7 Conn. 94, as an instance where corporation was in fact treated as a natural person; Davis v. Central R. R. Co., 17 Ga. 327, as bearing on question as to where residence of corporation is considered to be; in the following: American Society v. Gartrell, 23 Ga. 458; In re Assurance Association, 26 N. J. L. 368; In re Kipp, 1 Paige Ch. 613. holding members of corporation are competent as witnesses for or against corporation; Smith v. Bank, 5 S. & R. 320. Cited generally in Cromwell v. Insurance Co., 2 Rich. L. 516, holding corporation has its residence wherever it does its corporate business. See note, 33 Am. Dec. 400.

Modified in Ohio & Miss. Co. v. Wheeler, 1 Black. 295, 17 L. 133, and Barrow Co. v. Kane, 170 U. S. 106, 107, 42 L. 966, 967, 18 S. Ct. 528, collecting authorities, holding for purpose of giving jurisdiction in Federal courts, corporation may be considered a citizen; also in McKinley v. Wheeler, 130 U. S. 635, 636, 32 L. 1050, 9 S. Ct. 640, holding corporation may join in location of mining claims upon public lands in like manner as individual citizens. The rule is further modified in Railroad Tax Case, 8 Sawy. 265, 283, 13 Fed. 745, 758; also, 9 Sawy. 193, 18 Fed. 403, where a private corporation is said to be a citizen within the meaning of the first section to the fourteenth amendment to the Constitution. Modified in Louisville Ry. Co. v. Letson, 2 How. 554, 11 L. 376, a leading case, holding for jurisdictional purposes, corporation will be considered a citizen of State which created it; and to same effect, Elson v. Piggott, 94 Ind. 22; also, Cooke v. State Bank, 52 N. Y. 110, 11 Am. Rep. 676, and B. & O. R. R. Co. v. Cary, 28 Ohio St. 218, collecting authorities.

Federal courts.— Corporations suing in Federal courts must aver facts to show that its members are entitled as citizens to maintain action, p. 92.

Cited and rule applied in dissenting opinion, Marshall v. B. & O. Ry. Co., 16 How. 340, 14 L. 964, where no averments were made as to citizenship of members, the rule was denied by the majority. Approved and followed in Bank of Cumberland v. Willis, 3 Sumn. 473, F. C. 885; also, Kirkpatrick v. White, 4 Wash. 597, F. C. 7,850, where plea in abatement, that one member of corporation was resident of same State as defendant, was sustained; Susquehanna Bridge Co. v. Evans, 4 Wash. 482, F. C. 13,635, note by Washington, J. Principle applied in Lexington Co. v. Dorr, 2 Litt. 257, where corporation brought action in State court. Cited in Bank v. Martin, 5 Pet. 480, 8 L. 198, where suit brought by United States Bank was dismissed by United States District Court for want of jurisdiction. Cited generally in Society v. Wheeler, 2 Gall. 133, F. C. 13,156; Heriot v. Davis, 2 Wood. & M. 231, F. C. 6,404, as bearing on question of right of Circuit Court to entertain jurisdiction of case when it does not have jurisdiction over all of defendants.

Overruled In Marshall v. B. & O. Ry. Co., 16 How. 326, 14 L. 958, holding averment that corporation was organized under laws of State of which adverse party is not a resident is sufficient. Cited in Covington Bridge Co. v. Shepherd, 20 How. 233, 234, 15 L. 898, 899, where rule in Marshall v. B. & O., supra, was approved. This case collects authorities. The proposition is overruled in leading case, Louisville Ry. Co. v. Letson, 2 How. 554, 11 L. 376, holding corporation a citizen of State creating it, for jurisdictional purposes. The rule in Louisville v. Letson, supra, approved generally in Ober v. Gallagher, 93 U. S. 205, 23 L. 831; Missouri Ry. Co. v. Texas Ry. Co., 4 Woods 364, 10 Fed. 500; Shaw v. Quincy Mining Co., 145 U. S. 451, 36 L. 772, 12 S. Ct. 938, holding further, corporation, like individual, can only be sued in district of its domicile, or in that of plaintiff; so also it is approved and followed in St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 555, 556, 557, 40 L. 806, 16 S. Ct. 625; Barrow Co. v. Kane, 170 U. S. 106, 107, 42 L. 966, 967, 18 S. Ct. 528, where authorities are collected and examined; Doremas et al. v. Bennett, 4 McLean, 226, F. C. 4,001; Hall v. Bank, 14 W. Va. 619, 621; Maltz v. American Express Co., 1 Flipp. 612, F. C. 9,002; Insurance Co. v. "C. D., Jr.," 1 Woods, 74, F. C. 7,051; Terry v. Insurance Co., 3 Dill. 410, F. C. 13,839, holding corporation ereated by laws of Great Britain to be an "alien," and entitled, when sued, to have action brought in Federal court; Lonergan v. Illinois Ry. Co., 55 Fed. 551, but a mere averment that corporation is a citizen of a particular State is insufficient; City of Ysleta v. Canda, 67 Fed. 7, case of a municipal corporation; Hollingsworth v. Southern Ry. Co., 86 Fed. 356, holding further, that one State by adopting a corporation already organized under the laws of another State, does not make corpora-

tion a citizen of its State, so that Federal court is divested of jurisdiction in an action between one of its citizens and corporation. Overruled in Dinsmore v. Philadelphia Ry. Co., 7 Fed. Cas. 728, and Bank v. Simonton, 2 Tex. 539, following Louisville v. Letson, supra, but holding there must be an averment of jurisdictional facts in case of corporations suing, the same as when individual citizen sues. Note, 33 Am. Dec. 400.

Corporations.— The term "inhabitant" may include corporations having property within a district, p. 88.

Cited with approval in Gilbert v. New Zealand Ins. Co., 49 Fed. 885, and Zambrino v. Galveston Ry. Co., 38 Fed. 451, 453, holding corporation may be an inhabitant of a district other than that of which it is a citizen or subject; Home Ins. Co. v. Augusta, 50 Ga. 541, 542, where foreign corporation having local agent was held to be an inhabitant; Slavens v. S. P. R. R. Co., 51 Mo. 310, where corporation was held to be resident of county through which its railroad passed; Bushel v. Comm. Ins. Co., 15 S. & R. 177, holding the word "person" as used in a statute, includes corporations as well as individuals. Cited generally, Yadkin Co. v. Benton, 1 Hawk. 423, implying, without deciding, residence of corporation is confined to county in which it has its principal office.

Trustee is a real person, capable of being a citizen or alien, who has the whole legal estate in himself, p. 91.

Cited in Mead v. Walker, 15 Wis. 503, which involved the question whether trustee or cestui que trust was real party in interest in suit brought by former.

Miscellaneous.— Cited Gates v. Johnson, 10 Fed. Cas. 87, not clear to what point cited. Cited in Sill v. Bank of United States, 5 Conn. 106, as to value of a decision when court did not consider particular point decided. Cited in State v. Finley, 6 Kan. 369, not in point; Jetts Case, 18 Gratt. 949, as to duties of courts in interpreting statutes; Farmers' Bank v. Sawyer, 7 Wis. 385, as authority for holding, a demurrer to a complaint that it did not allege corporation was created under laws of some State, could not be considered frivolous.

5 Cr. 92–99, 3 L. 46, MATTHEWS v. ZANE.

Public lands lying in one district cannot be sold at land office of another district, p. 99.

Cited generally in Doe v. Eslava, 9 How. 447, 13 L. 211, as bearing on question as to title acquired by certificate of purchase.

Modified in Garner v. Willett, 18 Ill. 458, 459, where application to purchase was made while land was lying within district from whose office it was afterwards sold.

5 Cr. 100–115, 3 L. 48, HODGSON v. MARINE INS. CO.

Insurance.— Insurance made for benefit of all whom it may concern, without warranty as to neutrality, covers the interest of a belligerent, p. 109.

Rule applied in Seamens v. Loring, 1 Mason, 136, F. C. 12,583, holding policy issued under such circumstances covers interest of all who have authorized the insurance; Maryland Ins. Co. v. Bathurst, 5 Gill & J. 191, where loss occurred through ship and cargo being property of belligerent.

Insurance.— Promissory note given for premium is sufficient consideration for contract of insurance, p. 110.

Pleading.— It is not necessary, in action of covenant on sealed policy, to aver an abandonment in declaration, p. 110.

Insurance.— Overvaluation, without other evidence of fraud, will not avoid policy, p. 111.

Cited and principle applied in Brooke et al. v. Insurance Co., 4 Mart. (N. S.) 643, where payment of policy was contested on ground of overvaluation of cargo; Akin v. Insurance Co., 4 Mart. (N. S.) 662, where insured recovered, although goods invoiced at sum less than amount insured for; Phoenix Co. v. McLoon, 100 Mass. 476, holding, in absence of fraud, valuations are binding on insurers both in law and equity. Extended note, 29 Am. Dec. 619.

Insurance.— An innocent misrepresentation, not material to risk, does not avoid the policy, p. 111.

Cited approvingly in Dewees v. Insurance Co., 34 N. J. L. 251, holding plea setting up misrepresentation collateral to contract of insurance in avoidance of policy, must show it was material and fraudulently made.

5 Cr. 115–141, 3 L. 53, UNITED STATES v. PETERS.

Federal courts.— Federal courts may exercise jurisdiction over a case in which a State may be ultimately affected, provided the State be not necessarily a party defendant, p. 139.

This principle was applied in Louisville Ry. Co. v. Letson, 2 How. 550, 11 L. 375, where corporation was sued in United States Circuit Court, although State was a member of corporation; also, in Lee v. Kaufman, 3 Hughes, 103, F. C. 8,191; and United States v. Lee, 106 U. S. 209, 211, 212, 27 L. 178, 179, 1 S. Ct. 279, where suit was maintained against defendants who held as representatives of the United States; South Carolina v. Wesley, 155 U. S. 544, 39 L. 254, 15 S. Ct. 231, where there was a suggestion that the State was a necessary

party, but no averment and proof thereof; Tindal v. Wesley, 167 U. S. 214, 221, 42 L. 140, 143, 17 S. Ct. 774, 777, holding averment by defendants that they hold as representatives of the State, does not make State defendant within meaning of eleventh amendment, so as to deprive court of jurisdiction; Head v. Porter, 48 Fed. 482, where suit was maintained against government armorer for infringement of patent; Howell v. Miller, 91 Fed. 135, holding injunction maintainable to prevent infringement of copyright by State agents preparing a new edition of its laws. Approved generally in dissenting opinion, Cunningham v. Macon Ry. Co., 109 U. S. 462, 27 L. 998, 3 S. Ct. 612, the majority holding, under facts, State was an indispensable party defendant. Explained in dissenting opinion, United States v. Lee, 106 U. S. 242, 27 L. 189, 1 S. Ct. 279.

Distinguished in Governor v. Madrazo, 1 Pet. 122, 7 L. 79, where it was held a suit against governor of a State officially is suit against State; Briggs v. Lightboats, 11 Allen, 178, where lien for labor and material furnished in construction of boat was sought to be enforced against United States, after title and possession had passed to United States; Board v. Gannt, 76 Va. 463, where suit was in State court, against State's official, although State was held to be real party defendant; State v. Doyle, 40 Wis. 203, 206, where it was held a suit could not be maintained against the secretary of state, when he is sued in his official capacity. This case collects and reviews authorities.

Federal courts.— Jurisdiction of, cannot be affected by State legislation, p. 138.

Cited and principle applied in Riggs v. Johnson County, 6 Wall. 195, 18 L. 776, where State court enjoined defendant from acting, the effect of which was to annul judgment of Federal court; Ex parte Hill, 38 Ala. 437, where the jurisdiction of officers created by Confederate States government was sought to be abridged by act of one of the Confederate States. Cited generally in Rhode Island v. Massachusetts, 12 Pet. 750, 751, 9 L. 1270, 1271; Bank of Commerce v. New York, 2 Black, 633, 17 L. 455, as an instance where power of State to encroach on powers of Federal government was denied; Mayor v. Cooper, 6 Wall. 253, 18 L. 853, as to right of national government to have its laws interpreted and applied by its own tribunals; The Celestine, 1 Biss. 12, F. C. 2,541, as to exclusive jurisdiction of court once having acquired jurisdiction; In re Brinkman, 7 Bank Reg. 426, 4 Fed. Cas. 147, as to prohibition on State courts from taking cognizance of cases falling within exclusive jurisdiction of Federal courts. Cited generally in Ex parte Hill, 38 Ala. 462; Ex parte Holman, 28 Iowa, 105, 4 Am. Rep. 169, as bearing on question of right of State court to interfere with operation of Federal; Semple v. Hagar, 27 Cal. 170, as to right of State courts to review decisions of Federal; Lincoln Mining Co. v. Court, 7 N. Mex. 505, 38 Pac. 586.

Federal courts.— It rests with Federal courts to determine the question of their own jurisdiction, p. 136.

Approved in Freeman v. Howe, 24 How. 459, 16 L. 752. Cited generally in Ex parte Holman, 28 Iowa, 104, 4 Am. Rep. 168.

Miscellaneous.— The case is cited in Ex parte Crane, 5 Pet. 219, 8 L. 103; People v. Pearson, 2 Scam. 204, 33 Am. Dec. 448; Richards v. Wheeler, 2 Aiken, 370; Holmes v. Jennison, 14 Pet. 632, 10 L. 630: Ex parte Newman, 14 Wall. 166, 20 L. 879; and in Jelley v. Roberts, 50 Ind. 7, as an instance where mandamus was issued by Supreme Court; and as bearing on general subject of power to issue writ of mandamus. Cited in Assigns v. Lamar, 2 Fed. Cas. 69, where reason for enforcement by one court of decree rendered in another is stated; Ex parte Reynolds, 20 Fed. Cas. 598, as having no bearing on case; Ex parte Law, 35 Ga. 289, as authority for holding United States Circuit and District Courts are not inferior courts within technical use of that term. Erroneously cited in Cline v. Greenwood, 10 Or. 241, and Cook v. Portland, 20 Or. 582, 27 Pac. 264.

5 Cr. 142–154, 3 L. 61, VIOLETT v. PATTON.

Bills and notes.— Blank indorsement of negotiable instrument with intent to give a person credit, precludes indorser from denying that it was not filled up when he indorsed it, p. 151.

Cited and principle applied in Michigan Bank v. Eldred, 9 Wall. 552, 19 L. 776, where blanks in note were filled in by holder, after which it was transferred to bona fide purchaser; Goodman v. Simonds, 20 How. 361, 15 L. 939, and Bank v. Neal, 22 How. 108, 16 L. 328, holding, where party to negotiable instrument intrusts it to another with blanks not filled up, such instrument carries on its face implied authority to fill up blanks; Roberts v. Adams, 8 Port. 301, 33 Am. Dec. 292, where firm had signed blank note, and after dissolution it had been filled out by one of the partners and given in satisfaction of firm debt; Herbert v. Huie, 1 Ala. 20, 34 Am. Dec. 756, where note was filled in for greater sum than had been agreed on; Beckwith v. Angell, 6 Conn. 321, where agreement between indorser and holder was filled in subsequent to indorsement; South Berwick v. Huntress, 53 Me. 91, 87 Am. Dec. 537, where penal bond was signed by sureties before sum was inserted, it was presumed parties had agreed that one to whom bond was delivered might make insertion; Androscoggin Bank v. Kimball, 10 Cush. 374, holding, if one sign note with blank date for accommodation of another, it will be presumed he authorized other to fill in date; Greenfield Bank v. Stowell, 123 Mass. 198, 25 Am. Rep. 68, holding indorsement and delivery under such circumstances makes one to whom delivered indorser's agent; Whitmore v. Nickerson, 125 Mass. 498, 28 Am. Rep. 258, where A. indorsed in blank unsigned promis-

sory note and delivered it to B. to deliver to C., when C. signed his firm name thereto, B. delivered to C., who signed his individual name; Rogers v. Stevenson, 16 Minn. 73, where C. indorsed A.'s unsigned note to B., B. afterwards acquiring A.'s signature thereto; Chaddock v. Vanness, 35 N. J. L. 524, 10 Am. Rep. 262; Nelson v. Dubois, 13 Johns. 179, where indorsement was made in blank before note was delivered to payee, holder may write over name of indorser a guaranty, so as to take promise out of statute of frauds; Van Duzer v. Howe, 21 N. Y. 537, and Waldron v. Young, 9 Heisk. 782, where filling of blank was violation of agreement and to that extent a forgery; Selser v. Brock, 3 Ohio St. 306, where principal debtor and payee agreed upon and filled in illegal rate of interest; Frazier v. Gains, 2 Baxt. 97, where principal debtor inserted greater sum in note than his sureties had agreed to be liable for; Orrick v. Colston, 7 Gratt. 195; Hopkins v. Richardson, 9 Gratt. 495, where indorser of bond was held, the principal debtor becoming insolvent; Snyder v. Van Doren, 46 Wis. 608, 32 Am. Rep. 743, 1 N. W. 288. Cited generally in dissenting opinion, Magruder v. McDonald, 3 Cr. C. C. 310, Fed. Cas. 8,965; Clark v. Sigourney, 17 Conn. 525; Weaver v. Marvel, 12 La. Ann. 518, as an instance where note was indorsed containing blank to be afterwards filled; Pierse v. Irvine, 1 Minn. 375, as an instance where parol evidence was admitted to explain the nature of contract arising under such circumstances; Hodgkin v. Bond, 1 N. H. 285, holding, where one indorses in blank, this is not sufficient memorandum, within meaning of statute of frauds.

Distinguished in United States v. Nelson, 2 Brock. 72, F. C. 15,862, holding principle does not apply to sealed instruments; Angle v. Insurance Co., 92 U. S. 339, 23 L. 559, where material parts of printed form were altered; Inglish v. Brenceman, 5 Ark. 382, 41 Am. Dec. 99, where note was altered by insertion of date after execution.

Contracts — Consideration.— Benefit to promisor or damage to promisee constitutes good consideration, p. 150.

Cited and this principle adopted in United States v. Linn, 15 Pet. 314, 10 L. 751, and Kenworthy v. Sawyer, 125 Mass. 29, where accommodation sureties were held bound on strength of something of value flowing from promisee to their principal; Emerson v. Slater, 22 How. 43, 16 L. 365, and Offcutt v. Hall, 1 Cr. C. C. 574, F. C. 10,450, holding averment that defendant indorsed note to give it credit, and that this induced plaintiff to accept same, is sufficient averment of consideration; Rucker v. Bolles, 80 Fed. 513, 49 U. S. App. 375, where performance of act by promisee under no obligation to do so, was held good consideration; Gillespie v. Battle, 15 Ala. 283, holding note given by vendee in possession for purchase money of land cannot be avoided on ground that contract is void by statute of frauds; Whiteside v. Jennings, 19 Ala. 790, where note given by

purchaser for land sold under order of Orphans' Court was held good consideration for bond for titles executed by commissioners; R. E. Lee Mining Co. v. Omaha Co., 16 Colo. 132, 26 Pac. 331, where advance by promisee to promisor was held good consideration; Fickling v. Marshall, 22 La. Ann. 507, where promisee relinquished third party from mortgage obligation; Farmer v. Stewart, 2 N. H. 101, holding forbearance of right to object to award, is good consideration for promise; Sands v. Crooke, 46 N. Y. 570, where risk incurred by promisee was held sufficient consideration; Bason v. Hughart, 2 Tex. 479, where promisee relinquished judgment; Muller v. Riviere, 59 Tex. 642, 46 Am. Rep. 292, holding agreement of promisee not to foreclose deed of trust on stock of goods owned by promisor's husband, and to furnish promisor goods under same terms they were furnished her husband, is good consideration for promise to pay husband's debts. Approved in Piatt v. United States, 22 Wall. 507, 22 L. 861. Cited generally in Somers v. Miner, 9 Conn. 466, holding where several subscribe and agree to pay to a certain fund, the promises of others are good consideration for promise of each subscriber; Vincent v. Larson, 1 Idaho, 248; Owing's Case, 1 Bland Ch. 401, 17 Am. Dec. 337; Love v. Wall, 1 Hawk. 315.

Distinguished in Rutledge v. Townsend, 38 Ala. 716, where new notes were given as collateral security for existing indebtedness, held no damage to promisee; Crane v. Bullock, Charlt. (Ga.) 320, holding a promise by trustee to pay, individually, debt of cestui que trust, to be without consideration.

Bills and notes.— Blank indorsement, for accommodation, with intent to give a person credit, is in effect a letter of credit, p. 150.

Cited to this point and principle applied in Israel v. Gale, 77 Fed. Rep. 533, holding indorser liable to every one except party for whom it was intended; Jones v. Berryhill, 25 Iowa, 300, holding guarantor, under statute, liable the same as accommodation indorser; Breckenridge v. Lewis, 84 Me. 356, 30 Am. St. Rep. 356, 24 Atl. 865, where one intrusted his signature to agent to have some obligation written over it; Johnson v. Blasdale, 1 S. & M. 20, 40 Am. Dec. 86, holding further, where agent exceeds his authority, and purchaser is aware of this fact, note will be void beyond sum authorized; Davis v. Lee, 26 Miss. 509, 59 Am. Dec. 268, where party to whom note was intrusted was authorized to fill up as he may choose, not inconsistent with purpose for which signed; Smith v. Wyckoff, 3 Sandf. Ch. 90; Chemung Bank v. Bradner, 44 N. Y. 686, where member of firm signed draft in blank with firm's name, and delivered same to third party; Whittle v. Hide Bank, 7 Tex. Civ. App. 618, 26 S. W. 1012, where accepted draft was used by holder to defraud acceptor. See Yeaton v. Bank of Alexandria, 5 Cr. 53, 3 L. 35, sustaining action against accommodation indorser. Cited generally in Folger v. Chase, 18 Pick. 68, where indorsement was on blank piece of paper attached to note; Central Bank v. Davis, 19 Pick. 375, holding

"accommodation indorser is entitled to no peculiar favor." Approved in Michigan Co. v. Leavenworth, 30 Vt. 20.

Distinguished in Conway v. Bank, 6 J. J. Marsh. 132, where note was indorsed under agreement that it was to be discounted by particular party, which agreement was broken.

Bills and notes — Trial.—Whether suit against maker of note would have produced money is question for jury, p. 153.

Cited and rule applied in Camden v. Doremus, 3 How. 533, 11 L. 713. Approved in Pococke v. Blount, 6 Mo. 345.

Bills and notes.— Before resort can be had to indorser of note, maker must be sued if solvent, p. 153.

Cited and rule applied in Hanna v. Pegg, 1 Blackf. 184, suit against assignor; Herald v. Scott, 2 Ind. 57, holding where assignee sues assignor, he must show that maker is unable to pay any part; Bozell v. Hauser, 9 Ind. 524, where maker was shown to be utterly insolvent. Cited generally in Morrison v. Lovell, 4 W. Va. 350, as to what circumstances relieve holder from pursuing principal debtor.

Statute of frauds.— Virginia statute construed and manner in which it differs from English statute, as to requiring agreement to answer for debts of another to state consideration therefor, pointed out, p. 152.

Cited in the following: Thompson v. Hall, 16 Ala. 207, 208; Packard v. Richardson, 17 Mass. 141, 9 Am. Dec. 134; Pearce v. Wren, 4 S. & M. 97, as authority for holding a promise to answer for debts of another need not state consideration; also in Britton v. Angier, 48 N. H. 423, 424; Miller v. Irvine, 1 Dev. & B. 107, where above rule is adopted.

The rule of Thompson v. Hall, supra, is followed in Fyler v. Givens, 3 Hill L. 51, 53; Taylor v. Ross, 3 Yerg. 332, 333; Colgin v. Henley, 6 Leigh, 100, 103; Dorman v. Richard, 1 Fla. 292. Cited generally in Rigby v. Norwood, 34 Ala. 133; How v. Kemball, 2 McLean, 107, F. C. 6,748; Ellett v. Britton, 10 Tex. 212, as being contra to English rule in the following: Hayes v. Jackson, 159 Mass. 453, 34 N. E. 684; Bean v. Valle, 2 Mo. 138; Neelson v. Sanborne, 2 N. H. 414, 9 Am. Dec. 108, as authority for holding no action can be maintained, in case where statute requires agreement to be in writing, unless consideration for promise be stated in writing. Cited in extended note on "when consideration of contract must be expressed, and what is sufficient expression," 60 Am. St. Rep. 435, 436.

Miscellaneous.— Cited in dissenting opinion, Hunter v. Hempstead, 1 Mo. 70, as to right of indorsee to sue remote indorser, not in point.

5 Cr. 154–173, 3 L. 64, PIERCE v. TURNER.

Fraudulent conveyances.— In the Virginia statute of 1792, making void as to creditors conveyances not acknowledged and recorded as therein provided, the word "creditors" refers to those of the grantor only, p. 165.

Cited and principle applied in Kelly v. Mills, 41 Miss. 283, holding deed from naked trustee to complainant not void as to trustee's creditors for failure to record; Mississippi, etc., Co. v. Chicago, etc., R. R. Co., 58 Miss. 856, holding unrecorded mortgage not void as to creditors of mortgagee's constructive trustee who is charged with notice; Givens v. Branford, 2 McCord, 155, 13 Am. Dec. 705, holding unrecorded marriage settlement not void as to creditor of husband who had notice; Crenshaw v. Anthony, Mart. & Y. 112, holding failure to record trust deed in Tennessee, and possession for five years by husband of cestui que trust, who had notice, does not give husband title or make deed void as to his creditors; Morgan v. Elam, 4 Yerg. 428, 449, holding unrecorded marriage settlement, made in Virginia, not void as to creditors of husband, who was party thereto; Bradshaw v. Thomas, 7 Yerg. 499, applying rule to similar statute and admitting in evidence unregistered contract to sell a horse to prove title in obligor when levied on by obligee's creditor; Hamilton v. Bishop, 8 Yerg. 42, 29 Am. Dec. 103, holding unregistered deed of slave to separate use of married woman not void so as to give title to purchaser under mortgage made by her husband; Douglass v. Morford, 8 Yerg. 385, holding a proviso in registration statute in favor of "rights of creditors" referred to creditors of grantor as to whom unregistered bill of sale held void; Baldwin v. Baldwin, 2 Humph. 477, holding unregistered deed of feme sole to trustee for her benefit in contemplation of marriage, not void as to creditors of husband; Land v. Jeffries, 5 Rand. 222, 258, holding unrecorded deed by feme sole intended as a trust, made in contemplation of marriage, not void as to her husband's creditors; Chamberlayne v. Temple, 2 Rand. 398, 14 Am. Dec. 790.

Criticised in dissenting opinion in Land v. Jeffries, 5 Rand. 233; distinguished in Thomas v. Gaines, 1 Gratt. 357, 358, holding deed of marriage settlement not recorded, void as to creditors of husband, though he joined therein. Distinguished in McCandlish v. Keene, 13 Gratt. 637. Rule of construction decided in Harmon v. Oberdorfer, 33 Gratt. 503, against leading case in view of change in statute expressly so settling it. Cited as authority for a construction since altered by statute in Snyder v. Martin, 17 W. Va. 287, holding void a grant of land by parol accompanied by delivery of possession as to creditor of grantor's heir. See also Anderson v. Anderson, 2 Call (Va.), 207, note.

Where the application of a law works an injury, the remedy is in the legislature, not in the court, p. 167.

Cited to same effect in Alvord v. Lent, 23 Mich. 373.

Miscellaneous citations.— Chamberlayne v. Temple, 2 Rand. 398, 14 Am. Dec. 790. Erroneously cited in 1 Wash. Tr. 277, and in 13 Ga. 76.

5 Cr. 173–187, 3 L. 70, KEMP'S LESSEE v. KENNEDY.

Federal courts.— United States courts are courts of limited jurisdiction, p. 185.

Cited on the general doctrine above in Brown v. Noyes, 2 Wood. & M. 79, F. C. 2,023, and Ludington v. The Nucleus, 15 Fed. Cas. 1095, holding pleadings must allege facts showing jurisdiction; Fideliter v. United States, 1 Sawy. 156, 1 Abb. 579, F. C. 4,755, so in admiralty seizure must be alleged; United States v. New Bedford Bridge, 1 Wood. & M. 406, F. C. 15,867, presumption is against jurisdiction; In re Booth, 3 Wis. 180, and they are strictly limited to jurisdiction conferred by statute; Lange v. Benedict, 73 N. Y. 35, 29 Am. Rep. 94, Circuit Court is a court of limited jurisdiction but not an inferior court.

But, jurisdiction having once been conferred, it will not be presumed taken away unless intention is plain, United States v. Shaw, 39 Fed. Rep. 433.

Courts.— To determine whether a court is one of general jurisdiction or not its constitution and powers must be inspected, p. 185.

Judgments.— Judgments of inferior United States courts are erroneous but not void if proceedings fail to show jurisdiction, p. 185.

Cited approvingly, and principle applied, in McCormick v. Sullivant, 10 Wheat. 199, 6 L. 302, holding such a judgment valid between the parties until reversed; Kennedy v. Georgia Bank, 8 How. 611, 12 L. 1219, and Dowell v. Applegate, 152 U. S. 337, 38 L. 467, 14 S. Ct. 615, holding they may not be impeached collaterally; in the following: Baker v. Biddle, 1 Bald. 406, F. C. 764, Farmers' Loan v. McKinney, 6 McLean, 9, F. C. 4,667; Brown v. Noyes, 2 Wood. & M. 80, F. C. 2,023, holding such a judgment is not a nullity though reversible on direct attack; Bank of United States v. Moss, 6 How. 39, 12 L. 335, and until reversed must be enforced; Ex parte Watkins, 3 Pet. 203, 7 L. 653, extends rule to criminal cases; Cuddy, Petitioner, 131 U. S. 284, 33 L. 156, 9 L. 704, to contempts; In re Osterhaus, 18 Fed. Cas. 895, to judgments of territorial courts; Ward v. Cozzens, 3 Mich. 258, to process of Circuit Courts. Cited in general discussion, in Ex parte Lennon, 64 Fed. 322, 22 U. S. App. 561; Fisher v. Rutherford, 1 Bald. 193, F. C. 4,823.

Rule does not apply where record shows court was wholly without jurisdiction; Moore v. Edgefield, 32 Fed. 501; McNutt. v. Bland, 2 How. 22, 11 L. 164, dissenting opinion, proceedings of Circuit Court are erroneous unless jurisdiction shown.

Judgments.— A subsisting judgment of a court of competent jurisdiction is valid until reversed, p. 186.

Approved and principle applied in the following citing cases: Cooper v. Reynolds, 10 Wall. 316, 19 L. 932, Wyman v. Campbell, 6 Port. 238, 31 Am. Dec. 686, reviewing authorities, Rodgers v. Evans, 8 Ga. 145, 52 Am. Dec. 391, Haywood v. Collins, 60 Ill. 342; dissenting opinion, Horner v. Doe, 1 Ind. 133, 48 Am. Dec. 358, collecting cases — all holding that erroneous judgment is not open to collateral attack; Harvey v. Tyler, 2 Wall. 340, 342, 343, 17 L. 873, 874, unless it be affirmatively shown that they have no jurisdiction; White v. Crow, 110 U. S. 189, 28 L. 115, 4 S. Ct. 74, even where error consists in entry before expiration of statutory period; Birdsall v. Phillips, 17 Wend. 468, or where error involves a finding as to a jurisdictional fact; Telford v. Barney, 1 G. Greene, 589, rule extends to all judicial acts of court of competent jurisdiction; Kittredge v. Emerson, 15 N. H. 263, and to judgments of sister States; State v. Middlesex, 15 N. J. L. 71, to erroneous process. The doctrine is affirmed in Quesenberry v. Barbour, 31 Gratt. 500, and Jackson v. Astor, 1 Pinn. 158, 39 Am. Dec. 291; and applied in Camberford v. Hall, 3 McCord (S. C.), 346, holding that garnishee cannot take advantage of errors in suit against original debtor; in the following: Applegate v. Lexington Mfg. Co., 117 U. S. 269, 29 L. 896, 6 S. Ct. 748; Wright v. Marsh, 2 G. Greene, 114, and Boker v. Chapline, 12 Iowa, 206, all holding every presumption not inconsistent with the record will be indulged in favor of the jurisdiction of such a court; Diehl v. Page, 3 N. J. Eq. 147, and State v. Lewis, 22 N. J. L. 566, rule extends to case where special powers are conferred on court of general jurisdiction and every intendment is in favor of the judgment. The following have been held courts of general jurisdiction within the rule: Borden v. State, 11 Ark. 552, 54 Am. Dec. 242, Johnson v. Beazley, 65 Mo. 259, 27 Am. Rep. 281 (reviewing authorities), Guilford v. Love, 49 Tex. 742, Probate Courts; Pittenger v. Pittenger, 3 N. J. Eq. 167, Orphans' Court; Fort v. Stevens, 17 Wend. 484, 485, Court of Common Pleas; Russell v. Lewis, 3 Or. 383, a County Court in probate matters; and Gresham v. Ewell, 85 Va. 6, 6 S. E. 702, a County Court. Cited in general discussion in Lincoln v. Tower, 2 McLean, 478, F. C. 8,355; Hunt's Heirs v. Ellison's Heirs, 32 Ala. 196, 199; Mosely v. Tuthill, 45 Ala. 652, 6 Am. Rep. 718; Morewood v. Hollister, 6 N. Y. 315; James v. Smith, 2 S. C. 187; Francis v. Washburn, 5 Hayw. (Tenn.) 301.

On the other hand it has been held in Tolmie v. Thompson, 3 Cr. C. C. 137, F. C. 14,080 (afterwards reversed, 2 Pet. 157), 7 L. 381; Morse v. Presby, 25 N. H. 302, and Werz v. Werz, 11 Mo. App. 35, that where a special jurisdiction has been conferred on a court of general jurisdiction the rule does not apply; Van Doren v. Horton, 25 N. J. L. 207, a court of limited jurisdiction must cause jurisdiction

to be shown on the face of the proceedings; Clark v. Holmes, 1 Doug. (Mich.) 394, or its judgment is open to collateral attack; Ex parte Kearny, 55 Cal. 215, 216, Police Courts are courts of inferior jurisdiction; Russell v. Work, 35 N. J. L. 320; Camp v. Woods, 10 Watts, 120, 122, Justices' Courts; Young v. Rathbone, 16 N. J. Eq. 227, 84 Am. Dec. 153, where a judgment is not merely erroneous, but an usurpation of jurisdiction, rule does not apply; Hart v. Seixas, 21 Wend. 55, 57, jurisdiction will not be presumed upon appeal.

Courts.— Inferior courts are technically those whose judgments are subject to revision, but they are not necessarily courts of special and limited jurisdiction, whose judgments are disregarded unless their proceedings show jurisdiction, p. 185.

Definition cited and approved; Nugent v. State, 18 Ala. 524; La Croix v. Commissioners, 49 Conn. 596, and State v. Fillebrown, 2 S. C. 407. Cited Fox v. Hoyt, 12 Conn. 497, 31 Am. Dec. 763, questioning whether Justices' Court is one of special and limited jurisdiction; Kennedy v. Greer, 13 Ill. 452, holding Circuit Courts in Illinois not inferior; Lange v. Benedict, 73 N. Y. 35, 29 Am. Rep. 94; United States Circuit Court is not inferior; Supervisors v. Le Clerc, 3 Pinn. 325, County Courts in Wisconsin are. Cited in general discussion in Gay v. Lloyd, 1 G. Greene, 85, 46 Am. Dec. 504; Seymour v. Bailey, 66 Ill. 297; The Fideliter, 1 Abb. 579; 1 Sawy. 156, F. C. 4,755; Waters v. Randall, 8 Met. 134; Clark v. Holmes, 1 Doug. (Mich.) 394; Curtis v. Leavitt, 15 N. Y. 229; Waller v. Condray, 2 Yerg. 173; Maskall v. Maskall, 3 Sneed, 209. See also 79 Am. Dec. 164, note.

5 Cr. 187–191, 3 L. 74, MARINE INS. CO. OF ALEXANDRIA v. YOUNG.

Appeal and error.— Refusal by lower court to grant motion for new trial is not assignable error, p. 191.

This holding is approved by the following citations: Pomeroy's Lessee v. Bank, 1 Wall. 598, 17 L. 640, declining to entertain bill of exceptions to ruling of lower court, denying motion for new trial; Wright v. Lessee, 1 Pet. 169, 7 L. 98, applying principle to granting of motion to amend pleadings by lower court, refusing to entertain writ of error therefor; Railway Co. v. Twombly, 100 U. S. 81, 25 L. 550, refusing to entertain writ of error for refusal to grant new trial; Earnshaw v. United States, 146 U. S. 68, 36 L. 889, 13 S. Ct. 15, holding exercise of discretion by appraisers in refusing to postpone reappraisement of imported goods in absence of importer, not subject to review; Willis v. Board, 86 Fed. 877, where Circuit Court of Appeals refused to review denial of motion to grant new trial; Chouteau v. Consoue, 1 Mo. 351, refusing to entertain writ of error to correct the decision of lower court claimed to be contrary

to evidence, because if error, it was error in fact; M'Courry v. Doremus, 10 N. J. L. 249, holding refusal of lower court to continue cause not error, for which writ of error will lie; Crawford v. Railroad Co., 28 N. J. L. 482, holding refusal to grant leave to amend as to matters of substance not assignable error; Law v. Merrills, 6 Wend. 278, refusing to reverse judgment for refusal to grant a new trial. Cited, generally, in Ringgold's Case, 1 Bland Ch. 9.

Distinguished in Jones v. Van Zandt, 5 How. 224, 12 L. 126, entertaining jurisdiction of cause on certificate of division of opinion in Circuit Court, where division not upon questions urged as reasons for new trial; United States v. Chicago, 7 How. 191, 12 L. 663, entertaining jurisdiction on certificate of division where question of right involved in determining motion for preliminary injunction; Goldsby v. Robertson, 1 Blackf. (Ind.) 22, holding refusal to grant motion for new trial assignable as error where new trial was a matter of right; Gilliland v. Rappleyea, 15 N. J. L. 143, holding writ of error did lie where, after order granting plaintiff a new trial, he was non prossed and judgment subsequently entered for defendant; different rule announced in Sorrel v. St. Julien, 4 Mart. (O. S.) (La.) 509, where the Supreme Court of Louisiana entertained appeal from order denying new trial on ground that it was a court of appeals, not merely a court of error.

Instruction to jury.— Court is not bound to construe testimony at the request of the jury, p. 191.

5 Cr. 191–234, 3 L. 75, BODLEY et al. v. TAYLOR.

Equity jurisdiction.— United States Supreme Court, following practice in Virginia and Kentucky, will take jurisdiction as court of equity of suit setting up equitable against legal land title, p. 223.

Cited and doctrine applied in Brush v. Ware, 15 Pet. 105, 10 L. 677, where court went behind patent and examined equitable title, in view of peculiar system of Virginia, Kentucky and Ohio; Lorman v. Clarke, 2 McLean, 575, F. C. 8,516, holding, when a right created by statute existed in Michigan enforceable only in equity, the Federal court would take equitable jurisdiction to give effect thereto; Reed v. Bullock, Lit. Sel. Cas. 514, 12 Am. Dec. 349, holding entry for land gave an equitable right which could be set up in a court of chancery; Davis v. Fletcher, 11 La. Ann. 506, holding court had jurisdiction to quiet title in equitable owner against one who held legal title; Ludelling v. Vester, 20 La. Ann. 436, holding court could go behind patent and investigate validity of conflicting titles from their inception; Stephenson v. Smith, 7 Mo. 619, where court of equity took jurisdiction of bill to enjoin ejectment where equitable title set up against legal title of defendant which was alleged to be based on fraud; Lamont v. Stimson, 3 Wis. 556, 62 Am. Dec. 701, holding equity could go behind patent and decree legal

title to person having equitable right; Taylor v. Brown, 5 Cr. 255, 256, 3 L. 94, where court took jurisdiction where equitable set up against legal title.

Denied in M'Clung v. Hughes, 5 Rand. 475, holding that in absence of fraud court would not go behind patent to determine title. Distinguished in Maguire v. Tyylor, 40 Mo. 439, denying jurisdiction of court of equity, where junior patent based on confirmation in 1810, attempted to be set up against elder patent based on claim filed in 1806.

Equity.— In all cases in which a court of equity takes jurisdiction it will exercise that jurisdiction in conformity with the settled principles of a court of chancery, p. 223.

Cited and principle applied in Ex parte Crane, 5 Pet. 210, 8 L. 100, dissenting opinion, contending that exercise of jurisdiction conferred by congress on Federal courts should be in conformity with settled principles of common law, equity, and admiralty, not with the usages, principles and practice of State courts; Hall v. Mining Co., 1 Woods, 547, F. C. 5,955, holding that a Georgia statute providing equitable relief could not be administered by a Federal court, because the mode of proceeding prescribed by the statute was a legal proceeding; Brown v. Buck, 75 Mich. 278, 13 Am. St. Rep. 441, 42 N. W. 828, holding unconstitutional a statute which attempted to transfer the cognizance of equitable questions to a jury; Pittsburgh Co. v. Keokuk Co., 68 Fed. 21, 46 U. S. App. 530, holding that the existence of a legal remedy by State law does not oust Federal court in such State of its equitable jurisdiction when by the settled principles of equity the question is an equitable one; Cropper v. Coburn, 2 Curt. 472, F. C. 3,416, holding that State law by providing a legal remedy cannot deprive parties entitled to come into Federal courts of a remedy which would otherwise exist in equity.

Statutes.— Federal courts conform to State decisions, respecting State laws, p. 222.

Approved and followed in Green v. Neal, 6 Pet. 296, 8 L. 404, where United States Supreme Court conformed to decision of State court upon State statute of limitations; Prentice v. Zane, 19 Fed. Cas. 1272, in argument to support decision that Federal court in Pennsylvania should adopt construction of State statute by State court; Lorman v. Clarke, 2 McLean, 575, F. C. 8,516, where a right created by statute in Michigan was enforceable only in equity there, the Federal court took equitable jurisdiction to give effect thereto; Vaughan v. Phebe, Mart & Y. 24, 17 Am. Dec. 779, holding construction of Virginia law by Virginia court authority for Tennessee court.

Virginia-Kentucky compact.— There is no violation of the compact if laws be neither made nor expounded for the purpose of depriving those protected thereby of their rights, p. 223.

Public lands.— Only such reasonable certainty of entry required as will enable subsequent locator by exercise of due judgment and diligence to locate his own lands on the adjacent residuum, p. 224.

Cited and rule applied in McNeel v. Herold, 11 Gratt. 314, in determining conflicting boundaries.

Public lands.— Where description in entry of land claim begins on a road and calls for a distance from a given point on the same road the distance must be measured according to the meanders of the road and not in a straight line, p. 226.

Rule applied in Preeble v. Vanhoozer, 2 Bibb, 120, construing entry to determine boundary where claims conflicting.

Public lands.— In Kentucky where an entry calls for a quantity of land on given side of a road, it is to be surveyed in a square with road as one side, p. 226.

Public lands.— Where one call in an entry is vague and uncertain, but there is enough that is certain to determine the location, the vague part will be discarded, but the certain part will not be vitiated by it, p. 228.

Equity — Public lands.— Where survey of lands in Kentucky upon prior entry confirmed by patent, through inadvertence, includes lands not contained in such entry, but included in subsequent entry and patent, court of equity will decree conveyance of such lands to subsequent locator, p. 234.

Miscellaneous citations.— Ex parte Crane, 5 Pet. 200, 8 L. 96, as precedent for considering jurisdictional questions first; Walden v. Bodley, 14 Pet. 159, 10 L. 400, and Walden v. Bodley, 9 How. 36, 13 L. 36, referring to leading case as growing out of same transactions. Cited erroneously in Bayard v. McLane, 3 Harr. 233.

5 Cr. 234–256, 3 L. 88, TAYLOR v. BROWN.

Public lands.— Certificate of surveyor is sufficient evidence that warrant was in hands of surveyor at the time of survey, when made under Virginia military land warrants, p. 242.

Cited and affirmed in Craig v. Radford, 3 Wheat. 597, 4 L. 468, holding surveyor's certificate sufficient evidence that warrant was in his possession when survey made; Cragin v. Powell, 128 U. S. 699, 32 L. 569, 9 S. Ct. 206, holding courts have no power to correct surveys except by a direct proceeding; Cohas v. Raisin, 3 Cal. 448, holding that where alcalde of San Francisco granted lands during war with Mexico, grant presumed to be regular; Lambourn v. Hartswick, 13 S. & R. 122, to the effect that where survey regularly returned and party has been in possession for a time analogous to

statute of limitations, presumption is in favor of regularity of proceedings.

Public lands.— Virginia act of 1748, requiring surveyor to record survey within two months, is directory merely, and failure so to do does not invalidate title, p. 242.

Affirmed in Craig v. Radford, 3 Wheat. 597, 4 L. 468, holding the same act directory as to the provision therein requiring the surveyor "to see the land plainly bounded by natural bounds or marked trees;" Stringer v. Lessee, etc., 3 Pet. 339, 340, 7 L. 699, 700, holding subsequent Virginia act containing similar provision merely directory and legal title not affected by failure to comply therewith; Garrard v. Silver Peak Mines, 82 Fed. 590, holding a location and record of the survey, though not within time specified by act of congress, valid against one who attempts to acquire adverse title twenty years afterwards; County v. Riddle, 51 Tex. 366, holding survey not forfeited when return not made as required by statute.

Public lands.— It is not necessary under Virginia statute, that the deputy surveyor who made the survey should make out the plat and certify it, it may be done from his notes by his principal, p. 247.

Affirmed in Craig v. Radford, 3 Wheat. 597, 4 L. 468, holding principal surveyor could legally make and certify plat of survey made by his deceased deputy.

Public lands.— Title commences with the survey which is the appropriation, p. 254.

Cited and principle applied in Ashley v. Cramer, 7 Mo. 102, holding title never acquired, where survey never made; McAfee v. Keirn, 7 Smedes & M. 789, 45 Am. Dec. 333, holding patent related back to equitable title acquired by settlement and entry; Silver, etc., Co. v. Clark, 5 Mont. 423, 5 Pac. 581, and Talbot v. King, 6 Mont. 108, 9 Pac. 442, holding junior patent related back to prior location; Wardwell v. Paige, 9 Or. 524, where location made under State law on United States public lands before selection by State, and subsequently and after selection defendant obtained legal title, held that he was trustee for first locator. See also Stark v. Mather, 12 Am. Dec. 568, note.

Equity.— Where one watches for accidental mistakes of others to take advantage of them, equity will not enforce the advantage gained, p. 256.

Cited and applied in Cragin v. Powell, 128 U. S. 700, 32 L. 569, 9 S. Ct. 206, dismissing petition where plaintiffs, discovering error in survey, obtained grant describing land by quantity, township and section

and sought to recover from parties holding under old erroneous survey; Deweese v. Reinhard, 165 U. S. 393, 41 L. 760, 17 S. Ct. 343, dismissing bill to enjoin ejectment where plaintiff with knowledge of defendant's possession sought to take advantage of an error.

Equity jurisdiction.— Equity will entertain jurisdiction to establish prior equitable title against subsequent legal title, p. 254.

Principle applied in Stephenson v. Smith, 7 Mo. 619, entertaining jurisdiction of bill to establish equitable against legal title where latter claimed to have been founded on fraud; McAfee v. Keirn, 7 Smedes & M. 789, 45 Am. Dec. 333, holding equitable title acquired by settlement, and patent related back to it; McArthur v. Phoebus, 2 Ohio, 420, when court went behind elder patent and examined equities of parties.

Denied in Virginia by M'Clung v. Hughes, 5 Rand. 476, holding patent established title in absence of fraud; also by French v. Co., 5 Leigh, 666, refusing to entertain bill setting up equitable title against patent. Distinguished in Maguire v. Tyler, 40 Mo. 439.

Local adjudication.— In questions respecting title to real estate Federal courts will follow decisions of State courts, p. 255.

Cited and applied in Prentice v. Zane, 19 Fed. Cas. 1272, where decisions of Pennsylvania courts construing Pennslyvania statute regarded as authority; Vaughan v. Phebe, Mart & Y. 24, holding Virginia court's construction of Virginia statute authority in Tennessee; Green v. Neal, 6 Pet. 296, 8 L. 404, overruling former decision construing Tennessee statute of limitations to conform to subsequent construction of Tennessee court.

Public lands.— Survey not vitiated by including surplus land, p. 253.

Cited in Vanderslice v. Hanks, 3 Cal. 43, holding a grant from Mexican government not vitiated because survey contained surplus; Houston v. Pillow, 1 Yerg. 488, holding title not vitiated, because survey included too much.

Modified in Coan v. Flagg, 123 U. S. 126, 31 L. 111, 8 S. Ct. 51, holding survey fraudulently including more than warrant calls for does not give title against United States, and fraud presumed from very large excess.

Miscellaneous citations.— Poole v. Nixon, 19 Fed. Cas. 999, 9 Pet. Appx. 770.

5 Cr. 257–261, 3 L. 94, UNITED STATES v. ARTHUR.

Pleading.— Upon demurrer judgment must be against the party who committed the first error in pleading, p. 261.

Principle applied in Morton v. Kirk, 79 Fed. 291, where bill dismissed for substantial defect upon demurrer to response; Stoney

v. McNeile, 1 McCord, 87, where defect in plea was fatal on demurrer to replication; Potter v. Titcomb, 7 Me. 323, adjudging replication bad for failure to allege fraud; Hall v. Williams, 8 Me. 436, holding plea bad on general demurrer to rebutter; Will v. Mattherson, 2 G. Greene, 186, where, on demurrer to replication, plea held bad because statute of limitations pleaded, which was not a bar; Anderson v. Barry, 2 J. J. Marsh. 269, where sufficiency of declaration examined on demurrer to plea.

Distinguished in Aurora, etc. v. West, 7 Wall. 93, 19 L. 46, where objection as to mere matter of form not fatal to replication on demurrer to rejoinder; Jackson v. Rundlet, 1 Wood. & M. 383, F. C. 7,145.

Pleading.— A plea of performance of condition of a bond, without oyer, is bad on demurrer, p. 261.

Cited in Anderson v. Barry, 2 J. J. Marsh. 278, in argument of court that declaration was good, notwithstanding want of profert, to show that oyer may be craved, nevertheless; Clancy v. Dickey, 2 Hawks (N. C.), 515, arguing that bond is not in the record, though profert made, if no oyer craved. See also Polk, etc. v. Bull, 1 Harr. 437, note.

Distinguished in State v. Mayugh, 13 Md. 378, holding such defect can be availed of only by special demurrer.

5 Cr. 262–280, 3 L. 96, HEPBURN v. AULD.

Deed.— After long possession in severalty a deed of partition will be presumed, p. 276.

Principle applied in Scott v. Evans, 1 McLean, 489, F. C. 12,529, holding where statute of limitations was not applicable by reason of nonresidence, plaintiff's title was nevertheless barred by lapse of time; Beardslee v. French, 7 Conn. 128, 18 Am. Dec. 88, where long nonuser of highway held evidence of abandonment; Gaines v. Com, 2 J. J. Marsh. 107, where conveyance presumed from thirty years' possession by purchaser who held bond for title; Kingston v. Leslie, 10 S. & R. 391, holding admissible, evidence of long possession upon which to presume conveyance; Hanes v. Peck, Mart. & Y. 233, where title presumed from more than thirty years' possession.

Distinguished in Ransdale v. Grove, 4 McLean, 284, F. C. 11,570, where mere possession for long time held not ground for the presumption when inconsistent with the evidence.

Specific performance.— Equity will not decree specific performance of part of contract for sale of land where vendor fails to give good title to the rest and it is not fit subject for compensation, p. 278.

Cited and principle applied in Wood v. Mason, 2 Cold. 253, holding vendee of land entitled to rescission where vendor failed to give

good title to a part; Lewis v. Yale, 4 Fla. 438, where court refused to give compensation because it was not a case where specific performance could have been granted; Thompson v. Gould, 20 Pick. 139, holding court could not decree compensation where portion of consideration had failed by burning of house on land; Gregoire v. Bulow, Rich. Eq. Cas. 244, where court refused to decree specific performance or grant compensation where there was title outstanding to one-twelfth of the whole tract; Morgan v. Morgan, 2 Wheat. 299, 4 L. 244, where court refused to grant relief because neither party able to give good title as to whole of his tract.

Equity.— In equity time may be dispensed with when not material and vendor may compel specific performance of contract for sale of land if able to give good title to the whole thereof at the date of decree, though he could not have done so at proper time for performance, p. 378.

The citations show that a large number of subsequent cases have affirmed and applied this proposition, as follows: Langworth v. Taylor, 1 McLean, 401, F. C. 8,490, holding where vendor guilty of negligence himself and had acquiesced in delays of vendee, time not material and court entertained bill for specific performance; Morgan v. Morgan, 2 Wheat. 304, 4 L. 246, note discussing authorities; Wilson v. Tappan, 6 Ohio, 174, holding complainants entitled to specific performance if they could make good title any time before decree; Linn v. McLean, 80 Ala. 368, holding plaintiff, vendor, could make good title any time before date of decree on bill in the nature of specific performance; Chrisman v. Partee, 38 Ark. 60, where a mistake had been made in description of property in deed tendered before trial, held plaintiff entitled to specific performance if he tendered good deed before decree; Brackenridge v. Dawson, 7 Ind. 387, holding offer of performance by vendor when both parties in default and in absence of stipulation making time material entitles him to decree when vendee brings suit for rescission; Tewksbury v. Howard, 138 Ind. 111, 37 N. E. 358, holding vendor entitled to specific performance where good title made out before decree; Lancaster v. Roberts, 144 Ill. 225, 33 N. E. 30, holding, where time expressly made material in contract to sell but subsequently waived by both parties and vendor subsequently makes good title he is entitled to specific performance; Steele v. Branch, 40 Cal. 11, holding where plaintiffs, vendees, agreed to pay off mortgage on land when due, a short delay in paying, granted by mortgagees, did not deprive them of right to specific performance; Mathews v. Gillis, 1 Iowa, 254, holding plaintiff, vendee, entitled to specific performance where, though plaintiff guilty of laches, defendant has not acted on the contract as forfeited; Manning v. Brown, 10 Me. 52, principle applied where held under agreement to convey land on payment of notes at

maturity, when plaintiff sued on notes he waived stipulation as to time in agreement to convey; Barnard v. Lee, 97 Mass. 94, holding plaintiff, vendee, entitled to specific performance though he did not tender payment till some days after time fixed by contract; Davidson v. Moss, 5 How. (Miss.) 686, where rescission denied when asked for on ground of failure to give title, when title was made good before decree; Rodman v. Zilley, 1 N. J. Eq. 327, holding vendor entitled to specific performance though deed not tendered till after day named in contract; Oakey v. Cook, 41 N. J. Eq. 364, 7 Atl. 503, where incumbrances on property at time of contract in violation thereof no bar to specific performance if cleared off before decree; Fletcher v. Wilson, 1 Sm. & M. Ch. 389, holding that though vendor could not give title at time of contract and sale, vendee not entitled to rescission when title perfected by time of hearing; Wiswall v. McGowan, 1 Hoff. Ch. 134, holding plaintiff entitled to specific performance where defendant had extended time by parol; Gregoire v. Bulow, Rich. Eq. Cas. 242, where court of equity took jurisdiction of suit for specific performance, notwithstanding plaintiff could not give good title at time of contract; Seymour v. Delancy, 3 Cow. 519, 15 Am. Dec. 284, holding failure to give title on day when contract was to be performed not a bar to specific performance. See note to Johnson v. Evans, 50 Am. Dec. 676, collecting authorities; also note to McKean v. Reed, 12 Am. Dec. 324; cited also in Tufts v. Tufts, 3 Wood. & M. 474, F. C. 14,233, but court declined to decide whether case was within the rule.

Distinguished in Garnett v. Macon, 2 Brock. 247, F. C. 5,245, 6 Call, 371, holding time material because of fall in price and bill dismissed; also in Sneed v. Wiggins, 3 Ga. 99, affirming rule, collecting cases, but holding time material, when payments of installments required to be on named days; Glass v. Rowe, 103 Mo. 539, 15 S. W. 341, where bill dismissed because time had been expressly made of the essence of the contract; Curtis v. Blair, 26 Miss. 327, 59 Am. Dec. 262, where time held material because expressly made so, and bill, therefore, dismissed; Inman v. Insurance Co., 12 Wend. 461, where time held material where by policy plaintiff being required to notify defendants forthwith of destruction of property, waited several weeks.

Equity.— Lapse of time should not be disregarded in equity in this country as in England on account of fluctuation and uncertainty of land values here, p. 279, per Livingston, J.

Cited and approved in Taylor v. Williams, 2 Colo. App. 563, 31 Pac. 505, holding failure of vendor to produce abstract showing clear title by day agreed on not cured by subsequently showing defects disclosed by abstract do not exist in fact; Green v. Covillaud, 10 Cal. 328, 70 Am. Dec. 733, holding where culpable neglect in vendees in lying by for rise in price is shown, they cannot have

specific performance; Rogers v. Saunders, 16 Me. 101, 33 Am. Dec. 642, holding time material where great change in value has occurred; Richmond v. Gray, 3 Allen, 30, where plaintiff held not entitled to specific performance when he could not make good title at time fixed in contract though he could do so before decree; Goldsmith v. Guild, 10 Allen, 242, where held plaintiff not entitled to specific performance when contract by its terms to be performed in ten days and he did not perform on his part within that time. Cited, but not applied, in Barnard v. Lee, 97 Mass. 94.

Criticised in Rogers v. Saunders, 16 Me. 109, dissenting opinion.

Equity.— Equity cannot compel specific performance on terms and conditions; nor execute for part and assess damages as to the residue, p. 279, per Livingston, J.

Criticised in Clark v. Seirer, 7 Watts, 111, 32 Am. Dec. 748.

Tender.— Tender of assignment of contract is not vitiated by recital in assignment of release of all demands by assignee to assignor, where such release would not impair rights of assignee, p. 274.

Cited in Hepburn v. Dunlop, 1 Wheat. 184, 185, 4 L. 67, a case growing out of the same transactions, in statement of facts by the court.

Miscellaneous.— Cited in Keats v. Rector, 1 Ark. 425.

5 Cr. 280, 281, 3 L. 101, UNITED STATES v. EVANS.

Appeal and error.— In case of voluntary nonsuit, writ of error will not lie, upon the judge's refusal to reinstate the case, p. 281.

Rule cited and followed in Marsh v. Graham, 6 Iowa, 78, where plaintiff, after voluntary nonsuit, attempted, upon writ of error, to review the rulings and decisions of the court below; Andrews v. Bank, 77 Md. 29, 25 Atl. 917, where plaintiff neglected to summon his witnesses or in any manner to prepare for trial, held that he might not appeal from judgment of nonsuit; Ewing v. Glidwell, 3 How. (Miss.) 335, 34 Am. Dec. 97, where plaintiff, voluntarily submitting to nonsuit, was not permitted to review judgment on writ of error; Copeland v. Mears, 2 Smedes & M. 521, holding writ of error would not lie where plaintiff voluntarily accepted nonsuit upon the improper exclusion of his testimony. Cited in general discussion in Railway Co. v. Railway Co., 68 Tex. 108, 3 S. W. 566; Ringgold's Case, 1 Bland Ch. 9; Sorrell v. Julien, 4 Mart. (O. S.) 509. See also 12 Ind. 96, note; 4 La. Ann. 439, note; 6 La. Ann. 660, note.

Distinguished in Transportation Co. v. Pullman, 139 U. S. 39, 35 L. 61, 11 S. Ct. 480, holding rule otherwise in case of compulsory nonsuit; Gilliland v. Rappleyea, 15 N. J. L. 143, as a different case from that at bar.

5 Cr. 281–283, 3 L. 101, YEATON v. UNITED STATES.

Admiralty.— Appeal in admiralty suspends the sentence altogether, p. 283.

Cited and principle applied in Irvine v. The Hesper, 122 U. S. 266, 30 L. 1178, 7 S. Ct. 1182, The Louisville, 154 U. S. 657, 25 L. 771, 14 S. Ct. 1191, Saratoga v. Four Hundred and Thirty-eight Bales, 1 Woods, 79, F. C. 12,356, United States v. Preston, 3 Pet. 66, 7 L. 605, Folger v. Robt. Shaw, 2 Wood. & M. 540, F. C. 4,899, Dixon v. Watkins, 9 Ark. 152, Hudson v. Smith, 9 Wis. 126, Hughes v. Dundee Co., 11 Sawy. 558, 28 Fed. 43, and Souter v. Baymore, 7 Pa. St. 418, 47 Am. Dec. 519, all refusing to allow decree in admiralty which had been appealed from to be pleaded. Cited, discussing generally effect of appeals as vacating judgment of lower courts, in Tyler v. Shea, 4 N. Dak. 385, 50 Am. St. Rep. 665, 61 N. W. 471; Texas v. Smith, Dall. (Tex.) 409; Ætna Ins. Co. v. McCormick, 20 Wis. 272; State v. Johnson, 13 Fla. 46; and Palmer v. Conly, 4 Den. 377; Bayard v. McLane, 3 Harr. (Del.) 233, construing agreement for contingent fee in admiralty cause.

But held in Braithwaite v. Jordan, 5 N. Dak. 252, 65 N. W. 720, decree of lower court may be enforced pending appeal unless security be given.

Admiralty.—When statute authorizing forfeiture is repealed pending appeal, there can be no decree of condemnation pronounced without special reservation in the statute, p. 283.

Cited in United States v. Four Cases of Lastings, 10 Ben. 374, F. C. 15,145, as an authority on the main proposition, but section 13 of Revised Statutes modified this rule by providing that repeal of statute shall not release any penalty unless it expressly so provides. Cited in general discussion in State Bank v. Knoop, 16 How. 408, 14 L. 993, dissenting opinion.

Statutory construction.—After expiration or repeal of a law no penalty can be enforced or punishment inflicted for violations of law committed while it was in force, p. 284.

The following citing cases affirm this principle and apply it in various ways: Assessor v. Osbornes, 9 Wall. 575, 19 L. 751, holding where jurisdiction depends on statute, suits brought pending its existence abate with its repeal; Maryland v. Baltimore, 3 How. 552, 11 L. 722, if a State repeal a law imposing a penalty, it constitutes a remission of penalty already incurred; Union Iron Co. v. Pierce, 4 Biss. 332, F. C. 14,367, repeal of penal statute defeats pending actions for penalties; United States v. Mann, 1 Gall. 182, F. C. 15,718, penalties incurred under the embargo act are abrogated by the repeal of the embargo; United States v. Van Vliet, 22 Fed. 643, a penal statute cannot be enforced after repeal, though

offense was committed before repeal; Moore v. United States, 85 Fed. 468, 56 U. S. App. 477, a conviction under a penal statute applicable to territories cannot be had after abrogation of the statute by admission of the territory, where offense was committed as a State; State v. Tombeckbee Bank, 1 Stew. 349, penalties incurred under statute, though before repeal, cannot be recovered afterwards; Pope v. Lewis, 4 Ala. 489, affirming the foregoing case, a common informer cannot recover penalty where statute has been repealed; George v. State, 39 Ala. 677, a person cannot be convicted of offense committed while a slave under law applicable only to slaves, when law has been since repealed by abrogation of slavery, First National Bank v. Henderson, 101 Cal. 310, 35 Pac. 900, where defense in nature of penalty is erroneously disregarded, repeal of statute pending appeal cures the error; Bank v. State, 12 Ga. 491, 493, right to a penalty is not vested, but may be defeated by repeal of statute before judgment; Western Union v. Smith, 96 Ga. 571, 23 S. E. 900, judgment for a penalty will be set aside where statute is repealed after judgment and order denying new trial but before expiration of time allowed by law to except to the order; Coles v. Madison County, Breese, 158, 12 Am. Dec. 165, county has no vested right in a penalty which may not be taken away before judgment by repeal of statute creating the penalty; Thompson v. Bassett, 5 Ind. 536, to the same effect; Commonwealth v. Cain, 14 Bush (Ky.), 536, an indictment for embezzling funds of bank will be quashed where, pending proceedings, the act creating the penalty expires by limitation; Speckert v. Louisville, 78 Ky. 290, repeal of statute defeats suit for penalty; State v. Baltimore R. R. Co., 12 Gill & J. 437, 38 Am. Dec. 324, repealing of statute defeats suit for penalty; Keller v. State, 12 Md. 326, 71 Am. Dec. 597, repeal of statute creating offense defeats criminal action at any time prior to final affirmance; Saco v. Gurney, 34 Me. 14, repeal of statute defeats suit for penalty; State v. Edward, 5 Mart. (O. S.) 475, judgment of forfeiture will be reversed if statute creating forfeiture is repealed pending proceedings; Teague v. Mississippi, 39 Miss. 520, repeal of statute defeats suit for penalty; Globe v. State Bank, 41 Neb. 181, 59 N. W. 684, rule applies to suit to enforce any obligation imposed solely by statute; Lewis v. Foster, 1 N. H. 62, repeal after judgment and before review defeats action for penalty and judgment will be set aside in higher court; Belvidere v. Warren R. R. Co., 34 N. J. L. 199, repeal of tax statute imposing 12 per cent. penalty for delinquency, prevents recovery of amount of penalty, although original assessment may be enforced; Curtis v. Leavitt, 15 N. Y. 229, the right to a defense of usury may be taken away by repeal of statute pending proceedings; Hartung v. People, 22 N. Y. 101, 109, repeal of criminal statute imposing penalty, after conviction, entitles defendant to reversal on appeal; Allen v. Farrow, 2 Bail. 587, repeal defeats a qui tam action; State v.

Cole, 2 McCord (S. C.), 3, repeal of statute releases penalty imposed; Mahoney v. State, 5 Wyo. 524, 63 Am. St. Rep. 67, 42 Pac. 14, repeal of criminal statute, after conviction, pending appeal, entitles defendant to dismissal of action; Sheppard v. State, 1 Tex. App. 524, 28 Am. Rep. 423, where a penal statute is repealed pending appeal, action must be dismissed. The rule is applied by analogy in Hunt v. Jennings, 5 Blackf. 196, 33 Am. Dec. 466, where statute from which court derives jurisdiction in particular case is repealed, the court cannot proceed under repealed statute even in suits pending at the time of repeal unless repealing statute contains saving clause; Butler v. Palmer, 1 Hill, 330, identical with foregoing; G. & O. R. R. Co. v. Patton, 9 W. Va. 658, where procedure is changed pending proceedings should conform to the new law.

Distinguished in Tinker v. Van Dyke, 1 Flipp. 527, F. C. 14,058, distinguishing between penalties imposed and rights conferred by statute; Taylor v. Rushing, 2 Stew. 162, but where penalty has accrued to a private individual he has a vested right, which is not impaired by repeal of statute before recovery of judgment (which was afterwards overruled in Pope v. Lewis, 4 Ala. 493); United States v. Barr, 4 Sawy. 254, F. C. 14,527, rule has been changed by section 13 of revised statutes, so that even a crime may be punished, notwithstanding subsequent repeal of the statute constituting the act a crime; State v. Crusius, 57 N. J. L. 282, 31 Atl. 236, holding that a similar rule of construction has been enacted in New Jersey; Hargrove v. Chambers, 30 Ga. 602, rule has no application to liability of directors of bank imposed as penalty for violation of their charter, such a penalty subsists after expiration of the bank's charter; State v. Taylor, 2 McCord (S. C.), 490, where a statute has been repealed, persons may be punished for offenses committed before its repeal; Nicholas v. Commonwealth, 91 Va. 816, 22 S. E. 508, where jurisdiction to try cases has been taken away after conviction, court is not deprived of power to fix day for carrying sentence into effect, it being merely the execution of an existing judgment. Qualified in State v. Addington, 2 Bail. 519, 23 Am. Dec. 152, holding a repeal after judgment will not defeat execution of the sentence.

Admiralty.— On appeal in admiralty the cause is tried de novo, p. 283.

Cited with approval, Anonymous, 1 Gall. 24, 25, F. C. 444, permitting amendment in Circuit Court; Jay v. Olney, 1 Wood. & M. 271, F. C. 7,236, Circuit Court may increase damages awarded by District Court; The Philadelphian, 60 Fed. 426, 21 U. S. App. 90, additional proof may be introduced in Circuit Court of Appeals; Nelson v. White, 83 Fed. 217, and The M. M. Morrill, 48 U. S. App. 660, holding record on appeal to Circuit Court of Appeals must contain all the evidence so that case may be tried de novo.

The Beeche Dene, 55 Fed. 527, 13 U. S. App. 211, suggests that in prize cases the cause is tried de novo in Supreme Court, in others the practice has been modified by rule. On this point see the following: Gedney v. L'Amistad, 10 Fed. Cas. 151; Vanderheyden v. Reid, 1 Hopk. Ch. 412; Clarke v. Manchester, 56 N. H. 506; Sharon v. Sharon, 79 Cal. 647, 22 Pac. 30; Kennon v. Shull, 9 Ind. 156; Lyles v. Barnes, 40 Miss. 609; Stalbird v. Beattie, 36 N. H. 456, 72 Am. Dec. 318.

Cited in general discussion in the following: Leschi v. Washington Territory, 1 Wash. Tr. 17; People v. Townsey, 5 Den. 72; Smith v. Hard, 59 Vt. 19, 8 Atl. 319; Moore v. State, 43 N. J. L. 222, 39 Am. Rep. 574; Scott v. Watkins, 22 Ark. 564; Cook v. Gray, 2 Houst. 475, 81 Am. Dec. 193; Robinson v. Beall, 26 Ga. 86; Musgrove v. Vicksburg R. R. Co., 50 Miss. 681; State v. Academy of Science, 13 Mo. App. 219; Johnson v. Hahn, 4 Neb. 147; Dartmouth College v. Woodward, 1 N. H. 133; Rich v. Flanders, 39 N. H. 388, dissenting opinion. And see 94 Am. Dec. 218, note.

Admiralty.— After dismissal of libel for forfeiture, property libelled will be restored to claimants, they paying the duties thereon if not already paid, p. 284.

Denied as to this point, United States v. Five Hundred Boxes of Pipes, 2 Abb. (U. S.) 501, F. C. 15,116, Supreme Court possesses no admiralty jurisdiction to enforce payment of duties. Cited generally, Whelan v. United States, 7 Cr. 112, 3 L. 286; United States v. Wonson, 1 Gall. 14, F. C. 16,750; Steamship Co. v. Joliffe, 2 Wall. 465, 466, 17 L. 809, 810.

5 Cr. 284–287, 3 L. 102, UNITED STATES v. POTTS.

Duties.—Where the intention of congress was to distinguish between raw and manufactured copper, copper plates turned up at the edge are exempt from duty, though imported as "raised bottoms," pp. 286, 287.

Cited and applied in Hartranft v. Wiegmann, 121 U. S. 615, 30 L. 1014, 7 S. Ct. 1243, where shells cleaned by acid and ground on an emery wheel were exempt from duty as "shells of every description, not manufactured;" Patton v. United States, 159 U. S. 509, 40 L. 237, 16 S. Ct. 92, holding wool, which had actually undergone the process of scouring, properly classified as imported scoured, although not known commercially as scoured wool; New Orleans v. N. O. Coffee Co., 46 La. Ann. 89, 14 So. 503, holding a corporation producing "brands" of coffee, though a secret, nonpatented, roasting and cooling process, is not a manufacturer, nor exempt as such from the payment of a license.

5 Cr. 287–288, 3 L. 103, RUSH v. PARKER.

Appeal and error.— United States courts will grant time to produce affidavits as to the value of the matter in dispute, p. 287.

Cited in Richmond v. City of Milwaukee, 21 How. 392, 16 L. 72, holding affidavits as to the value shall not be filed after the case has been heard and dismissed for want of jurisdiction, nor at all, if the value of the property appears in the pleadings; The Grace Girdler, 6 Wall. 442, 18 L. 790, to the point that the value of the matter in dispute may be shown by affidavits filed when the question of jurisdiction is raised and holding a liberal practice warranted in admiralty cases; Cattle Co. v. Needham, 137 U. S. 634, 34 L. 800, 11 S. Ct. 209, holding where the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received to vary the value appearing in the record; Davie v. Heyward, 33 Fed. 94, holding where defendant applied for citation in writ of error without stating the value of his interest, while plaintiff's affidavit in opposition showed the amount, the question of the jurisdictional amount must be left to the Supreme Court; in Ringgold's Case, 1 Bland Ch. 24, holding that affidavits shall be received, as to the value of the matter in dispute, when that fact does not appear in the record, in order to fix the amount of appeal bond. Cited approvingly in Harman v. Lynchburg, 33 Gratt. 40.

5 Cr. 288–289, 3 L. 103, LOGAN v. PATRICK.

Federal courts — Jurisdiction.—A Circuit Court has jurisdiction in a suit in equity to stay proceedings upon judgment at law between same parties, though subpœna be served on defendant in another district, pp. 288, 289.

Followed in Jones v. Andrews, 10 Wall. 333, 19 L. 937, affirming jurisdiction of Circuit Court of a bill in equity to enjoin garnishee proceedings at law irrespective of the residence of the parties; French v. Hay, 22 Wall. 252, 22 L. 858, holding in a case removed from a State to the Circuit Court, the Circuit Court may enjoin the complainant from proceeding in any other court; Christmas v. Russel, 14 Wall. 81, 20 L. 763, holding when no party to the original suit had any connection with filing the bill, such bill is original and the Circuit Court has no jurisdiction between citizens of the same State; Krippendorf v. Hyde, 110 U. S. 281, 28 L. 147, 4 S. Ct. 29, holding where goods are attached by process of the Circuit Court, a third party claiming title to the same may file a bill upon equity side of the court, which proceeding will be considered auxiliary; Hatch v. Dorr, 4 McLean, 113, F. C. 6,206, holding a creditor's bill for discovery not an original proceeding and not affected by defendant's change of residence; Cortez Co. v. Thann-

hauser, 20 Blatchf. 61, 9 Fed. 227, holding suits in equity, brought to stay the prosecution of suits at law, dependent and supplementary merely; McBee v. Railroad Co., 48 Fed. 246, holding the jurisdiction of the court unaffected in an original bill in equity supplementary to an ancillary foreclosure suit which it seeks to oppose; Maitland v. Gibson, 79 Fed. 138, holding a bill filed to enforce the payment of costs against the plaintiff in an equity suit, may be treated as a dependent proceeding; McDonald v. Seligman, 81 Fed. 756, holding a bill in equity to enjoin the enforcement of a judgment obtained in the Circuit Court, is ancillary, and maintainable without diversity of citizenship; Towne v. Smith, 1 Wood. & M. 120, F. C. 14,115, denying to assignee of insolvents a perpetual injunction against attachment issuing out of the Circuit Court; Dunlap v. Stetson, 4 Mason, 361, F. C. 4,164, holding suit for relief upon judgment an auxiliary proceeding; Clarke v. Navigation Co., 1 Story, 540, F. C. 2,859, sustaining jurisdiction of Admiralty Court in proceeding in rem irrespective of residence of claimants; Williams v. Byrne, Hemp. 473, F. C. 17,718, holding a bill to enjoin judgment in Circuit Court not an original bill. Cited in general discussion, Freeman v. Howe, 24 How. 460, 16 L. 752, and approved; Bank v. Leland, 17 Fed. Cas. 60, arguendo; 76 Am. Dec. 223, note; Davis v. Packard, 10 Wend. 55.

Appearance — Courts.— The entering of an appearance by defendant is an admission of a due and effectual service, p. 288.

Cited and rule followed in Segle v. Thomas, 3 Blatchf. 15, F. C. 12,633, holding that a defendant appearing and answering a bill in equity cannot object upon the hearing that he was not served with process; Flanders v. Insurance Co., 3 Mason, 160, F. C. 4,852, holding a corporation, having entered a general appearance in a suit brought in another State, waived objection to the service; Harrison v. Rowan, 1 Pet. C. C. 491, F. C. 6,140, holding eleventh section of judiciary act not a denial of jurisdiction but a grant of a privilege to defendant, which he waives by voluntary appearance; Winans v. Railroad Co., 6 Blatchf. 219, F. C. 17,862, holding where defendant corporation removed a case to the Circuit Court, and entered an appearance thereon, it waived the question of service; Reinstadler v. Reeves, 33 Fed. 310, holding defendants, by formal appearance in another State, waive right to service in district in which they reside; Shainwald v. Davids, 69 Fed. 702, denying sufficiency of service upon law firm in an original proceeding; Lee v. Ætna Ins. Co., 15 Fed. Cas. 141, holding process of the court served upon a corporation in another State, effectual where such corporation has filed a consent that process shall be valid if so served; Wilson v. Pierce, 30 Fed. Cas. 154, to the point that right to be served in district of residence is personal and may be waived by general appearance. Cited in note to Hilton v. Miller, 14 Ind. 588,

to the point that jurisdiction may be waived by appearance in State courts; Trinity, etc., R. R. Co. v. Brown, 91 Tex. 678, 45 S. W. 795, upholding jurisdiction in a foreclosure proceeding obtained by such voluntary appearance; S. C., 46 S. W. 929, at another hearing quotes from the foregoing. Cited to this point in general discussion in Picquet v. Swan, 5 Mason, 571, F. C. 11,135; Cortez v. Thannhauser, 20 Blatchf. 62, 9 Fed. 228.

5 Cr. 289, 3 L. 104, RADFORD v. CRAIG.

Appeal and error.— Counsel for neither side appearing when cause was called in Supreme Court, writ of error ordered dismissed, p. 289.

No citations.

5 Cr. 289–302, 3 L. 104, HARRISON v. STERRY.

Conflict of laws.— While the law of the place where contract is made is, generally speaking, law of the contract, right of priority is a privilege dependent on the place where the property lies, p. 299.

This case is the leading case on this subject, and its doctrine has been followed by the courts, as well as extended by analogy. It is cited and the principle applied in Smith v. Union Bank, 5 Pet. 523, 8 L. 214, and Bank v. Smith, 4 Cr. C. C. 35, 37, F. C. 14,362, holding priority of decedent's debts to be determined by law of place where property is found; Burrows v. Hannegan, 1 McLean, 316, F. C. 2,206, lex loci applies to assignments; Le Prince v. Guillemot, 1 Rich. Eq. 213, marriage settlement constituting lien in France is valid contract here, but the lien gives no priority over American creditors; The Trenton, 4 Fed. 665, sale of vessel under proceedings in rem, extinguishes lien acquired in another jurisdiction; Underwriters' Wrecking Co. v. The Katie, 3 Woods, 186, F. C. 14,342, mortgage on vessel in home port has priority over a previous lien in foreign jurisdiction; Donald v. Hewitt, 33 Ala. 545, 546, 73 Am. Dec. 433, lien of attaching creditor in one State preferred to prior lien in foreign State; Crowell v. Skipper, 6 Fla. 583, although contract is construed according to lex loci contractus, property rights under it are subject to the regulations of the country into which the property affected may be brought; Hardeman v. Downer, 39 Ga. 438, held by analogy, that homestead and exemption laws do not impair obligation of contract, quoting and approving this case at length; Lee v. Creditors, 2 La. Ann. 604, foreign lienholder accorded no priority in local insolvency proceedings; Corbett v. Littlefield, 84 Mich. 35, 22 Am. St. Rep. 684, 47 N. W. 582, subsequent attachment takes priority over foreign chattel mortgage; Saunders v. Williams, 5 N. H. 215, subsequent attachment preferred to foreign assignment in insolvency; Dalton v. Currier, 40 N. H. 248; and also Dunlap v. Rogers, 47 N. H. 287, 93 Am. Dec. 435, holding same

as preceding case; Johnson v. Hunt, 23 Wend. 90, property taken by absconding debtor to foreign State and then transferred to citizen of that State will not be affected by involuntary subsequent assignment in State from which he fled nor can it be seized if brought again within its jurisdiction; Hall v. Harris, 11 Tex. 310, lien acquired by wife by marriage contract in Louisiana will be deferred to lien acquired subsequently by trustee under law of Texas. Cited, generally, in discussion in In re Sun Ins. Co., 22 Fed. 115; Handrick v. Andrews, 9 Port. 27, collecting authorities; Weinstein v. Freyer, 93 Ala. 261, 9 So. 286; Leake v. Gilchrist, 2 Dev. 80; Dow v. Rowell, 12 N. H. 50; Hardeman v. Downer, 39 Ga. 428; Sherill v. Hopkins, 1 Cow. 108.

Some courts have ruled adversely to the foregoing: Watts v. Kilburn, 7 Ga. 350, holding removal of property to foreign State and voluntary sale there will not defeat previously acquired judgment lien if property is brought back to State from whence removed; Colt v. O'Callaghan, 2 La. Ann. 985, where a vendor acquires no privilege under the law of the place of sale he acquires none by translation of the property to a place where law gives such privilege to contracts made there. The principal case is distinguished in Taylor v. Boardman, Jr., 25 Vt. 591, holding that lien acquired by chattel mortgage upon personal property in foreign State will be enforced where property has been wrongfully removed from State, even as against attaching creditors.

Bankruptcy.— The United States are entitled to priority independent of whether claim proved or not, p. 299.

Cited in Lewis v. United States, 92 U. S. 622, 23 L. 514, holding United States need not prove claim, in bankruptcy proceedings; Thelluson v. Smith, 1 Pet. C. C. 198, F. C. 13,878, United States takes priority over judgment creditors; United States v. Lewis, 26 Fed. Cas. 925. See S. C., 13 Bank. Reg. 33, United States need not prove debt in insolvency prior to filing bill to enforce priority; Commonwealth v. Lewis, 6 Binn. 274, and Willing v. Bleecker, 2 S. & R. 228, United States takes priority over foreign attachment, where no right of property has been acquired. Cited, in general, discussion in note to United States v. Howland, 4 Wheat. 120, 4 L. 530; in dissenting opinion, Merrill v. Nat. Bk. of Jacksonville, 173 U. S. 177, as to distribution of dividends of bankrupt national bank.

Insolvency.— In case of a contract made with foreigners in a foreign country, the bankrupt laws of the foreign country are incapable of operating a legal transfer of property in United States, p. 302.

Cited and principle applied in Ogden v. Saunders, 12 Wheat. 361, 6 L. 657, holding discharge in insolvency not a bar against action by citizen of another State in Federal courts; In re Klein, 1 How.

280, 11 L. 132, 14 Fed. Cas. 717, discharge in one sovereignty is not recognized in another except upon principles of comity; Booth v. Clark, 17 How. 337, 15 L. 170, discussing effect of assignment under foreign law; Security Trust Co. v. Dodd Mead, 173 U. S. 629, holding assignment under Minnesota insolvent law unavailing to prevent attachment of Massachusetts personalty by a New York creditor; Towne v. Smith, 1 Wood. & M. 131, 137, F. C. 14,115, States held foreign within the rule; Betton v. Valentine, 1 Curt. 172, F. C. 1,370, holding assignee in Massachusetts not authorized to represent creditors in Rhode Island for the purpose of setting aside conveyance void as to them; The Watchman, 1 Ware, 237, F. C. 17,251, local attaching creditor has priority over foreign assignee for benefit of creditors; Perry Mfg. Co. v. Brown, 2 Wood. & M. 454, 465, 466, 467, F. C. 11,015, right of attachment exists until assignee takes possession; Woodhull v. Wagner, 1 Bald. 301, F. C. 17,975, discharge in one State does not protect from arrest in another; McCarty v. Hall, 13 Mo. 483, State will not suffer property to be withdrawn under foreign laws of administration which may be necessary to satisfy debts due its citizens; Abraham v. Plestoro, 3 Wend. 549, 559, 562, 20 Am. Dec. 742, 751, 753, foreign assignment in insolvency does not operate to transfer title to goods on the high seas at the time, even as against bankrupt, it not appearing that the vessel carrying them belonged to the foreign country in question (reversing Plestoro v. Abraham, 1 Paige Ch. 237); Lehmer v. Herr. 1 Duv. (Ky.) 362; Willitts v. Waite, 25 N. Y. 586, collecting authorities and holding foreign assignee in bankruptcy takes property subject to claims of local attaching creditors; Milne v. Moreton, 6 Binn. 364, 371, 372, 6 Am. Dec. 471, 478, 479, collecting authorities; Goodsell v. Benson, 13 R. I. 247, 250, insolvency laws have no extra-territorial effect, collecting and reviewing authorities; In re Bugbee, 4 Fed. Cas. 610, 9 Bank. Reg. 261, attaching creditor has priority over foreign assignee; Pugh v. Bussel, 2 Blackf. 401, discharge in insolvency has no extra-territorial effect as to contracts not made and to be performed there or citizens of other States; Olivier v. Townes, 2 Mart. (La.) (N. S.) 101, local attachment prevails over prior assignment unaccompanied by delivery, although such assignment would have been valid by the law of the assignor's domicile; Fox v. Adams, 5 Me. 254, local attachment has priority over previous foreign assignment in insolvency; Carrier's Case, 2 Bland Ch. 497, 498, property of decedent may be detained in country where situated in opposition to foreign administration or bankrupt laws; Blake v. Williams, 6 Pick. 309, 310, 17 Am. Dec. 378, 380, local attachment has priority over foreign assignment in bankruptcy; Cross v. Brown, 19 R. I. 238, 33 Atl. 153, local attaching creditor preferred to foreign assignee in bankruptcy; Topham v. Chapman, 1 Mill. 286, 12 Am. Dec. 629, holding similarly.

Cited in general discussion in Planters' Bank v. Sharp, 6 How. 330, 12 L. 459; Brooks v. Marbury, 11 Wheat. 102, note; 6 L. 430; Ogden v. Saunders, 12 Wheat. 362, 6 L. 657; Meeker v. Wilson, 1 Gall. 429, F. C. 9,392, note to Blane v. Drummond, 1 Brock. 65, F. C. 1,531; Stearns v. Burnham, 5 Me. 263, 17 Am. Dec. 229; Reynolds v. McMullen, 35 Mich. 585, 54 Am. Rep. 397, 22 N. W. 50; La Selle v. Woolery, 14 Wash. 71, 53 Am. St. Rep. 856, 44 Pac. 115. See also notes on this subject in 55 Am. Rep. 130, and 12 Am. Dec. 472.

This case has been distinguished on this point by some courts; Crapo v. Kelly, 16 Wall. 627, 21 L. 437, the property of bankrupt being a vessel on the high seas at time of assignment, held title passed to assignee in State to which vessel belonged (reversing Kelly v. Crapo, 45 N. Y. 91, 6 Am. Rep. 37); Ex parte Norwood, 3 Biss. 512, F. C. 10,364, receiver under foreign jurisdiction may prove debt in another jurisdiction; criticised in In re Republic Ins. Co., 20 Fed. Cas. 549, receiver of corporation allowed to prove debt in foreign insolvency proceedings; Robinson v. Rapelye, 2 Stew. 101, assignment for benefit of creditors in New York, held valid in Alabama against local attaching creditor; Wilson v. Matthew, 32 Ala. 346, where court of Alabama gave effect to insolvency, discharge obtained in Louisiana as against a resident of Louisiana who participated in the insolvency proceedings; Frank v. Bobbitt, 155 Mass. 115, 29 N. E. 210, where prior foreign assignment was upheld to exclusion of subsequent attachment of foreign creditor; questioned on this point by Chancellor Kent, in Holmes v. Remsen, 4 Johns. Ch. 488, 8 Am. Dec. 596, which was afterwards disapproved on this point in Holmes v. Remsen, 20 Johns. 266, 11 Am. Dec. 280; Hoyt v. Thompson, 5 N. Y. 344, receiver of insolvent corporation may sue in foreign State where he does not come into conflict with creditors resident in that State; Long v. Girdwood, 150 Pa. St. 418, 24 Atl. 711, domestic court will not give foreign attaching creditor priority over foreign assignment. Commented on Lehmer v. Herr, 1 Duv. (Ky.) 362; Hoyt v. Thompson, 5 N. Y. 350; Weider v. Maddox, 66 Tex. 376, 59 Am. Rep. 620, 1 S. W. 170; but a voluntary assignment made in foreign State, valid according to the laws of State where property is situated had it been made there, will be upheld; Dana v. Lull, 17 Vt. 395, one of two partners may not assign all the property of the firm for the benefit of its creditors and then put an end to the firm; Peck v. Hibbard, 26 Vt. 704, 62 Am. Dec. 609, discharge by insolvency proceedings in the country where an obligation is created is a valid defense to the obligation wherever sued upon; Hanford v. Paine, 32 Vt. 456, 78 Am. Dec. 591, distinguishing between voluntary and involuntary assignment, and holding former valid even as against local attaching creditors; Mowry v. Crocker, 6 Wis. 331, a foreign voluntary assignment is valid as against attaching creditor of same foreign State.

Fraudulent conveyance.— An instrument executed in contemplation of insolvency and in fraud of the bankrupt act is void, p. 301.

Cited in Kahn v. Salmon, 10 Sawy. 198, 20 Fed. 811, assignment for the benefit of creditors held void when, by confessing judgment, assignor had previously put the bulk of his property out of his possession; Receivers, etc. v. Paterson Bank, 10 N. J. Eq. 18, assignment of notes in contemplation of insolvency for the purpose of preferring one creditor, held void.

Bankruptcy.— Where bankruptcy proceedings are against one only of two partners assignee acquires only his interest in partnership property, p. 302.

Cited in Amsinck v. Bean, 22 Wall. 406, 22 L. 805, holding in bankruptcy against individual partner only his interest in partnership property passes; Clarke v. Stanwood, 166 Mass. 381, 44 N. E. 537, discussing, generally, rights of creditors where one partner only is insolvent. Cited, arguendo, Winship v. Bank, 5 Pet. 576, 8 L. 233.

Equitable assignment.— Equity will support an equitable assignment, p. 300.

Cited in Houston v. Nowland, 7 Gill & J. 493, holding an equitable assignment of an interest in lands which leaves nothing but the dry legal title in the assignor is valid to defeat an attachment of the land in suit against the assignor.

Contracts.— Right of priority is no part of a contract. It is extrinsic and dependent on the lex fori, p. 298.

Cited and approved in McLure v. Menton, 24 S. C. 568, 58 Am. Rep. 276, where it is held that law changing the priority of payment of decedent's debts did not impair the obligation of a contract; Baldwin v. Buswell, 52 Vt. 64, nor a law changing right of priority under attachment.

Partnership.— One partner may make a valid assignment in bankruptcy of the partnership effects, when the other is absent from the country, p. 300.

Approved and principle applied in Forbes v. Scannell, 13 Cal. 288; Leitensdorfer v. Webb, 1 N. Mex. 68; dissenting opinion, collecting authorities and holding partner may make general assignment in absence of other partner; Egberts v. Wood, 3 Paige Ch. 525, 24 Am. Dec. 242, partner may make valid assignment preferring one partnership creditor without concurrences of his partners; Mabbett v. White, 12 N. Y. 454, partner may sell all partnership property to creditor in payment of debt without consulting other partners; Clafflin Co. v. Evans, 55 Ohio St. 192, 60 Am. St. Rep. 689, 45 N. E. 4, partner may make assignment when he is "managing" part-

ner; Deckard v. Case, 5 Watts, 24, 30 Am. Dec. 289, may make assignment of all partnership property if transaction is bona fide; Hennessy v. Western Bank, 6 Watts & S. 311, 40 Am. Dec. 562, holding two partners have power to make assignment of partnership property in absence of third partner; White v. Union Ins. Co., 1 Nott & McC. 560, 9 Am. Dec. 727, surviving partner may assign effects of firm to third person for purpose of paying firm debts; Robinson v. Crowder, 4 McCord, 537, 17 Am. Dec. 766, partner may make valid assignment for purpose of paying debts. Cited in passing, Gordon v. Cannon, 18 Gratt. 404, as to authority of partner to execute such assignment; Rumery v. McCulloch, 54 Wis. 572, 12 N. W. 68, partner has authority to execute assignment for benefit of creditors where other partner has departed the country. Cited in general discussion, in Bohler v. Tappan, 1 McCrary, 135, 1 Fed. 470; Robards v. Waterman, 96 Mich. 235, 55 N. W. 663; Moore v. Stevens, 60 Miss. 816; Boswell v. Green, 25 N. J. L. 396. And see 48 Am. Rep. 359, note; Stegall v. Coney, 49 Miss. 770.

Distinguished in Bowen v. Clark, 1 Biss. 132, F. C. 1,721, holding rule not applicable where other partner has given express notice that he will not be bound; Ex parte Hartz, 11 Fed. Cas. 723, decree in bankruptcy cannot be rendered on voluntary petition of partner, unless all unite; qualified in Kirby v. Ingersoll, Harr. Ch. (Mich.) 185, holding rule does not apply when other partner is on the ground and can be consulted; Kirby v. Ingersoll, 1 Doug. (Mich.) 486, 490, 501, affirming the preceding case on appeal and collecting authorities; Havens v. Hussey, 5 Paige, 32, partner has not authority to make general assignment without consent of copartners; Hutchinson v. Smith, 7 Paige, 26, but he may not assign partnership property in preference of individual creditor after death of one of the partners; Mabbett v. White, 12 N. Y. 460, dissenting opinion, limiting rule to partial assignments, the other partner being absent from the country; Sloan v. Moore, 37 Pa. St. 223, partner may not assign all of partnership property pending dissolution, the other party being accessible and not assenting; In re Daniels, 14 R. I. 501, limiting rule to case where partner not uniting in assignment is inaccessible; Sibley v. Young, 26 S. C. 419, 2 S. E. 317, holding by analogy that partner is not bound by sealed instrument executed by his partner.

Miscellaneous.— Erroneously cited, 6 Yerg. (Tenn.) 320, cited arguendo, Musson v. Lake, 4 How. 278, 11 L. 974.

5 Cr. 303, 3 L. 108, BROWN v. STRODE.

Federal courts.— The courts of the United States have jurisdiction over suits between citizens of the same State, when plaintiffs are nominal plaintiffs for the use of an alien, p. 303.

The following citing cases affirm and apply this principle: McNutt v. Bland, 2 How. 14, 15, 11 L. 161, holding citizens of other States

entitled to sue upon sheriff's bond in Federal courts sitting in Mississippi, though such suits are required to be taken in the name of the governor; Florida v. Georgia, 17 How. 499, 15 L. 196, holding that in a suit between States to establish their boundary, the attorney-general may intervene on behalf of the United States; Wood v. Davis, 18 How. 469, 15 L. 461, where the real parties at interest resided out of the State, and the nominal parties were mere special agents; Rice v. Houston, 13 Wall. 67, 20 L. 484, holding executors or administrators to be real parties in interest and entitled as such to maintain actions against citizens of other States; Walden v. Skinner, 101 U. S. 589, 25 L. 968, holding jurisdiction of the Circuit Court not defeated because joined with the defendant as nominal parties, are the executors of a deceased trustee, citizens of the same State as complainant; Maryland v. Baldwin, 112 U. S. 491, 28 L. 823, 5 S. Ct. 279, holding a suit on an administrator's bond taken in the name of the State is to be regarded, for purposes of jurisdiction, as taken in the name of the party for whose benefit it is brought; Stewart v. Railroad Co., 168 U. S. 449, 42 L. 539, 18 S. Ct. 106, holding the administrator of a deceased person but a nominal party to a suit for damages for the benefit of the widow; Patterson v. Mater, 26 Fed. 32, where goods in possession of a marshal were taken by State process, and bond given for their return, holding marshal may maintain an action in the Federal courts irrespective of the question of citizenship between himself and obligors; Sioux City Ry. Co. v. Chicago Ry. Co., 27 Fed. 772, holding a sheriff and other officials, named as joint defendants in an equity bill, are to be considered mere nominal parties in absence of averments to the contrary; Wade v. Wortsman, 29 Fed. 757, holding a marshal having no interest in a suit save the proper performance of his official duty, not a party in interest, and his residence in no way material; Ferguson v. Ross, 38 Fed. 163, holding a suit brought by an individual in his official capacity as shore inspector against a citizen of another State, might not be removed from the State court, the real plaintiff being the State of New York; Goodnow v. Leichfield, 47 Fed. 753, 4 McCrary, 216, where a petition for removal alleged that plaintiff, a citizen of same State as defendant, was only a nominal party; Carver v. Trust Co., 73 Fed. 12, holding a defendant dropped from the case, in the State court, as having no interest in it is to be regarded as a mere formal party; Missouri v. Bowles Mill. Co., 80 Fed. 161, suit on attachment bond in name of State a nominal party, held not to oust Circuit Court's jurisdiction.

Cited also in Governor v. Ball, Hemp. 545, F. C. 530, holding action upon administration bond payable to the governor by name, must be brought in the name of the governor for the time being; Middlebrooks v. Insurance Co., 14 Conn. 310, applies this rule where the secretary of a foreign corporation, who was temporarily within the

State, was served with summons — held, that he was not real party in interest, and the corporation might not be sued in State court; Clarey v. Marshall, 4 Dana, 97, it appearing from the record that the court had jurisdiction, no exception can be taken after verdict; Cooke v. Bank, 52 N. Y. 113, 11 Am. Rep. 678, holding a suit might be removed to Federal court upon the application of one defendant, the others not being necessary parties; Hadley v. Dunlap, 10 Ohio St. 6, holding right of defendants to remove cause into the Circuit Court, cannot be taken away by joining with them an unnecessary defendant, resident in State where suit is brought. Cited in Sands v. Smith, 1 Dill. 294, 1 Abb. (U. S.) 372, F. C. 12,305, discussing removal of causes; Heriot v. Davis, 2 Wood. & M. 223, F. C. 6,404, as to whether those voluntarily appearing are to be regarded as parties for jurisdictional purposes; Foss v. Bank, 1 McCrary, 477, 3 Fed. 187, arguendo; Goodnow v. Litchfield, 4 McCrary, 216, 47 Fed. 753, approving the rule; In re Barry, 42 Fed. 122, F. C. 1,059, discussing Circuit Court jurisdiction.

Commented upon and explained, and question of when parties are nominal parties discussed in Coal Co. v. Blatchford, 11 Wall. 176, 177, 20 L. 181, holding trustees suing for benefit of others form no exception to the rule, and must be considered as parties in interest; Knapp v. Railroad Co., 20 Wall. 123, 22 L. 331, holding suit by trustees for bondholders of a railroad company cannot be removed to the Circuit Court, the defendant being a corporation resident in same State as trustees; New Orleans v. Gaine's Administrator, 138 U. S. 607, 34 L. 1106, 11 S. Ct. 431, holding one pursuing an equitable right, based upon her own claims and by subrogation by operation of law, stands upon her own citizenship irrespective of the citizenship of the persons to whose rights she is subrogated.

The principal case is distinguished in Irvine v. Lowry, 14 Pet. 300, 10 L. 465, holding in suit for payment of "office notes," jurisdiction is determined by the citizenship of the parties to the record, even though the contract may have been assigned; United States v. Myers, 2 Brock. 523, F. C. 15,844, holding a nominal party to be one to whom nothing is due — in this case action was upon unpaid custom duties and the plaintiff is a party in interest; Dodge v. Perkins, 4 Mason, 438, F. C. 3,954, holding where an administrator sues as such, and is a citizen of the same State as the defendant, the court has no jurisdiction, although intestate was a citizen of another State; Ward v. Arredondo, 1 Paine, 412, F. C. 17,148, holding one receiving a deed in trust to be delivered at his discretion upon the payment of a sum of money, is a party in interest in a suit to compel delivery of the deed; Texas v. Lewis, 12 Fed. 3, holding in a suit by a State against an individual who was merely a nominal party, the real parties at interest being aliens might remove the case to the Circuit Court; in same case, upon rehearing, 14 Fed. 67; in Harper v. Norfolk & W. R. R. Co., 36 Fed. 103, 104,

holding an administrator a real party to a suit, and question of jurisdiction determined by his residence, and not intestate's; Reinach v. Railroad Co., 58 Fed. 37, holding a suit to foreclose, brought by an alien mortgage bondholder, is maintainable in a Federal court although the legal title is in a citizen of the same State as some of the defendants; Shipp v. Williams, 62 Fed. 6, 22 U. S. App. 380, holding no jurisdiction in Federal courts, of a bill by beneficiary under a deed of trust, against debtor and trustee to foreclose the deed, where trustee and debtor are citizens of the same State; Calderwood v. Braly, 28 Cal. 99, holding that all defendants must be aliens or citizens of another State or cause cannot be removed to Circuit Court; Vimont v. Railway Co., 64 Iowa, 517, 518, 17 N. W. 32, 33, 64 Iowa, 524, 21 N. W. 12, distinguishes principal case, asserting the plaintiff there to be a mere conduit, through whom the parties aggrieved were to seek their remedy, and holding a trustee the real party in interest; Miller v. Sunde, 1 N. Dak. 4, 44 N. W. 302, holding the citizenship of an administrator determines the question of diverse citizenship on which Federal jurisdiction depends; Robb v. Parker, 3 S. C. 70, where assignees of a bond sued thereon in a State court, in their own names, holding question of Federal jurisdiction depends upon the citizenship of assignees; Geyer v. Life Ins. Co., 50 N. H. 233, 9 Am. Rep. 187, holding a suit brought by an administrator against a citizen of the same State cannot be removed to the United States courts; Dunn v. Waggoner, 3 Yerg. 59, holding trustees in whom the legal interest is vested are parties in interest so as to oust the Federal courts of jurisdiction. Criticised and rule denied in dissenting opinion, McNutt v. Bland, 2 How. 24, 26, 11 L. 165, 166, holding jurisdiction not affected by joinder of nominal parties. Cited in Gill v. Stebbins, 2 Paine, 419, F. C. 5,431, as being overruled in Osborne v. United States Bank, 9 Wheat. 856, 6 L. 232, where the rule is laid down that the jurisdiction is determined by the relative situation of the parties named on the record.

5 Cr. 303, 304, 3 L. 308, HODGSON v. BOWERBANK.

Federal courts.—Although plaintiff be described as an alien, yet defendant must be expressly stated to be a citizen of a particular State to give Federal courts jurisdiction, p. 304.

Cited in dissenting opinion, McNutt v. Bland, 2 How. 22, 11 L. 164, majority holding fact that governor and party sued on bond are citizens of the same State will not oust court of jurisdiction; dissenting opinion, Marshall v. Railroad Co., 16 How. 340, 13 L. 964, majority holding citizen of one State can sue in Federal courts a corporation averred to have been created in another; Shaw v. Mining Co., 145 U. S. 447. 36 L. 770, 12 S. Ct. 936, holding, under act of March 3, 1887, a corporation incorporated in one State cannot be

compelled to answer in the Circuit Court held in another State, where its usual place of business is, to a suit by a citizen of a different State; The Fideliter, 1 Abb. (U. S.) 579, 1 Sawy. 156, F. C. 4,755, holding libel defective for not alleging a seizure; Donaldson v. Hazen, Hemp. 424, F. C. 3,984, holding jurisdictional facts must be set forth in the pleadings; Blair v. Manufacturing Co., 7 Neb. 154, holding jurisdictional facts as to citizenship must appear on the record; Herndon v. Insurance Co., 107 N. C. 195, 12 S. E. 242, holding fact that defendant is a foreign corporation does not render unnecessary the allegation of the citizenship of the plaintiffs.

Distinguished in Commercial Bank v. Green, 2 Flipp. 182, F. C. 3,059, holding service upon defendant as citizen of one State when, in fact, he was citizen of another, did not oust jurisdiction.

Federal courts.— Jurisdiction of, is limited by the Constitution, p. 304.

Approved and applied in In re Barry, 136 U. S. 609, 34 L. 508, holding District Court has no authority to issue a writ of habeas corpus to restore an infant to father, unlawfully detained by grandparents; Florence S. M. Co. v. Machine Co., 110 Mass. 81, holding suit in which a defendant and plaintiff are citizens of the same State cannot be removed; Pooley v. Lucco, 72 Fed. 561; Orosco v. Gagliardo, 22 Cal. 85, and Roberts v. Knight, 7 Allen, 451, all holding Federal courts without jurisdiction of suits between aliens.

Amendment.— Record, defective for not showing defendants citizens of some particular State, was amended by consent, p. 304.

Cited in Glover v. Shepperd, 11 Biss. 580, 15 Fed. 838, holding if requisite citizenship actually exists, petition may be amended.

5 Cr. 304–311, 3 L. 108, KEENE v. UNITED STATES.

Duties.— Jurisdiction of District Court over causes of seizure does not attach unless there has been an open seizure by one with authority, p. 310.

Rule applied in The Fideliter, 1 Abb. (U. S.) 578, 1 Sawy. 155, F. C. 4,755, dismissing libel.

Duties — Seizure.— Court of district in which a seizure is made on land has jurisdiction to try question of forfeiture, p. 310.

Principle applied in United States v. Bark Reindeer, 2 Cliff. 69, F. C. 16,144, holding vessel could be condemned by court of district where she was seized; The Washington, 29 Fed. Cas. 338, holding to authorize District Court to condemn, the first seizure must be within its district. Cited in Tug May, 6 Biss. 249, note, F. C. 9,330, and dissenting opinion, Slocum v. Wheeler, 1 Conn. 448.

Miscellaneous.— Cited in Blanchard v. Sprague, 3 Sumn. 284, F. C. 1,517.

5 Cr. 311–313, 3 L. 110, UNITED STATES v. RIDDLE.

Certificate of probable cause.— A doubt concerning the construction of a law of seizure may authorize a certificate of probable cause, p. 313.

Cited in Averill v. Smith, 17 Wall. 92, 21 L. 616, and Stacey v. Emery, 97 U. S. 646. 24 L. 1036, holding trespass will not lie against a collector of internal revenue, where a certificate of probable cause has been granted; United States v. Ship Recorder, 2 Blatchf. 121, F. C. 16,130, granting certificate, where seizure was under construction of act given by attorney-general; The Active, Deady, 176, F. C. 33, allowing certificate where seizure was within the letter of the act; Schooner Friendship, 1 Gall. 112, F. C. 5,125, holding a doubt of the law is proper cause for a certificate of probable cause; United States v. Rings, 1 Sprague, 298, F. C. 16,572, granting certificate of reasonable cause, for doubts of the law; Ship La Manche, 2 Sprague, 215, 224, F. C. 8,004, holding captors not liable, where vessel presents probable cause for capture; United States v. Cable, 27 Fed. Cas. 266, giving certificate where seizure was made in good faith in the belief that the law was being violated; United States v. Reindeer, 27 Fed. Cas. 768, granting certificate, where there were doubts as to the construction of the law; United States v. Cloth, 28 Fed. Cas. 108; and United States v. Horse, 22 Vt. 657, allowing certificate where seizure was under circumstances warranting suspicion.

Revenue laws.— The attempt, not the intention, to defraud is punishable, p. 312.

Affirmed and applied in United States v. Packages, Gilp. 325, F. C. 16,561, holding making up of a false invoice, at place of exportation, is not an offense, until followed up by an actual attempt; United States v. Batchelder, 24 Fed. Cas. 1037, holding declaration defective, because it did not allege that the defendant made the entry upon the false invoice.

5 Cr. 313–320, 3 L. 111, HIMELY v. ROSE.

Appeal and error.— Upon an appeal from proceedings under a mandate, directed to a lower court, nothing is before the court, but the proceedings subsequent to the mandate, p. 314.

The following citing cases affirm and variously apply this principle: The Santa Maria, 10 Wheat. 442, 446, 6 L. 361, 362, holding interest or damages could not be given by Circuit Court in the execution of a mandate, where same had not been decreed by Supreme Court upon the original appeal; Boyce v. Grundy, 9 Pet. 290, 9 L. 132, holding Circuit Court could not, in carrying out the decree, allow interest, where court in affirming decree allowed none;

Ex parte Sibbald v. United States, 12 Pet. 492, 9 L. 1169, holding inferior court can examine mandate for no other purpose than execution; Washington B. Co. v. Stewart, 3 How. 424, 425, 11 L. 663, 664, holding Supreme Court has no power to review its own decision in a cause; Corning v. Factory, 15 How. 466, 14 L. 775, dismissing appeal, where court below had not acted on the mandate; Roberts v. Cooper, 20 How. 481, 15 L. 974, and Supervisors v. Kennicott, 94 U. S. 499, 24 L. 260, holding writ of error brings up for revision nothing but the proceedings subsequent to the mandate; Tyler v. Maguire, 17 Wall. 284, 21 L. 583. holding this court could examine into the sufficiency of the reason of the State court for not executing its mandate; Stewart v. Salamon, 97 U. S. 362, 24 L. 1045, dismissing appeal from decree of Circuit Court passed in exact accordance with the mandate of this court upon a previous appeal; Clark v. Keith, 106 U. S. 465, 27 L. 302, 1 S. Ct. 569, and Chaffin v. Taylor, 116 U. S. 572, 29 L. 729, 6 S. Ct. 520, holding whatever was examined here on writ of error cannot be re-examined upon a subsequent writ; In re W. & G. R. R. Co., 140 U. S. 97, 35 L. 342, 11 S. Ct. 674, where affirming judgment said nothing about interest, judgment on mandate should not have allowed it; Metcalf v. Watertown, 68 Fed. 861, 34 U. S. App. 107, holding where judgment on mandate determines questions not covered thereby, it is subject to review; Republican Min. Co. v. Mining Co., 79 Fed. 735, 48 U. S. App. 218, holding appellate court is not bound to consider any of the questions, which were before it on the first writ of error; Fortenberry v. Frazier, 5 Ark. 202, 39 Am. Dec. 374, holding after a case has been remanded and is again brought before the Supreme Court, nothing is before the court for adjudication but proceedings subsequent to the mandate; Davidson v. Dallas, 15 Cal. 83, and Davenport v. Kleinschmidt, 8 Mont. 480, 20 Pac. 826, holding decision of Supreme Court cannot be reviewed; Roberts v. Haggart, 4 Dak. 212, 29 N. W. 656, holding a rehearing cannot be granted after final judgment and adjournment of term; Semple v. Anderson, 4 Gil. (Ill.) 562, holding court will not go behind its former adjudication even though it appear of record that the court acted without jurisdiction; Dodge v. Gaylord, 53 Ind. 369, holding second appeal brings up for review only proceedings subsequent to the reversal; Hey v. Schooley, 7 Ohio (2d pt.), 49, holding a final decree to sell mortgage premises is not opened by an appeal from decree affirming sale; Overton v. Bigelow, 10 Yerg. 53, holding that rehearing of cause cannot be allowed at a subsequent term, although cause was retained for taking an account; Chambers v. Hodges, 3 Tex. 529, holding, after close of term, court cannot revise decree; Silva v. Pickard, 14 Utah, 251, 47 Pac. 146, holding that decision of Supreme Court will not be reviewed; dissenting opinion, State v. Circuit Court, 71 Wis. 610, 38 N. W. 199, majority holding lower court can grant a new trial, though denial of previous motion for new

trial has been affirmed by Supreme Court. Cited in Bissell, etc., Co. v. Goshen, etc., Co., 72 Fed. 553, 43 U. S. App. 47; Poole v. Nixon, 9 Pet. App. 780, 9 L. 309, F. C. 11,270, and Sanderson v. Sanderson, 20 Fla. 299; note to 21 Am. Dec. 119, on general subject, collecting authorities.

Distinguished in Hastings v. Foxworthy, 45 Neb. 692, 63 N. W. 960, holding where the case on first appeal was remanded generally for a new trial, the appellate court on second appeal may reverse its rulings in the first; Teaff v. Hewitt, 1 Ohio St. 520, 59 Am. Dec. 637, holding appeal from final decree opens up the whole merits of cause.

Appeal.— Exception to auditor's report unnecessary where error appears on its face, p. 317.

Admiralty if property ordered to be restored is sold, interest is not to be paid unless specially ordered by the decree, p. 317.

Miscellaneous.— Cited incidentally in Sturgis v. Fay, 16 Ind. 431, 79 Am. Dec. 442.

5 Cr. 321, 3 L. 113, WELSH v. MANDEVILLE.

Practice.— Supreme Court will not compel a hearing, unless the citation be served thirty days before the first day of the term, p. 321.

Cited in National Bank v. Bank, 99 U. S. 609, 25 L. 362, holding the meaning of the statute is not that the citation be served thirty days before the return-day, but that the defendant shall have thirty days' notice before he shall be compelled to answer; Cox v. McGarrahan, 131 U. S. 100, 19 L. 500, denying a motion to rescind an order advancing a cause, founded upon the fact that the writ of error to judgment below was allowed less than thirty days before the first day of the term. Cited in Sammins v. Wightman, 25 Fla. 554, 6 So. 175.

5 Cr. 322–333, 3 L. 114, RIDDLE v. MANDEVILLE.

Bills and notes.— Under Virginia law, indorsee of promissory note may recover directly from a remote indorser in equity, p. 333.

This holding is approved and the principle applied in Bank of United States v. Weisiger, 2 Pet. 347, 7 L. 447, and Smith v. Harley, 8 Mo. 560; Dorsey v. Hadlock, 7 Blackf. 115, approves and extends rule to suit by assignee of non-negotiable note against remote assignor; Turneys v. Hunt, 8 B. Mon. 407, 408, if immediate indorser is insolvent it furnishes even a stronger ground for equity; Watson v. Hahn, 1 Colo. 495, this right will support an express promise to pay, enforceable at law. Cited arguendo, Walker v. Henry, 36 W. Va. 110, 14 S. E. 443.

Criticised in Hayward v. Andrews, 106 U. S. 677, 27 L. 273, 1 S.

Ct. 549, holding that a mere assignee of a chose in action cannot sue in equity without some particular fact existing, bringing the case within the cognizance of a court of equity, and holding in this case that the fact that assignee could not sue in his own name at law would not entitle him to sue in equity if the assignor had not refused to permit him to use his name; Walker v. Brooks, 125 Mass. 245, applies the same doctrine.

Distinguished in Clifford v. Keating, 3 Scam. 252; Long v. Pence, 93 Va. 587, 25 S. E. 594, and Watson v. Hahn, 1 Colo. 495, on ground that under statute in some States indorsee may sue remote indorser directly at law in the following: McCarthy v. Rhea, 1 Blackf. (Ind.) 55; Dunn v. Price, 11 Leigh (Va.), 209, and Drane v. Schofield, 6 Leigh, 396, Long v. Pence, 93 Va. 587, on ground that indorsee may sue remote indorser in name of assignor.

Bills and notes.— Indorsement of promissory note is prima facie evidence of indorsement for full value, p. 332.

Cited with approval on this point and doctrine followed and applied in Moses v. Lawrence County Bank, 149 U. S. 302, 303, 37 L. 745, 3 S. Ct. 901; Cowles v. Harts, 3 Conn. 522; Canal Co. v. Templeton, 20 La. Ann. 142, 96 Am. Dec. 386; Labadie's Executor v. Chouteau, 37 Mo. 421; Morton v. Rogers, 14 Wend. 586. Cited without particular application in Worthington v. Curd, 15 Ark. 506.

Warranty.— Quære whether sale of chattel under bill of sale containing warranty of title would not entitle subsequent assignee to sue original warrantor, p. 332.

Cited, Boyd v. Whitfield, 19 Ark. 461, as showing that covenants of warranty do not pass from one vendee to another by mere sale of chattel.

Bills and notes.— Where indorser of promissory note is sued by remote indorsee, he may set up any defense which would have been available against his immediate indorsee, p. 331.

Cited and followed in Turneys v. Hunt, 8 B. Mon. 410; Smith v. Harley, 8 Mo. 560; Caton v. Lenox, 5 Randolph, 43.

Equity.— Where estate has been distributed or executor is insolvent, a creditor may sue the legatees in chancery, p. 604.

Cited and principle applied in Davis v. Vansands, 45 Conn. 604; Trescot v. Trescon, McCord Chan. (S. C.) 433; Buchanan v. Pue, 6 Gill. (Md.) 118, executor may sue legatees to recover estate distributed before insufficiency of assets was known; Hammond v. Hammond, 2 Bland Ch. 348, where executor is dead or insolvent creditor may sue heirs and devisees; Gregory v. Forrester, 1 McCord Chan. (S. C.) 326, holding similarly; applied in Chewett v. Moran, 17 Fed. 821, and Continental Bank v. Heilman, 81 Fed. 42,

to suit against heirs to charge lands in their hands with ancestor's debts.

But held in McCollum v. Hinckley, 9 Vt. 149, creditor must not have been guilty of laches.

Equity will make that party immediately liable who is ultimately liable at law, p. 332.

Approved in Gaines v. New Orleans, 4 Woods, 221, 222, 17 Fed. 20, and applied to suit against a grantor for rents and profits received by his grantees; United States v. Aborn, 3 Mass. 129, 131, F. C. 14,418, applied to suit against sureties on probate bond of insolvent executor; Dickinson v. Hoomes, Admr., 8 Gratt. 405, covenant of warranty running with land may be enforced in equity against remote warrantor; Rodney v. Shankland, 1 Del. Ch. 46, 12 Am. Dec. 74, reviewing authorities, applying rule to suit by cestui que trust to enforce trust; Trecothick v. Austin, 4 Mason, 36, F. C. 14,164, equity will not put cestui que trust to circuity of action to enforce trust; Henshaw v. Freer, Bailey Eq. 316, applied to suit against estate for services rendered deceased executor for benefit of estate which would have been entitled to recover from the estate. Cited in general discussion in Colt v. Lasnier, 9 Cow. 331; Grant v. Ludlow, 8 Ohio St. 24; Henshaw v. Freer, Bailey Eq. 318.

Bills and notes.— There is no privity at common law between indorsee and remote indorser of promissory note, p. 329.

Cited on this point and approved, Hempstead v. Hunter, dissenting opinion, 1 Mo. 70; Long v. Pence, 93 Va. 587, holding similar want of privity between assignee and remote assignor. Cited in general discussion and without making particular application to the principle in Wood v. Dummer, 3 Mason, 313, F. C. 17,944; Oelrichs v. Spain, 15 Wall. 229, 21 L. 45; Leavens v. Butler, 8 Port. 395; Thomas v. Brinsfield, 7 Ga. 161; Watkins v. Worthington, 2 Bland Ch. 523; Moses v. Lawrence Bank, 149 U. S. 302, 37 L. 745, 13 S. Ct. 901.

5 Cr. 333, 334, 3 L. 117, DULANY v. HODGKIN.

Bills and notes.— Under Virginia law indorser is not liable unless plaintiff show maker is insolvent, or that he has brought suit and it has proved fruitless, p. 334.

Cited in Camden v. Doremus, 3 How. 533, 11 L. 713, holding the ascertainment of the notorious insolvency answers the demand of due diligence; Drane v. Schofield, 6 Leigh (Va.), 390, 398, holding if holder elects to pursue maker into an adjoining State, and then fails to commence or prosecute his suit, he has no recourse against assignor.

5 Cr. 335–343, 3 L. 117, YEATON v. FRY.

Admiralty.— Voyage from neutral to blockaded port with notice of blockade incurs liability to capture and condemnation as prize, pp. 342, 343.

Cited in The Circassian, 2 Wall. 151, 17 L. 800 (affirming S. C., 5 Fed. Cas. 712), applying principle where blockaded port was not immediate but ultimate destination; The Pearl, 19 Fed. Cas. 54, where blockaded port ultimate, not immediate destination; United States v. One Hundred and Twenty-nine Packages, 27 Fed. Cas. 286, where vessel had not even left port but was prepared to proceed, held vessel and whole cargo contraband and otherwise liable to seizure.

Marine insurance.— Policies of insurance are generally liberally construed in order to effect the intention of the parties, but exceptions are construed against insurer, p. 342.

Cited and applied in Northwest Trans. Co. v. Boston Ins. Co., 41 Fed. 801, holding exception of perils from want of ordinary skill, etc., in navigation strictly construed against insurer; Koons v. La Fonciere Compagnie, etc., 71 Fed. 983, construing language of exception of less than 50 per cent. of value, against insurer; Hernandez v. Sun Mut. Ins. Co., 6 Blatchf. 325, F. C. 6,415, holding whole policy should be read together in arriving at intention of parties; Palmer v. Warren Ins. Co., 1 Story, 364, 366, 368, F. C. 10,698, holding visit to port during excepted period does not exonerate from liability for loss after expiration of period; Canton Ins. Co. v. Woodside, 90 Fed. 305, 306, holding policy on personal effects with stipulation " warranted free from all average," does not exempt insurer from liability for articles totally lost because a few others are saved; Greenleaf v. St. Louis. Ins. Co., 37 Mo. 29, deciding navigation of excepted waters does not preclude recovery upon subsequent loss elsewhere; Grant v. Lexington, etc., Ins. Co., 5 Ind. 26, 61 Am. Dec. 77, holding violations of exceptions do not preclude recovery when violation has ceased and loss is from cause not affected thereby; Parkhurst v. Gloucester, etc., Ins. Co., 100 Miss. 302, 97 Am. Dec. 102, holding policy against usual marine risks to cover loss by barratry of master; Hoffman v. Ætna Fire Ins. Co., 32 N. Y. 414, 88 Am. Dec. 345, holding transfer of interest in partnership goods from one partner to another does not avoid policy under proviso against assignments; Paul v. Travelers Ins. Co., 112 N. Y. 479, 8 Am. St. Rep. 762, 20 N. E. 349, holding accidental death from suffocation by gas not within exceptions of policy; Wilkins v. Insurance Co., 30 Ohio St. 336, 339, 27 Am. Rep. 457, 459, holding recovery not precluded where policy permitting navigation of certain waters, vessel navigates others, returns safely and is subsequently destroyed; Webster v. Insurance Co., 53 Ohio St. 564, 53 Am. St. Rep. 660, 42 N. E. 547, construing liberally representation of insured that property was

owned jointly by himself and wife; United States Mut. Acc. Assoc. v. Newman, 84 Va. 59, 3 S. E. 808, construing strictly against insurer words of exception where insured died from suffocation by gas; Blumer v. Insurance Co., 45 Wis. 641, holding statement in application for insurance that persons slept in mill insured does not preclude recovery if persons subsequently cease to sleep there under circumstances of case; Wakefield v. Insurance Co., 50 Wis. 536, 7 N. W. 649, construing strictly against insurer continuing warranty that house shall not be left vacant; Warren v. Springfield, etc., Ins. Co., 13 Tex. Civ. App. 469, 35 S. W. Rep. 811, holding representation in policy as to ownership of house by a husband sufficiently satisfied by proof that he built it, though on wife's land. Cited arguendo in Wright v. Sun Mut. Ins. Co., and Same v. Or. Mut. Ins. Co., 30 Fed. Cas. 706; also 3 Dill. 101, note, F C. 4,202.

Distinguished in Hood v. Insurance Co., 11 N. Y. 541, refusing to extend rule to cover timbers not united to structure, where insurance is of barque in course of construction.

Evidence.— Copies of proceedings of foreign Admiralty Court certified by deputy registrar who is certified by court judge who is certified by notary public, admissible in evidence, being court acting under law of nations, p. 343.

Cited in United States v. Lillby, 1 Wood. & M. 226, F. C. 15,597, admitting documents under seal of Portuguese notary in Africa, certified to by Portuguese consul in Brazil, forwarded under signature of American consul there; Thompson v. Stewart, 3 Conn. 181, 8 Am. Dec. 171, reconciling leading case and admitting document under seal of foreign Vice-Admiralty Court certified by deputy registrar; Lincoln v. Battelle, 6 Wend. 484, where document refused because only a copy of a copy; Stoddard v. Sloan, 65 Iowa, 685, 22 N. W. 926, where court took judicial notice of notary public's seal. Cited in general discussion in Tibbetts v. Shaw, 19 Me. 209, deciding appellate court had no jurisdiction where statute gave lower court authority to determine upon its own seal and it had done so.

Distinguished in Williams v. Wilkes, 14 Pa. St. 230, holding United States Circuit Court not being a foreign tribunal its seal proves itself.

Evidence.— One party cannot except to deposition taken before commissioners on his own behalf for failure to prove notice to other party; admission of notice by latter sufficient to enable him to use deposition, p. 343.

Approved and applied in Andrews v. Graves, 1 Dill. 110, F. C. 376; Lawrence v. Graves, 5 N. B. R. 281, 15 Fed. Cas. 72, holding deposition admissible when both sides represented when taken; Stewart v. Hood, 10 Ala. 608, holding such deposition admissible where party introducing was present and cross-examined; Greene v.

Chickering, 10 Mo. 111, holding party taking deposition would not object to its admissibility on account of his own irregularity; Devinney v. Jelly, Tappan (O.), 128, where plaintiff permitted to read defendant's deposition, but held he waived objections and notice by so doing.

Criticised in Sexton v. Brock, 15 Ark. 352, 353, excluding deposition of opposite party where introducing party was notified, but did not attend taking.

5 Cr. 344–350, 3 L. 120, OWINGS v. NORWOOD'S LESSEE.

Jurisdiction.— Supreme Court has jurisdiction of cases arising under treaties; but an action of ejectment where defendant sets up an outstanding title, alleged to be protected by treaty, is not such a case, p. 348.

Cited in Fisher v. Cockerell, 5 Pet. 257, 8 L. 117, denying jurisdiction where party claiming title under compact between Virginia and Kentucky did not show it on the record; Crowell v. Randell, 10 Pet. 392, 9 L. 468, denying jurisdiction where nothing apparent from the record bringing cases within twenty-fifth section of judiciary act; Henderson v. Tennessee, 10 How. 323, 13 L. 439, denying jurisdiction where outstanding title in third person under treaty set up as defense in ejectment; Wynne v. Morris, 20 How. 5, 15 L. 801, denying jurisdiction because claim made was not under any Federal statute; Verden v. Coleman, 1 Black, 474, 17 L. 162, denying jurisdiction where outstanding title under treaty in third person set up as defense, and jurisdiction claimed thereon; Long v. Converse, 91 U. S. 113, 23 L. 235, denying jurisdiction when outstanding title of Federal assignee in bankruptcy who was not a party set up as defense against officers of State court; Miller v. Lancaster Bank, 106 U. S. 544, 27 L. 290, 1 S. Ct. 537, 538, denying jurisdiction where petition by parties in possession to enjoin execution of writ is based on claim that title has never passed out of a corporation not a party, on account of inability of defendant under Federal banking act to acquire title; Giles v. Little, 134 U. S. 650, 33 L. 1064, 10 S. Ct. 625, applying by analogy denying jurisdiction where outstanding title in person not a party under judgment of Federal courts set up as ground thereof; Connor v. Scott, 4 Dill. 246, F. C. 3,119, collecting cases, where Federal Circuit Court took jurisdiction of suit to enforce lien where defendant claimed under Federal assignee in bankruptcy.

The general doctrine as to treaties is applied in United States v. Old Settlers, 148 U. S. 469, 37 L. 525, 13 S. Ct. 667, holding that court has jurisdiction to determine rights under Indian treaty, but cannot go behind treaty to pass on matters settled thereby; Crystal, etc., Co. v. Los Angeles, 82 Fed. 120, denying jurisdiction where both parties claiming under treaty with Mexico, there was no con-

troversy over construction thereof; Gill v. Oliver, 11 How. 549, 13 L. 808, arguing in dissenting opinion that court has jurisdiction where both parties claim under treaty, though treaty itself not subject of construction; Baker v. Shy, 9 Heisk. 92, protecting right of Frenchman to convey land in Tennessee under treaty and statute; Nashville, etc., Ry. Co. v. Taylor, 86 Fed. 182, applying by analogy and holding Federal question involved where party not allowed equal privileges with all others under State tax laws; Opinion of Judge Davis, 44 Me. 592, holding question of right of suffrage of free colored persons not Federal question. See also Mathews v. Zane, 7 Wheat. 208, note, 5 L. 436.

Distinguished in Henderson v. Tennessee, 10 How. 327, 13 L. 441, dissenting opinion.

Confiscation.— Acts of confiscation passed by State during Revolution, vested titles in State where complete legal title was previously vested in British subject, p. 353, note.

Cited to this point in Atherton v. Johnson, 2 N. H. 35.

British treaty of 1794.— Interest by debt intended to be protected by the treaty must be an interest, holden as a security for money at time of the treaty; and the debt must still remain due, p. 347.

5 Cr. 351–358, 3 L. 123, MOSS v. RIDDLE.

Estoppel.—A bond cannot be delivered to the obligee as an escrow, p. 357.

Cited and principle applied in Blewitt v. Railway Co., 49 Fed. 127, holding deed cannot be delivered to grantee in escrow; United States v. Hammond, 4 Biss. 285, F. C. 15,292, holding good a plea of surety that bond delivered to principal obligor was not to be delivered until cosurety joined and plaintiff had notice; Bibb v. Reid, 3 Ala. 91, holding good similar pleas of sureties; Firemen's, etc., Co. v. McMillan, 29 Ala. 161, holding where plea alleged delivery in escrow, presumption is of delivery to obligee and plea is demurrable; Morgan v. Smith, 29 Ala. 286, where delivery of bill of sale to vendee held to convey title; State v. Chrisman, 2 Ind. 132, sustaining demurrer to plea admitting signing and not denying delivery of bond to obligee, but averring it was done on condition that others should sign; Deardorff v. Foresman, 24 Ind. 483, holding, in absence of notice to payee, signing and delivery of promissory note by sureties to maker on condition others will join before delivery to payee and condition not performed, sureties liable; Hubble v. Murphy, 1 Duv. (Ky.) 280, holding, when maker delivers to payee, latter's failure to perform agreement to obtain another on note no defense; Neely v. Lewis, 5 Gilm. (Ill.) 32, holding delivery to obligee for execution by another surety not an escrow; Brown v. State, 18

Tex. App. 328, holding agreement that there should be another surety on bail bond no defense when delivered to sheriff; Miller v. Fletcher, 27 Gratt. (Va.) 412, 21 Am. Rep. 362, collecting cases and holding no escrow when bond delivered to obligee on condition; Johnson v. Branch, 11 Humph. 522, holding delivery of bond to obligee upon condition not an escrow; Lambert v. McClure, 12 Tex. Civ. App. 579, 34 S. W. 974, holding delivery of deed to grantee with oral conditions an absolute delivery; Pope v. Latham, 1 Ark. 74, holding delivery of bond to County Court clerk for sheriff an absolute delivery.

Fraud.— Fraud consists in intention, which must be averred, p. 357.

Cited and applied in Brooks v. O'Hara, 2 McCrary, 649, 8 Fed. 532, sustaining demurrer to bill for not averring fraud with sufficient particularity; Feeney v. Howard, 79 Cal. 528, 12 Am. St. Rep. 164, 21 Pac. 985, holding where fraudulent intent not alleged, fraud cannot be set up as defense in suit to declare a trust; Woodroof v. Howes, 88 Cal. 190, 26 Pac. 113, holding allegation of fraud and intent in terms sufficient; Ross v. Webster, 63 Conn. 68, 26 Atl. 478, holding "earnest solicitation" on part of plaintiff not fraud; Robson v. Harwell, 6 Ga. 614, refusing to infer fraud from averment of parol agreement declaring trust and failure to execute it; Gray v. Earl, 13 Iowa, 190, holding inadmissible evidence of fraud where not alleged; Savage v. Davis, 7 Wend. 225, holding averment of fraud and intent in plea material averment.

Distinguished in Carter v. Carter, 5 Tex. 99, holding rule to be in that State that fraud need not be expressly pleaded.

Pleading.— Traverse cannot be of matters of inducement or conclusions of law, pp. 357, 358.

Cited in Finley v. Quirk, 9 Minn. 201, 86 Am. Dec. 97, where defendant attempted to avail himself of new matter under a denial of allegations of complaint; Griggs v. St. Paul, 9 Minn. 234, sustaining demurrer to complaint where no traversable facts alleged.

Error.— Refusal to allow amended plea to be filed after plea held bad is not ground for reversal, p. 358.

Cited in Romaine v. Norris, 8 N. J. L. 82, holding refusal to hear motion for nonsuit out of regular order not error because in discretion of court.

Delivery.— Delivery to one of several obligees constituting a partnership is delivery to all, p. 357.

Miscellaneous.— Cited erroneously in Boyd v. Whitfield, 19 Ark. 461.

5 Cr. 358–361, 3 L. 125, BRENT v. CHAPMAN.

Statute of limitations.— Five years' adverse possession of slave by Virginia statute gives title, on which may be maintained action for recovery, p. 361.

Subsequent cases have relied extensively upon this holding. It is approved and the doctrine applied in Shelby v. Guy, 11 Wheat. 371, 6 L. 497, holding where title to slave vested in vendor by statute in Virginia by adverse possession, it was available defense for vendee in Tennessee; Mitchell v. Wilson, 3 Cr. C. C. 249, F. C. 9,672, holding possession of slave during period of limitation gave title; Sims v. Canfield, 2 Ala. 561, holding title to slave acquired by adverse possession of defendant executor and his testator all together for more than six years; Goodman v. Munks, 8 Port. 95, holding bar of South Carolina statute of limitations an available defense in Alabama against recovery on note made in South Carolina (overruled, Jones v. Jones, 18 Ala. 253); Sadler v. Sadler, 16 Ark. 643, holding peaceable possession of slave for more than five years, vested title under Arkansas statute; Hicks v. Flint, 21 Ark. 465, holding possession of horse in Arkansas during period of limitation vested title and action maintainable to recover lien; Paschal, Admr., v. Davis, 3 Ga. 265, holding title to slave vested in vendee by possession during period of statute of limitation where slave belonged to vendor's intestate; Wynn v. Lee, 5 Ga. 232, holding title to slave acquired by possession in Mississippi during period of statute may be set up in Georgia; Stanley v. Earl, 5 Litt. 282, 15 Am. Dec. 67, holding title was acquired by adverse possession of slave for five years and recovery may be had upon such title from former owner; Cook v. Wilson, Litt. Sel. Cas. 439, holding adverse possession of slave for twenty years, gave title upon which to base action for recovery; Bunce v. Bidwell, 43 Mich. 546, admitting instructions to jury that adverse possession of land for twenty years gave perfect title; Alexander v. Burnet, 5 Rich. 209, dissenting opinion, holding that possession of slave during statutory period would give title, though party claiming thereunder held in another State; Kegler v. Miles, Mart. & Y. 430, 17 Am. Dec. 822, holding adverse possession of slave for three years, vested title upon which recovery could be had; Morris v. Lyon, 84 Va. 334, 4 S. E. 735, holding adverse possession of breast-pin more than five years, vested title; Hall v. Webb, 21 W. Va. 325, holding where title once vested to land, through adverse possession, subsequent repeal of statute of limitations cannot disturb title; Thornburg v. Bowen, 37 W. Va. 543, 16 S. E. 827, holding subsequent purchaser for value of horses acquired title by five years' possession, notwithstanding original fraud of vendor; Sprecher v. Wakeley, 11 Wis. 440, holding, after expiration of statute of limitations, subsequent statute cannot renew right to bring ejectment for lands; Hamilton v. Cooper, Walker, 544, 12 Am. Dec.

590, holding plea good of title acquired to slaves by adverse possession in another State; Huffman v. Alderson, 9 W. Va. 623, arguing that right to be released from payment of note is vested by statute of limitations expiring and cannot be divested by new statute.

Distinguished in Townsend v. Jemison, 9 How. 419, 13 L. 199, holding a statute of limitations which merely bars recovery on contract not available in another jurisdiction; Powell v. Wragg, 13 Ala. 164, holding possession founded upon bill of sale in fraud of rights of vendor's creditors does not give title; Jones v. Jones, 18 Ala. 253, deciding though recovery on contract barred by Georgia statute not available defense in Alabama, overruling Goodman v. Munks, supra; Moseby v. Williams, 5 How. (Miss.) 524, holding possession, not adverse, for five years, did not give title in Tennessee; Smoot v. Wathen, 8 Mo. 524, holding adverse possession did not appear; Moore v. State, 43 N. J. L. 205, 39 Am. Rep. 560, holding rule does not apply to prevent prosecution for crime barred by statute, after statute repealed. Modified in Alexander v. Burnett, 5 Rich. 203, 204, holding possession of slave during statutory period does not avail when party claiming thereunder held in another State. Distinguished in Hunt v. Fay, 7 Vt. 189, dissenting opinion, arguing New Hampshire creditor of deceased barred by New Hampshire statute may present claim to ancillary administrator in Vermont; Coleman v. Holmes, 44 Ala. 126, 4 Am. Rep. 122, holding valid an enactment in 1865, omitting time from 1861 to 1865, in computing statute of limitations; Cunningham v. Frandtzen, 26 Tex. 41, where court refused to decide whether rule applied under Texas statute.

Practice.— Supreme Court will entertain writ of error where case decided upon agreed statement, p. 358.

Cited approvingly in Suydam v. Williamson, 20 How. 434, 15 L. 980, in general discussion upon methods of getting facts in record for appellate court. Approved in Derby v. Jacques, 1 Cliff. 433, F. C. 3,817, holding court will hear case on agreed statement; United States v. Eliason, 16 Pet. 301, 10 L. 972, where Supreme Court entertained writ of error to Circuit Court in District of Columbia from judgment rendered on agreed statement; Holbrook v. Allen, 4 Fla. 101, where Florida Supreme Court entertained appeal from judgment upon agreed statement.

Miscellaneous.— Cited in Atherton v. Johnson, 2 N. H. 35.

5 Cr. 361–363, 3 L. 126, AULD v. NORWOOD.

Fraudulent loan.— Four years' adverse possession of chattel cannot be connected with four years' previous possession by another under owner to constitute a fraudulent loan within Virginia statute, p. 363.

Cited in Lightfoot v. Strother, 9 Leigh, 454, holding where loanee of slave sold her, purchaser could not add his subsequent possession to possession of loanee to make loan fraudulent.

5 Cr. 363–368, 3 L. 126, SLACUM v. SIMMS & WISE.

Incompetent tribunal.— Discharge of insolvent debtor who is in custody by magistrate who is surety on his bond is void for incompetency of tribunal, p. 368.

Cited in Eldridge v. Bush, Smith (N. H.), 297, holding discharge void because obtained by fraud, and sureties on bond liable.

Distinguished in Tappan v. Bellows, 1 N. H. 108, holding sheriff not liable for escape of prisoner for debt for giving him liberty of yard upon his giving bond with two sufficient sureties.

5 Cr. 368–372, 3 L. 128, UNITED STATES v. VOWELL.

Duties.— Duties on imports accrue on arrival at port of entry and not before, p. 372.

This holding has been largely affirmed and relied upon in the following citing cases: Arnold v. United States, 9 Cr. 120, 3 L. 676, holding duty did not accrue until arrival at port of entry; Meredith v. United States, 13 Pet. 494, 10 L. 262, holding duties on goods constituted personal debt against importer from arrival at port of entry; Saltonstall v. Russell, 152 U. S. 631, 38 L. 577, 14 S. Ct. 734, holding assessment of duties on cargo at first port of entry final; United States v. Dodge, Deady, 126, F. C. 14,973, where salt discharged at Astoria and subsequently written entry made, held duty accrued at time of arrival; United States v. Boyd, 24 Fed. 694, holding where fraudulent attempt made to land goods free, duty accrued immediately upon arrival with intent to unlade; McLean v. Hager, 31 Fed. 606, holding seizure for nonpayment of duties illegal where ship entered San Francisco for purpose of transferring cargo without landing; United States v. Lyman, 1 Mason, 499, F. C. 15,647, holding duty was due from importer immediately upon arrival; United States v. Segars, 27 Fed. Cas. 1017, holding duties a personal liability accruing at time of arrival, which cannot be deducted from amount of appraisement; United States v. Sugar, 1 Abb. (U. S.) 423, note, F. C. 16,555, quoting opinion in United States v. Segars, supra; United States v. Arnold, 1 Gall. 353, 354, 358, F. C. 14,469, holding duties did not accrue until arrival at port of entry; Prince v. United States, 2 Gall. 208, F. C. 11,425, holding prize brought in before, but not condemned till after, act reducing duty on prize goods not entitled to benefit of act; Enders v. Breene, 4 Rand. 445, holding duties a personal debt against importer from arrival at port of entry, and his bondsmen who have paid them money be substituted as creditors in equity in place of government.

Importation.— Importation is complete when vessel arrives at port of entry and not before, p. 372.

Cited and principle applied in Brown v. Maryland, 12 Wheat. 453, 6 L. 690, holding State license tax on importers of foreign goods unconstitutional because external commerce does not cease until introduction of goods into country; Harrison v. Vose, 9 How. 381, 13 L. 183, holding when vessel merely touched at Kingston for advices not an arrival; United States v. Cigars, 2 Curt. 437, F. C. 16,450, holding arrival at port of entry with intent to unlade an importation and without manifest incurrs forfeiture; United States v. Dodge, Deady, 126, F. C. 14,973, where cargo of salt held imported from time when brought within port of entry with intent to unlade, and not from time of subsequent written entry at customhouse; The Gertrude, 3 Story, 71, 2 Ware, 180, F. C. 5,370, holding where vessel driven on shore by stress of weather, goods not imported; The Cargo ex Lady Essex, 39 Fed. 767, holding where cargo unladen on account of stress of weather not a violation of law; Kidd v. Flagler, 54 Fed. 369, where applied by analogy, holding exportation complete when goods landed in foreign territory; Flagler v. Kidd, 78 Fed. 344, reversing Kidd v. Flagler, holding exportation not complete if goods landed temporarily with intent to return; The Coquitlam, 77 Fed. 751, 48 U. S. App. 116, holding a casual entry of foreign vessel into United States waters to transfer cargo when not bound to United States not an arrival within revenue laws; The Mary, 1 Gall. 209, F. C. 9,183, holding not an importation where vessel driven into port by stress of weather; United States v. Merriam, 26 Fed. Cas. 1239, holding act providing penalty for false entry not repealed by act providing penalty for illegal importation because latter completed before former can be done; Enders v. Brune, 4 Rand. 445, holding importation was complete upon arrival in port of entry; United States v. Arnold, 1 Gall. 358, F. C. 14,469, holding importation not complete until arrival at port of entry. Approved arguendo in dissenting opinion, Keck v. United States, 172 U. S. 463, arguing as to meaning of word "smuggle."

Distinguished in Waring v. Mayor, 8 Wall. 120, 19 L. 345, holding where port of Mobile permanently obstructed by shoals, importation took place when cargo delivered to lighters outside.

Miscellaneous.— Cited generally in United States v. Reiter, 27 Fed. Cas. 779.

5 Cr. 372–374, 3 L. 129, SLOOP SALLY v. UNITED STATES.

Appeal from Maine District Court in admiralty cases is to Massachusetts Circuit Court and not the United States Supreme Court, p. 374.

No citations.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1810.

VOL. VI.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. I.

CASES

ARGUED AND DECIDED AT FEBRUARY TERM, 1810.

The Judges present at this term, were

THE HONORABLE JOHN MARSHALL, Chief Justice.
The Honorable BUSHROD WASHINGTON,
The Honorable WILLIAM JOHNSON,
The Honorable BROCKHOLST LIVINGSTON, and
The Honorable THOMAS TODD,
} Associate Justices.

Judges Cushing and Chase were prevented from attending by ill health.

Supreme Court of the United States.

*3] *February Term, 1810.

SCOTT *v.* NEGRO BEN.

The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act.

ERROR to the judgment of the Circuit Court for the District of Columbia, sitting at Washington, upon a petition for freedom filed by Negro Ben, against Sabrett Scott, who claimed the petitioner as his slave.

The ground upon which the petitioner claimed his freedom was, that he had been imported into the state of Maryland contrary to the act of assembly of that state, passed in the year 1783, entitled, "An act to prohibit the bringing of slaves into this state;" by which it is enacted, "That it shall not be lawful, after the passing this act, to import or bring into this state, by land or water, any negro, mulatto or other slave, for sale, or to reside within this state; and any person brought into this state as a slave contrary to this act, if a slave before, shall thereupon immediately cease to be a slave, and shall be free; provided that this act shall not prohibit any person, being a citizen of some one of the United States, coming into this state with a *bona fide* intention of settling therein, and who shall actually reside within this state for one year at least, to be computed from 4*] *and next succeeding his coming into the state, to import or bring in any slave or slaves which before belonged to such person, and which slave or slaves had been an inhabitant of some one of the United States, for the space of three whole years next preceding such importation; and the residence of such slave in some one of the United States, for three years as aforesaid antecedent to his coming into this state, shall be fully proved, to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses."

Upon the trial the defendant below took two bills of exceptions.

The first was to the opinion of the court that it was incumbent on the defendant (Scott), in order to bring himself within the proviso contained in the first section of the act of 1783, to show to the jury that it has been fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses, that the petitioner was a resident of some one of the United States for three years antecedent to his coming into the state of Maryland; and that it was not sufficient for the defendant to prove, on the trial, to the satisfaction of the jury, that the defendant, being a citizen of some one of the United States, and coming into the state of Maryland with a *bona fide* intention of settling therein, and who actually resided within the said state for one year at least, computed from and next succeeding his coming into the state, imported the petitioner, who then belonged to the defendant, and that the petitioner had been an inhabitant of some one of the United States for the space of three whole years next preceding such importation.

The second bill of exceptions was to the refusal of the court to admit, as evidence, two certificates made during the trial, the one by the collector of the customs and naval officer of the United States, *for the district and [*5 port of Georgetown in the District of Columbia, and the other by a collector of taxes, appointed by the levy court for the county of Washington, in that district; the purport of which certificates was, that Scott had, on that day (16th June, 1807), by his own oath, proved, to the satisfaction of each of those officers respectively, that Ben "was a resident of the state of Virginia, one of the United States, three whole years next preceding the time when the said Mulatto Ben was brought into the state of Maryland."

The cause was argued by *C. Lee* and *Jones*, for the plaintiff in error, and by *Swann* and *F. S. Key*, for the defendant.

February 7. Marshall, *Ch. J.*, delivered the opinion of the court as follows, viz.:

In this case three opinions were given by the Circuit Court, to each of which the defendant in that court excepted. These opinions were, in substance,

1. That the master of a slave imported into the state of Maryland, while the act, passed in the year 1783, entitled, "An act to prohibit the bringing slaves into this state," was in force, could not be admitted to prove the fact that such slave had resided three years, previous to his importation into Maryland, in some one of the United States, unless he could show that this fact had been proved to the satisfaction of the naval officer, or collector of the tax.

2. That a certificate made by the naval officer and collector of the port of Georgetown, dated on the 16th day of June, in the year 1807, certifying that this fact was proved to his satisfaction on that day, did not satisfy the law.

3. That a similar certificate given by the collector *of the tax for the county of Wash- [*6 ington did not satisfy the law.

The correctness of these opinions is to be tested by comparing them with the act under which the plaintiff in the court below claimed his freedom.

The enacting clause of that law prohibits the importation of slaves into the state of Mary-

land, and gives freedom to such as shall be imported contrary to that act. A proviso excepts from the operation of the enacting clause those slaves which, having resided for three years within some one of the United States, and being the property of the importer, should be imported into the state of Maryland by a person intending to become a resident thereof, and who should actually reside therein for the space of twelve months thereafter. The act then adds—and the residence of such slave in some one of the United States for three years as aforesaid, antecedent to his coming into this state, shall be fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses.

By the plaintiff in error it is contended, that this part of the law is directory; that it prescribes a duty to the importer of a slave within the description of the proviso, but does not make his title to that slave dependent on the performance of this duty.

By the defendant it is contended, that this clause forms a part of the proviso, and that the fact of previous residence within some one of the United States can be proved by no other testimony, if that which is here prescribed be wanting.

The act, in its expression, is certainly ambiguous, and the one construction or the other may be admitted, without great violence to the words which are employed.

The great object of the proviso certainly was 7*] to *permit persons, actually migrating into the state of Maryland, to bring with them property of this description which had been within the United States a sufficient time to exclude the danger of its being imported into America for the particular purpose. The great object of the provision was, that the fact itself should accord with this intention. The manner in which that fact should be proved was a very subordinate consideration. Certainly the provisions of the law ought not to be so construed as to defeat its object, unless the language be such as absolutely to require this construction.

It would be a singular and a very extraordinary provision that a naval officer, or the collector of a tax, should be made the sole judge of the right of one individual to liberty, and of another to property. It would be equally extraordinary that the oath of one of the parties, probably in the absence of the other, should be conclusive on such a question. It would be not less strange that the manner in which this *quasi* judge should execute his duty should not be prescribed, and that not even the attempt should be made to preserve any evidence of his judgment.

These considerations appear to the court to have great weight; and the language of the law ought to be very positive to deprive them of their influence.

Upon an attentive consideration of that language, the majority of the court is of opinion, that the property of the master is not lost by omitting to make the proof which was directed, before the naval officer, or the collector of the tax, and that the fact on which his right really depends may be proved, notwithstanding this omission.

The words of this part of the section do not appear to the court to be connected, either in their sense, or in their mode of expression, with the proviso. It is a distinct and a substantive regulation. In legislation, the conjunction "and" is very often used when a provision is made in no degree dependent *on that [*8 which precedes it; and, in this case, no terms are employed which indicate the intention of the legislature, prescribing this particular duty, to make the right to the property dependent on the performance of that duty.

It is, then, the opinion of the majority of the court, that the fact of the residence of the plaintiff below within the United States was open for examination, even had his master omitted entirely to make the proof of that residence before the naval officer, or collector of the tax, and, consequently, that the Circuit Court erred in refusing to admit testimony respecting that fact.

The opinion of the court on this point renders a decision on the other exceptions unnecessary.

FIELD AND OTHERS *v.* HOLLAND AND OTHERS.

The report of auditors, appointed by consent of parties in a suit in equity, is not in the nature of an award by arbitrators, but may be set aside by the court, although neither fraud, corruption, partiality, or gross misconduct, on the part of the auditors, be proved.

Without expressly revoking an order of reference to auditors, the court may direct an issue to be tried.

A court of equity may ascertain the facts themselves, if the evidence enables them to do it, or may refer the question to a jury, or to auditors. After an issue ordered, a court of equity may proceed to a final decree, without trying the issue, or setting aside the order.

The answer of a defendant is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant.

The answer of one defendant is evidence against other defendants claiming through him.

The plaintiffs cannot avail themselves of the answer of a defendant, who is substantially a plaintiff; it is not evidence against a co-defendant.

If neither the debtor, nor the creditor, has made the application of the payments, the court will apply them to the debts for which the security is most precarious.

ERROR to the Circuit Court for the District of Georgia, in a chancery suit, in which Field, Hunt, Taylor and Robeson were complainants, and Holland, Melton, Tigner, Smith, Cox and Dougherty were defendants.

The decree of the court below dismissed the bill as to all the defendants.

The bill stated that, on the 21st of July, 1787, Micajah Williamson obtained from the state of Georgia a grant of 12,500 acres in Franklin county, in that state. On the 9th of July, 1788, Williamson conveyed to Swepson, who, on the 23d of July, 1792, conveyed

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NOTE.—The right of a debtor making a payment to direct the application of such payment, must be exercised at the time the payment is made. Am. Lead. Cas., 294; Harding v. Tifft, 75 N. Y., 461; Allen v. Culver, 3 Denio, 284.

If he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the creditor, and he may

to Cox, who, on the 3d of September, 1794, conveyed to Naylor, who, on the 18th of December, 1794, conveyed to the complainant **9***] Field, and one *Harland, as tenants in common, and that Harland afterwards conveyed his undivided interest to the other complainants.

That the defendants, Melton, Tigner and Smith, claim title to the land in virtue of a sale made by the sheriff to the defendant Melton, upon two writs of *fieri facias*, founded upon judgments obtained by the defendant Holland against the defendant Cox; one in the year 1793, for 1,556*l.*, the other in 1794, for 3,000*l.*, which executions were levied, and sales made thereon, in 1799. That the complainants were ignorant of those judgments at the time of their purchase. That the judgments, or the greater part thereof, were paid and discharged by Cox before the executions issued thereon; but the sheriff, well knowing the same, proceeded to levy and sell, &c.

That John Gibbons, the complainants' agent, exhibited to the sheriff an affidavit stating that the executions had issued illegally, on which it became the duty of the sheriff to return the same into court, and discontinue ministerial proceedings thereon until the judgment of the court whence the executions issued was first had and obtained in the premises, according to the provisions of the act in such case made and provided. The affidavit of Gibbon stated, that the executions were illegal because they had not beeen credited with a partial payment made by Cox.

The bill states that the sheriff's sale was fraudulently made with a view to get the land at a very low price; the sale being for 300 dollars, and the land worth 25,000. That the purchaser Melton, at the time of his purchase, knew of the complainant's title, and indemnified the sheriff for proceeding in the sale, and agreed that he should participate in its benefits.

Melton's answer states, that in the year 1787, having land warrants, he surveyed three tracts of 920 acres each, on what he then supposed was vacant land, but which appears now to be **10***] within Williamson's *elder grant, of which he had no intimation till the year 1797, when he had sold parts of his surveys. Finding that Naylor had Williamson's title, and being desirous of protecting the titles of so much of the land as he had sold, he purchased of Naylor 4,505 acres. That, with the same view, he afterwards purchased a judgment against Naylor, which he discovered was prior to Naylor's deed to him; upon this judgment, he caused an execution to be issued, and levied upon the land, which he bought in at a fair sale, under the execution, for 300 dollars. That afterwards, finding that the land had been sold for taxes, and purchased by George Taylor, he purchased Taylor's claim, and paid him 300 dollars for it. That in June, 1799, he first heard of the claim of the complainants, and made a verbal agreement with Gibbons, their agent, for the purchase thereof, at a dollar an acre; but finding Holland had a prior judgment against Cox which bound the land, and which he was about to enforce by an execution and sale of the land, and Gibbons having failed to compromise with Holland, or otherwise to stop the sale, he (Melton) agreed with Holland that he (Melton) should become the purchaser at the sale, and would pay Holland 1,500 dollars for the land without regard to the sum at which it might be struck off to him, which sum he has paid. That this was done without any fraudulent intention, and to secure his title; being fully satisfied that the lands were liable to the judgments.

The answer of Dougherty, the sheriff, denies all fraud, combination, and interest in the transaction, and avers that he acted merely in the discharge of his official duty; and that the sale was fair and *bona fide*.

Smith's answer is immaterial, as it relates only to 75 acres of the land which he claimed under a title prior to the complainants.

Tigner answers merely as to 357 acres, which he purchased of the defendant Melton in the year 1797.

*Holland's answer states, that subse- [***11** quent to the two judgments, he made large advances to Cox in goods, and took his obligations.

It states sundry payments and negotiations made by Cox, particularly three drafts, or inland bills of exchange, given by Cox to Holland in February, 1795, and payable in May, June, and July following, for which Holland gave the following receipt: "Washington, 21st February, 1795. Received from Zachariah Cox, Esq., three sets of bills of exchange, dated the

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apply it as he chooses. Nat. Bank v. Bigler, 83 N. Y., 53.

The rule settled in the Supreme Court of the United States is that the debtor, or party paying the money, may, in case he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if the latter fail, the law will make the application according to its own notions of justice. Neither party can make it at the trial, nor after a controversy has arisen. National Bank v. Mech. Bk., 94 U. S.; 4 Otto, 437; 1 Bond., 158, 222, 345; Taney, 460; 1 Dill., 311; 4 Cranch, 317; 7 Cranch, 572; 9 Wheat., 720, 737; 1 How., 250; 17 Pet., 251; 7 How., 681, 685; 2 Brock., 274; 2 Story C. C., 243; 1 Mas., 323; 5 Pet., 160; 16 Pet., 122.

Where a party makes a payment, he has the right to direct its application; but if he make no application at the time of payment, the other party may do it. If not applied by either party, the law will make the application. Selick v. Turnpike Co., 13 Conn., 453; Fairchild v. Holly, 10 Conn., 175; Meggott v. Wills, 1 Ld. Raym., 286; Simson v. Ingham, 2 Barn. & Cres., 65; Clayton's Case, 1 Merio., 584, 610; Brooke v. Enderby, 2 Brod. & Bing., 70; Chester v. Wheelwright, 15 Conn., 562; Blinn v. Chester, 5 Day, 166; Stamford Bk. v. Benedict, 15 Conn., 437; Allen v. Kimball, 23 Pick., 473; Wash. Bk. v. Prescott, 20 Pick., 339, 343; Reed v. Boardman, 20 Pick., 441; Hall v. Marston, 17 Mass., 575; Gilchrist v. Ward, 4 Mass., 692; Bonaffe v. Woodberry, 12 Pick., 463; Hussey v. Bank, 10 Pick., 415; Blackstone Bk. v. Hill, 10 Pick., 129; Upham v. Lefavour, 11 Met., 174.

The same is the rule in New York. 15 Wend., 19; 9 Cow., 420; 16 Wend., 557; 22 Wend., 558; 3 Den., 284; 5 Denio, 470; 11 Barb., 80; 32 Barb., 9; 2 Hall, 185; 11 Wend., 62; 2 Caines, 98; 2 Wend., 413; 11 Hun., 509; Hill & D. Supp., 32, 204; 30 Barb., 268; 59 N. Y., 485; 74 N. Y., 607; 43 N. Y., 52.

The direction by debtor may be inferred from circumstances. 3 Caines, 14; 15 Wend., 19; 8 Wend., 403; 6 N. Y., 147; 11 Wend., 62; Clarke, 470; 4 Cranch, 317; 7 Wheat., 13, 20.

When the creditor or debtor makes it, he cannot afterwards change it. Pattison v. Hull, 9 Cow., 747; Offut v. King, 1 McArthur, 312; 5 Pet., 304; 1 Mas., 323.

5th and 15th instant, for twenty thousand dollars, payable in Philadelphia, which, when paid, will be on account of my demand against said Cox."

That in September, 1796, a settlement took place between Cox and Holland, of all their transactions distinct from, and independent of, the two judgments, and Holland took Cox's note for 18,000 dollars for the balance, and gave a receipt, with a stay of execution upon the two judgments for three years.

That the judgments "never were dormant, but have been regularly kept alive and remain unsatisfied."

That it was an established rule between Cox and Holland, that all payments made were to go to the discharge of running and liquidated accounts, independent of the judgments, and that mode of settlement was adopted on their last settlement in 1796.

The answer of Cox states, positively, that the judgments were paid and satisfied, as early as the 14th of September, 1796, by settlement of that date, when the parties passed receipts in full of all past transactions.

That the three bills of exchange, amounting to 20,000 dollars, were by him delivered to Holland on account of the two judgments, and that the bills have been duly paid and discharged.

That the settlement of the 14th of September, 1796, was a final settlement of all accounts prior to that day, including judgments, bonds, **12***] notes, and *all demands whatever up to that time, and particularly the judgments in question. That they exchanged receipts in full, ("which receipt the defendant has lost or mislaid.") That, upon the settlement being made, Holland promised and verbally engaged to enter up satisfaction upon the said judgments.

The evidence on the subject of the payment of the judgments consisted principally of Mr. Vaughan's deposition, and the letters and receipt of Holland for the bills for 20,000 dollars.

Mr. Vaughan stated, that although he had no particular knowledge how Holland and Cox settled, yet when a new advance was made by Holland to Cox, after the 14th of September, 1796, he understood the old concern was settled. In a letter from Holland to Vaughan of the 18th of April, 1795, enclosing the bills for 20,000 dollars, he says, "you will oblige me much by procuring the payment of these bills. I have delayed the execution and sale of Mr. Cox's property to the great injury of my own affairs, and I request you may assure him that should the bills not be paid immediately, the consequence must be an assignment of the judgment against him, the result of which will be an immediate sale of his property, which I will not be able to prevent, unless his punctuality in this instance steps forward." "The late stoppage of Mr. Morris and Nicholson, I am fearful may affect them, but as they, together with Mr. Greenleaf, are concerned with Mr. Cox, in the valuable property which my execution is upon, I expect they will for their own sakes see me satisfied, and these drafts paid, to prevent worse consequences." He afterwards says, "I have not security by judgment to the extent of my debt against him." He also urges Mr. Vaughan to obtain security from Cox in case the bills should not be paid. In a letter of May 29, 1795, Holland again says, "I hope you will be able to make some arrangement for the payment of the 18,000 dollars, as I feel a reluctance in pushing the execution I have against the property of *Mr. Cox, although by [***13** doing so I would make some thousands."

It appeared from Mr. Vaughan's account with Cox, as stated in his deposition, that the bills for 20,000 dollars, and also a draft on I. Nicholson for 2,570 dollars, and 10 per cent. damages on the 20,000 dollars, excepting a balance of about 1,500 dollars, had been paid before the 6th of February, 1796; and Mr. Vaughan had given up to Cox his drafts of 18,000 dollars, and 1,000, and 3,000 dollars, all of which had been given to Holland on account of prior claims. On the 23d of December, 1803, it was agreed by the parties to this suit, that W. W., I. W., and J. C., or any two of them be appointed auditors, with power to examine all papers and documents relative to payments made by Zachariah Cox, in satisfaction of judgments obtained by Holland against him, and charged in the bill to be satisfied.

On the 21st of April, 1804, the auditors reported that they were of opinion, from the papers laid before them by both parties, that the judgments had been satisfied by payments made prior to February, 1796.

Upon exceptions being taken to this report, it was set aside on the 14th of May, 1804, and G. A., I. P. W., and E. S. were appointed auditors by the court, to report whether the judgments were really satisfied; and that they report a statement of the payments made on the judgments.

On the 7th of December, 1804, those auditors reported that they were of opinion that no payments appear to have been made on the judgments, no vouchers having been produced to that effect.

To this report exceptions were filed on the 14th of December, 1804. It does not appear upon the record that any order was taken either respecting the report or the exceptions to it.

*On the 17th of May, 1805, the court [***14** decreed, that the bill should be dismissed with costs as to Melton, Dougherty, Smith and Tigner; and that Holland should bring an action of debt upon the judgments against Cox, who was to appear by attorney and plead payment, upon the trial of which issue, the bill, answers, exhibits, and testimony in this cause was to be considered as evidence.

No other notice is taken of the order for an issue at law, and on the 15th of May, 1807, the court passed the following decree:

"This cause is involved in much obscurity, but, upon mature deliberation, we are of opinion that there is sufficient ground for us to decree upon. The defendant Holland is in possession of a judgment against Cox, which the latter contends is satisfied, and one of the objects of this bill is to have satisfaction entered of record upon the said judgment. The only difficulty arises upon the application of sundry payments which the complainants contend extinguished the judgment, but which the defendant Holland replies were applicable to other demands. The principle on which the court has determined to decree is this; that all payments shall be applied to debts existing when they were made, and as it appears that there were sundry demands of Holland's on Cox

which were not secured by judgment, that those sums shall be first extinguished, and the balance only applied to judgments.

"This application of those payments is supported by general principles, as well as the particular circumstances of the case.

"1. The payer had a right at the time of payment to have applied it to which debt he pleased where a number existed, but if he neglects to do so, generally, it rests in the option of the receiver to make the application. In this case Cox takes his receipts generally. Even **15***] when the large payment *of 20,000 dollars was made, he takes a receipt on account.

"2. It appears that the application of those payments has actually been made in the manner we adjudge; for from a letter of Mr. Vaughan, through whom most of the payments were made, he intimates that he had given up the evidences of several debts to Cox, because they had been satisfied. Such an act could only have been sanctioned by a knowledge on his part that the money paid through him was in part applicable to those debts.

"The sums which we adjudge to have been due to Holland are the following, viz.:

	l.	*s.*	*d.*
Amount of first judgment, - - -	1,556	0	0
Interest from 1st of May, 1793, -			
Amount of second judgment, -	3,000	0	0
Interest from 21st of June, 1793,			
Amount of acknowledged account,	332	10	7
Interest from 11th February, 1794,			
Note of March 1, 1794, int. Feb. 1, 1794, - - - - - - - - - -	2,278	0	0
Note due 1st May, 1794, - - -	1,500	0	0
Interest from 1st May, 1794, - -			

"The payments made by Cox are the following:

	l.	*s.*	*d.*
1794, May 25th, amount paid, -	11	13	4
June 25th, amount paid, - -	1,563	17	10
1795, Feb. 21, amount of bills $20,000, - - - - - - - - - -	4,666	13	4
1795, Feb. 26, amount paid, - -	28	0	0
Bills on Greenleaf, - - - - -	700	0	0
Bills on Cox himself, - - - -	11	13	4

"Upon the foregoing *data*, the register will state the account between the parties, calculating interest upon the whole amount bearing interest to the time of payment, and applying the payments according to their dates."

The register having, upon these principles, **16***] stated *an account, by which a balance of 11,086 dollars remained still due on the judgments, the court, by a final decree, dismissed the bill; and the complainants sued out their writ of error.

Jones and *Harper*, for the plaintiffs in error, contended,

1. That the court below erred in setting aside the report of the auditors who had been appointed by consent. Their report was like an award, which cannot be set aside but for fraud, or partiality, or gross mistake.

2. In not having decided upon the exceptions taken to the second report of the auditors.

3. In not enforcing or setting aside the order to try an issue.

4. In dismissing the bill as to the purchasers, and retaining it as to Holland. The purchasers had notice of the payment of the judgments. The plaintiffs, at the time of the sale, could not be presumed to have known the full extent of the payments made. It was sufficient that the purchasers had notice of the complainants' claim, and that the validity of the sale would be disputed.

The 20,000 dollars, in bills, ought to be applied to the judgments, because that is most beneficial to the payer, as no other debt was then bearing interest. The receipt is upon account of Holland's demand; evidently alluding to the single demand on the judgments. If it had been intended as a general payment, it would have been on account of his demands, in the plural.

The object of the bill is to set aside the sheriff's sale to Melton. He is the only real defendant. Hollaud is only incidentally interested. It would have been no cause of demurrer if he had not been made a party. Nor is Cox a necessary party.

*It is true that the answer of one defend- [***17**
ant cannot be taken as evidence against another. If one defendant wishes to avail himself of the testimony of another, he must take out a commission and examine him as a witness. Holland's answer is no more evidence in favor of Melton than Cox's answer is evidence against him. Holland's answer is only evideuce for himself, and no decree is sought against him. If, then, the answers of Cox and Holland are both excluded, the only evidence is Vaughan's deposition, aud Melton's answer. If Holland's and Cox's answer be both admitted, the result will be the same, for one destroys the other. Cox is not discredited by Vaughan's deposition. The only facts proved are the two judgments and the payment of 20,000 dollars.

If money be paid on account, it is to be applied, in equity, most beneficially for the debtor. It is not now in the power of the creditor to apply it to which demand he pleases. If neither party, at the time of payment, made the application, it is the province of the court of equity to make it now. The court is to judge, from all the circumstances of the case, what was the intention of the parties, and what application of the money would be most beneficial to the debtor.

Vaughan considered it as a settlement of all accounts.

Notice that the judgment was satisfied was not necessary; the purchaser was bound to take notice—*caveat emptor*. But if notice was necessary, enough was given to put the purchaser upon inquiry.

MARSHALL, *Ch. J.* Can the sheriff, in Georgia, sell the whole of a large tract for a small debt? or must he confine himself to the sale of enough to pay the debt?

JOHNSON, *J.* The sheriff cannot divide a tract *of land. If there are several tracts [***18**
of land, he may sell that which comes nearest to the sum.

Harper. An objection has been made to the copy of the deed from Williamson to Sweepson, that it does not appear that the origiual deed was recorded in due time.

But this objection comes too late in the Appellate Court. Not having been made in the court below, it must be considered as having been waived.

The first report of the auditors was pursuant to their authority, and can only be impeached for corruption, or gross impropriety of conduct, or mistake appearing upon the record.

F. S. Key and *C. Lee*, contra.

The report made by auditors, under an order made by consent, may be set aside as well as a report made by auditors under a reference made by the simple order of the court.

This report was excepted to because the auditors report only their opinion generally, that the judgments were satisfied, and do not report the payments in particular which had been made upon them.

LIVINGSTON, *J.* It does not appear what was done with those exceptions.

Key. It is to be presumed that they were properly disposed of. The cause was afterwards fully heard.

The second report states, that no payments appear to have been made upon the judgments. The exceptions to this report were abandoned.

As to the issue ordered to be tried, it was a mere interlocutory order, which the court was not bound to pursue; but might, if they thought **19***] proper, proceed *to a final hearing without trying the issue, or setting it aside formally.

No notice that the judgments were satisfied, is averred or proved. The payments were not made upon the judgments, and have been properly applied to other accounts.

If Cox did not at the time direct to which account the payments should be applied, Holland might apply them to which account he pleased. If neither party has applied them, the court will apply them to claims not secured by judgments.

Every debt due to Holland from Cox made but one demand. The notes due to Holland were payable in May; the bills for 20,000 dollars did not become due until after May, although drawn in February. If the bills were given on account of the judgments, there would have been a stay of execution until the bills became payable. When arrested in Philadelphia, Cox did not allege that the judgments had been satisfied; nor is it averred in his answer.

No good title is shown from Williamson. The original deed is not produced, and it does not appear from the copy whether the original was recorded in due time.

The first auditors exceeded their authority; they were only authorized to do a ministerial act, but they assumed to act judicially.

The report of the second auditors was correct; they were competent to say that no payments had been made upon the judgments. Cox's answer is no evidence against Holland. If the complainants wished to avail themselves of Cox's testimony, they ought to have taken out a commission and examined him.

But Holland's answer is evidence for him and **20***] *those claiming under him, and is conclusive unless contradicted by two witnesses.

Cox's answer is discredited in a material point, viz., the payment of the judgments.

This court decided in the case of the *Mayor & Commonalty of Alexandria* v. *Patton & others*, (ante, v. 5, p. 1,) that if the debtor do not, at the time of payment, direct to which account it shall be applied, the creditor may at any time afterwards apply it to which account he pleases. In equity, all debts bear interest.

February 12. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

In this case some objections have been made to the regularity of the proceedings in the Circuit Court, which will be considered before the merits of the controversy are discussed.

In May term, 1803, the following order was made:

"By consent of parties, it is agreed, that William Wallace, James Wallace and John Cumming, or any two of them, be appointed auditors, who shall have power to examine all papers and documents relative to payments made by Zachariah Cox, in satisfaction of judgments obtained by said Holland against said Zachariah, and charged in said bill to be satisfied, and that the testimony of John Vaughan, taken by complainants before Judge Peters, and now in the clerk's office, may be produced by them to said auditors. And it is further agreed, that said auditors may meet at any time after the first day of April next, and not before, on ten days' notice given to the adverse party."

The auditors returned the following report:

"We are of opinion, from the papers laid before *us, by both parties, that the judg- [***21** ments in the above case have been satisfied by payments made prior to February, 1796."

On exceptions this report was set aside.

By the plaintiffs in error it is contended, that the order under which the auditors proceeded was equivalent to a reference of the cause by consent, and that their report is to be considered as an award obligatory on all the parties, unless set aside for some of those causes which are admitted to vitiate an award. But this court is unanimously of opinion, that the view taken of this point by the plaintiffs is incorrect. The order in question bears no resemblance to a rule of court referring a cause to arbiters. It is a reference to "auditors," a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. The order in this case, so far from implying that the decision of the auditors shall be made the decree of the court, does not even require, in terms, that the auditors shall form any opinion whatever. They are merely directed to examine all papers and documents relative to payments made in satisfaction of the judgments.

From the nature of their duty they were bound to report to the court, and to state the result of their examination, but this report was open to exception, and liable to be set aside. In the actual case the report was a very unsatisfactory one, and was, on that account, as well as on account of the objections to its accuracy, very properly set aside.

The cause was again referred to auditors, who reported that no evidence had been offered to them of payments to be credited on the judgments alleged by the plaintiffs to have been discharged.

The defendants insist that this report ought to *have terminated the cause. But the [***22** court can perceive no reason for this opinion. If there were exhibits in the cause which proved that payments had been made, the plaintiffs ought not to be deprived of the benefit of those payments, because the auditors had not noticed the vouchers which established the fact.

The court, without making any order relative to this report, directed an issue for the purpose of ascertaining, by the verdict of a jury, the credits to which the plaintiffs were entitled.

It was completely in the discretion of the court to ascertain this fact themselves, if the testimony enabled them to ascertain it; or, if it did not, to refer the question either to a jury, or to auditors. There was, consequently, no error, either in directing this issue or in discharging it.

But, without trying the issue, or setting aside the order, the court has made an interlocutory decree, deciding the merits of the case by specifying both the debits and credits which might be introduced into the account, and directing their clerk to state an account in conformity with that specification.

This interlocutory decree is undoubtedly an implied discharge of the order directing an issue, and is substantially equivalent to such discharge. Had the issue been set aside, in terms, in the body of the decree, or by a previous order, it would have been more formal, but the situation of the case and of the parties would have been essentially the same. The only real objection to the proceeding is, that the parties might not have been prepared to try the cause in court, in consequence of their expectation that it would be carried before a jury. There is, however, no reason to believe that this could have been the fact. Had there been any objection to a hearing on this ground, it would certainly have been attended to, and, if overruled, would have been respected by this court. But no objection appears to have been made, **23***] and *the inference is, that the cause was believed to be ready for a trial.

These preliminary questions being disposed of, the court is brought to the merits of the case.

The plaintiffs claim title to a tract of land in the state of Georgia, under several mesne conveyances from Micajah Williamson, the original patentee. In the year 1793, while these lands were the property of Zachariah Cox, one of the defendants, two judgments were rendered against him in favor of John Holland, also a defendant, for the sum of 4,556*l.* sterling. These judgments remained in force until the year 1799, when executions were issued on them, which were levied on the lands of the plaintiffs held under conveyances from Cox, made subsequent to the rendition of the judgments. John Gibbons, the agent of the plaintiffs, objected to the sale, because the judgments were satisfied either in whole or in part, but as he failed to take the steps prescribed in such case by the laws of Georgia, the sheriff proceeded, and the lands were sold to Melton and others, who are also defendants in the cause.

This bill is brought to set aside the sale and conveyance made by the sheriff; and it also contains a prayer for general relief.

As the judgments constituted a legal lien on the lands in question, and the title at law passed to the purchasers by the sale and conveyance of the public officer, the plaintiffs must show an equity superior to that of the persons who hold the legal estate. That equity is, that the legal estate was acquired under judgments which were satisfied, and that sufficient notice was given to the purchasers to put them on their guard.

If the facts of the cause support this allegation, the equity of the plaintiffs must be acknowledged; but it is incumbent on them to make out their case.

*In the threshold of this inquiry, it be- [***24** comes necessary to meet an objection suggested by the plaintiffs relative to the testimony of the cause. It is alleged that neither Holland nor Cox are necessary or proper parties, and that their answers are both to be excluded from consideration.

The correctness of this position cannot be admitted. The whole equity of the plaintiffs depends on the state of accounts between Holland and Cox. They undertake to prove that the judgments obtained by Holland against Cox are satisfied. Surely to a suit instituted for this purpose, Holland and Cox are not only proper but nccessary parties. Had they been omitted, it would be incumbent on the plaintiffs to account for the omission by showing that it was not in their power to make them parties. Not only are they essential to a settlement of accounts between themselves, but, in a possible state of things, a decree might have been rendered against one or both of them. Neither is it to be admitted that the answer of Holland is not testimony against the plaintiffs. He is the party against whom the fact, that the judgments were discharged, is to be established, and against whom it is to operate. This fact, when established, it is true, affects the purchasers also, but it affects them consequentially, and through him. It affects them as representing him. Consequently, when the fact is established against or for him, it binds them.

The plaintiffs themselves call upon Holland for a discovery. They aver that the judgments were discharged, and expressly require him to answer this allegation. They cannot now be allowed to say that this answer is no testimony.

The situation of Cox is different. Though nominally a defendant, he is substantially a plaintiff. Their interest is his interest: their object is his object, He, as well as the plaintiffs, endeavors to show that the judgments were satisfied. He is not to be considered as really a defendant, nor does the *bill charge [***25** him with colluding to defraud the plaintiffs, or require him to answer the charge of contributing to the imposition alleged to have been practiced on them. It is not in the power of the plaintiffs, in such a case, to avail themselves of the answer of a party who is, in reality, though not in form, a plaintiff.

The answer of the defendant Holland, then, where it is responsive to the bill, is evidence against the plaintiffs, although the answer of Cox is not testimony against Holland.

The evidence in the cause, then, is the answer of Holland, the deposition of Vaughan, and the various exhibits and documents of debt which are found in the record. Does this testimony support the interlocutory decree which was rendered in May term, 1805?

That decree specifies the debits and credits which are to be allowed, and directs a statement to be made showing how the account will stand, allowing the specified items.

To this order two objections may be made.

1. That it ought to have been more general. If this be overruled,

2. That its principles are incorrect.

Upon the first objection it is to be observed, that a court of chancery may, with perfect propriety, refer an account generally, and, on the return of the report, determine such questions as may be contested by the parties; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the principles on which the account is to be taken. The propriety of the one course or of the other depends on the nature of the case. Where items are numerous, the testimony questionable, the accounts complicated, the su-
26*] perior *advantage of a general reference, with a direction to state specially such matters as either party may require, or the auditors may deem necessary, will readily be perceived.

Where the account depends on particular principles which are developed in the cause, the convenience of establishing those principles before the report is taken will also be acknowledged.

The discretion of the judge will be guided by the circumstances of the case, and his decree ought not to be reversed because he has pursued the one course or the other, unless it shall appear either that injustice has been actually done, or that there is reason to apprehend it has been done.

In this case it might, perhaps, have been more satisfactory had the parties been permitted to lay all their claims and all their objections before auditors, so that the precise points of difference between them, and the testimony upon those points, might be brought in a single view before the court.

But it is to be observed that two orders of reference had before been made, on neither of which was a satisfactory report obtained. That an issue had been directed, which had, for several terms, remained untried. The probability is, that the controversy depended less on items than on principles, and that all parties were desirous of obtaining from the court a decision of those principles. That no debits nor credits were claimed but those which were stated in the papers, and that all parties wished the opinion of the court on the effect and application of those items. Under such circumstances, a judge would feel much difficulty in withholding his opinion.

In such a case the justice of the cause could be defeated only by the exclusion of some item which ought to be admitted, or by an erroneous direction with respect to those items which were introduced.

27*] *This court perceives in the record no evidence of any credit to which the defendant Cox might be entitled, which is not comprehended in the recapitulation of credits allowed him in the Circuit Court, and they are the more inclined to believe that no such omission was made, as the fact would certainly have been suggested by the counsel for the plaintiffs, and the circumstances under which they claimed the item disallowed by the court, would have been spread upon the record. It is true, an additional credit is claimed in the assignment of errors; but the testimony in the record does not support this claim.

The majority of the court, therefore, is of opinion, that there is no error in the interlocutory decree, unless it shall appear that the principles it establishes are incorrect.

The items claimed by Holland, and allowed by the court, are supported by documents, the obligation of which has not been disproved.

There is, then, no question on the merits but this. Were the payments properly applied by the court, or were they applicable, to the judgments?

The principle that a debtor may control, at will, the application of his payments, is not controverted. Neither is it denied that, on his omitting to make this application, the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the court; and, in its performance, a sound discretion is to be exercised.

It is contended by the plaintiffs that if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention.

The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which *that power devolves [***28**
on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. That course has been pursued in the present case.

But it is contended, that bills for 20,000 dollars were received, and have been applied in discharge of debts which became due two months afterwards.

If the receipt given for these bills purported to receive them in payment, this objection would be conclusive. If an immediate credit was to be given for them, that credit must be given on a debt existing at the time, unless this legal operation of the credit should be changed by express agreement. But the receipt for these bills does not import that immediate credit was to be given for them. They are to be credited when paid. The time of receiving payment on them is the time when the credit was to be given; and, consequently, the power of application which the creditor possessed, if no agreement to the contrary existed, was then to be exercised. It cannot be doubted that he might have credited the sums so received to any debt actually demandable at the time of receiving such sum, unless this power was previously abridged by the debtor.

It is contended that it was abridged; and that this is proved by the form of the receipt. The receipt states, that the bills, when paid, are to be credited on account of the demand of Holland against Cox, and the plaintiffs insist that the words import a single demand, and one existing at the time the receipt was given.

This court is not of that opinion. The whole *debt due from one man to the other, [***29**
may well constitute an aggregate sum not improperly designated by the term demand, and the receipt may very fairly be understood to

speak of the demand existing when the credit should be given.

If the principles previously stated be correct, there is no evidence in the cause which enables this court to say that there was not due, on the judgments obtained by Holland against Cox, a sum more than equal to the value of the lands sold under execution. If so, the plaintiffs have no equity against the purchasers of those lands, whose conduct appears to have been perfectly unexceptionable; and the bill, both as to them and Holland, was properly dismissed.

It is the opinion of the majority of the court, that there is no error in the proceedings of the Circuit Court, and that the decree be affirmed.

Cited—3 Wheat. 155 (n); 5 Pet. 310; 20 Wall. 322; 2 Otto, 92 U. S. 694; 1 Biss. 133; Hemp. 257; 2 Mason, 205; 1 Wood & M. 168; 3 Wood & M. 395.

THE MARYLAND INSURANCE COMPANY *v.* WOODS.

In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty.

Quære, whether breach of blockade, by a vessel not warranted neutral, would discharge the underwriters.

If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation. A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders of April, 1804. She was not bound to make inquiry elsewhere than of the blockading force.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant, upon two policies of insurance, one upon the schooner William & Mary, Travers, master, and the other upon her cargo, "from Baltimore to Laguira, with liberty of one other neighboring port, and at and from them, or either of them, back to Baltimore." The policy contained the following clause: "Confessing ourselves paid the consideration due unto us for the assurance of the said assured, or his assigns, after the rate of seven and one half per cent. on cargo, by said vessel warranted by the assured to be American property, and that the vessel is an American bottom, proof of which to be required in the United States only. Insured **30***] against all risks, the *assured binding himself to do all in his power, in case of capture, for the defense of the property, and, if condemned, that he will enter an appeal if practicable."

Upon the trial of the issue of *non infregit*, seven bills of exceptions were taken. The first was by Woods, the plaintiff below, in whose favor the judgment was rendered, and is, therefore, unimportant, excepting that it states the facts which each party offered evidence to prove, and is referred to in all the other bills of exceptions.

It states, that the plaintiff gave evidence that he was a citizen of the United States, and sole owner of the vessel and cargo, of the value insured, and made insurance thereupon, according to the policies. That the vessel arrived in safety off the port of Laguira, on the 29th of March, but was refused permission to enter the port, except upon terms, as to the sale of his cargo, which the master deemed too disadvantageous to be accepted. That he remained with his vessel off the port, endeavoring to obtain permission to enter it on more advantageous terms, until the 31st of March, when, finding that such permission could not be obtained, he sailed with the vessel and cargo towards the port of Amsterdam, in the island of Curraçoa, with a view and intention of ascertaining, by inquiring from British ships of war, or other ships, or by actual inspection, or other proper means, whether the said port was in a state of blockade, and of entering it, if he should find it not blockaded. That about four months before, he had been informed in Baltimore, that an American vessel, bound to that port, had been warned off by the British blockading force; and a report, which he had heard in Baltimore before he sailed, that the island was still blockaded, induced him to suppose, at the time of sailing towards Amsterdam, that that port might still be in a state of blockade, (he then being ignorant of that fact, and not having been able to obtain information relative thereto off Laguira,) and to resolve to make *inquiry as aforesaid, before he [***31** attempted to enter the port. That on the first of April, on his passage to Amsterdam, being then about 28 or 30 miles distant therefrom, he discovered a ship, distant about 21 miles, and immediately changed his course and stood towards her, for the purpose of inquiring whether Amsterdam was still blockaded. The ship was the British ship of war "Fortune," and was then supporting alone the blockade of the port of Amsterdam. While standing towards her, she seized and captured the schooner as prize, under pretense of an attempt to break the blockade, and sent her to Jamaica, where the vessel and cargo were condemned as good prize, whereby they were totally lost to the plaintiff. That the distance of Amsterdam from Laguira was about 147 miles, which may be run in fifteen or twenty hours. That the plaintiff, upon the first intelligence of the capture, offered to abandon, and demanded payment of the loss.

That the British minister, on the 12th of April, 1804, informed the government of the United States that the siege of Curraçoa was converted into a blockade, which notification the government of the United States did not at any time make known. That the British government had issued an order to their commanders, and to their admiralty courts in the West Indies, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have previously been warned not to enter them." That this order was in force at the time of the capture, and had been notified by the British government to the government of the United States, and immediately published in the gazettes of the United States.

That to the eastward of Laguira, on the Spanish Main, the first port is New Barcelona, at the distance of about 57 leagues from Laguira. That it is a small port only entered by small vessels. That *the next port to [***32** the eastward of Laguira, on the Spanish Main,

is Cumana, at about the distance of 70 leagues. That about the time of the voyage aforesaid, no vessel could enter the port of New Barcelona without having obtained permission therefor at Cumana. That the next port on the Spanish Main, from Laguira, westward, is Porto Cabello, under the same jurisdiction, and at the distance of about 18 leagues; that no vessel could enter that port without having obtained permission therefor at Laguira. That the next port on the Spanish Main, to the westward of Laguira, is Maracaibo, at the distance of about 93 leagues, and about two and a half degrees further west from the port of Amsterdam. That the usual course of trade for vessels from Baltimore with cargoes for Laguira, assorted for the Spanish Main, is to proceed to the port of Amsterdam, if refused permission to enter Laguira. That vessels in such cases never proceed to Cumana or New Barcelona. That except Amsterdam, and the said ports on the Spanish Main, the nearest port to Laguira, used for the purposes of trade, is in the island of Porto Rico, distant more than 120 leagues. But that Carthagena, on the Spanish Main, although more distant than Porto Rico, may be reached from Laguira in a shorter time, being more in the course of the winds. That there is no port in the island of Bonaire, except a small roadstead on the west side of the island, where there is a small battery and military post. That a vessel bound from Laguira to Amsterdam could not touch at the said roadstead without going about five leagues out of her way, and being delayed three or four hours, and that there is no other place in the neighborhood of Laguira or of Amsterdam, except Porto Cabello, where information could then have been had respecting the continuance of the blockade.

The defendants then offered evidence to the jury, that when Travers sailed from Baltimore, and when he arrived at Laguira, and when he sailed from thence and arrived near the island of Curraçoa, he had reason to believe, and did [*33] know, that that island *was actually blockaded and attempted to enter the port of Amsterdam. That when the insurance was effected, a vessel might enter Cumana and Porto Cabello without first obtaining permission elsewhere. That the Spanish government was a party in the war. That it has been usual and customary for vessels sailing from Baltimore, having cargoes suitable to the markets on the Spanish Main, to proceed direct to either of the ports of Cumana, New Barcelona, Porto Cabello, Maracaibo, or Carthagena, without first calling at Laguira for permission.

Whereupon the plaintiff prayed the direction of the court to the jury, that if they believe the matters so offered in evidence by him, then the proceeding towards the port of Amsterdam for the purposes and in the manner so by the plaintiff stated and offered in evidence, doth not in operation of law deprive him of his right to recover for the said losses under the said policies.

But the court were of opinion, and so directed the jury, that if they shall be satisfied from the evidence in the case, that Travers, the master of the schooner, had reason to believe that the island of Curraçoa was actually blockaded at the time when he sailed from Laguira, and when he arrived near the said island, and that he attempted to enter the port of Amsterdam, then the plaintiff cannot maintain the present action.

To which opinion the plaintiff excepted.

The 2d bill of exceptions stated that the defendants, in addition to the evidence by them offered as stated in the first bill of exceptions, gave in evidence that Captain Travers might have obtained information at Laguira of the blockade of Curraçoa, (it being well and generally known there,) if he had made the inquiry; but that he made no such inquiry.

That there is a small island to the eastward of *Curracoa, called Bonaire, and about [*34] 20 miles distant therefrom on the direct and usual route to Curracoa, and where Captain Travers might also have received information of the blockade, but he sailed past the island without stopping thereat, or taking any measures whatever to learn whether the blockade existed or not. That after Travers found he could not sell his cargo to advantage at Laguira, he determined to proceed to Porto Rico, and as Curacoa was very little out of the course, to ascertain whether the blockade still continued. That on the 12th of April, 1804, the blockade of Curracoa was notified by the British minister to our government, and that there had been no notification of a discontinuance thereof. That when the schooner left Baltimore, it was generally reported and understood that Curracoa was blockaded. They also offered in evidence the record and proceedings of the Admiralty Court at Jamaica, and that the schooner was condemned on the ground of an attempt to violate the blockade.

Whereupon the plaintiff offered in evidence all the matters by him offered in evidence as stated in the first bill of exceptions, which bill of exceptions is referred and made part of this bill of exceptions, and also offered in evidence that the matters by the defendants stated in this and the foregoing bill of exceptions are untrue; and also that Travers, while lying off Laguira, did inquire whether the blockade of Curracoa still continued, and could obtain no information on that subject; and also that at the time he discovered the ship of war, he might have proceeded to, and entered into, the port of Amsterdam without being intercepted by the frigate.

Upon which aforesaid statement of facts, so given in evidence, the defendants pray the court to instruct the jury that the said Travers was not justified in sailing from Laguira and passing the island of Bonaire without inquiring there whether the port of Amsterdam was blockaded, and that in consequence thereof, the plaintiff is not entitled to recover.

*But the court were of opinion, that if [*35] the jury shall be satisfied, from the evidence in the case, that Travers sailed from Laguira for Amsterdam, with intent to enter that port if not actually blockaded, but if blockaded not to attempt to enter, but to sail for the island of St. Thomas; and if the jury shall be satisfied, from the evidence, that Travers did not attempt to enter the said port, but was captured on his way thither, at the distance of 29 or 30 miles therefrom, the court directed the jury that such conduct of Travers was not unlawful, and that, notwithstanding such conduct, the plaintiff can maintain the present action.

The 3d bill of exceptions stated that the defendants, upon all the matters in the preceding bills of exceptions contained, prayed the court to instruct the jury that if they believe that the blockade was notified by the British government to the American government, in a reasonable time before Travers sailed, and that it was generally known in Baltimore before he sailed, and that he had been informed of it, and knew of the general report and belief, and under these circumstances sailed from Laguira to the port of Amsterdam, without making due inquiry at Laguira, whether the blockade subsisted at Amsterdam, and passed Bonaire without making such inquiry, to the place where he was captured, then he was not justifiable in proceeding on the said voyage to Curracoa, there to make inquiry, not having first made the inquiry in the neighboring ports of Laguira and Bonaire.

The court refused to give the instruction as prayed, but repeated the instruction stated in the second bill of exceptions; to which the defendants excepted.

The 4th bill of exceptions stated that the defendants prayed the court to direct the jury, that if they shall be of opinion that there are three ports on the Spanish Main, viz., Port Cabello, at the distance of 21 leagues from Laguira, [*36 Maracaibo at 93 leagues *from Laguira, and about 2 1-2 degrees further west than Amsterdam, and Carthagena, at the distance of 185 leagues from Laguira, to the westward, and that the prevailing winds there are generally from the eastward, and that a voyage may be performed with more facility from Laguira to Porto Cabello than to Curracoa, and from Laguira to Maracaibo and Carthagena, than to the island of St. Thomas, or Porto Rico. That those ports are situated on the Spanish Main, and under the government and jurisdiction of the King of Spain. That vessels sailing from the ports of the United States, are in the habit of sailing direct to the said ports of Porto Cabello, Maracaibo and Carthagena without obtaining permission from the government at Laguira. That vessels leaving the United States with cargoes suited to the market on the Spanish Main, frequently sailed from Laguira, to one or other of the above-mentioned ports for the disposal of their cargoes. That the island of Curracoa belongs to the Dutch government, who were parties to the war. That there are two other ports on the Spanish Main, under the Spanish government, lying to windward of Laguira, viz., Cumana, 70 leagues, and New Barcelona, 57 leagues from Laguira, but the voyage from Laguira to those ports is more difficult than the voyage to Curracoa, which is 147 miles. That Curracoa was known to be blockaded, and so notified by the British government to that of the United States a reasonable time before Travers sailed, and that he knew the same at the commencement of the voyage; then Amsterdam was not a port to which he was entitled to go under the said policy. Which direction the court refused to give. And the defendants excepted.

The 5th exception stated that the defendants prayed the opinion of the court, upon the whole facts before stated, whether the insured had a right to proceed to Porto Rico, or St. Thomas, under the terms of the policy. That the court directed the jury that he had no such right, and that the defendants excepted.

*The 6th exception stated that the de- [*37 fendants, upon all the matters aforesaid, prayed the court to instruct the jury that if they believe that the insured, after his arrival at Laguira, proceeded on a provisional voyage for the port of Amsterdam, or for Porto Rico, or for St. Thomas, with an intention to go to Amsterdam, if not blockaded, and to Porto Rico, or St. Thomas, if the port of Amsterdam was blockaded, he was not so entitled to do under the policies, and in consequence thereof, that the plaintiff is not entitled to recover. Which direction the court refused to give, but gave the following opinion.

The court having declared that the said Travers had a right to proceed from Laguira to Amsterdam, as is fully stated in their second opinion, to which they refer, they directed the jury that if they find that the said Travers intended, if the port of Amsterdam was blockaded, to go to the island of Porto Rico, or St. Thomas, that such his intention only will not affect the policies; and that notwithstanding such intention the plaintiff can maintain his action thereon. To which direction the defendants excepted.

The 7th bill of exceptions stated that the defendants upon all the matters in the preceding bills of exception stated, prayed the opinion of the court that if the jury believe that Travers sailed from Laguira, on a voyage to St. Thomas, or Porto Rico, but with an intention to procced a small distance out of the way to see if Amsterdam was blockaded, and in case it was not blockaded then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants are not answerable; which opinion and direction the court refused to give, but gave the following opinion.

The court having declared that the said Travers had a right to proceed from Laguira to Amsterdam, as is fully stated in their second opinion, to which they refer, they are of opinion, and accordingly directed the jury, that if they find that the said Travers intended, if the port of Amsterdam was *blockaded, to [*38 go to the island of Porto Rico, or the island of St. Thomas, such his intention only will not affect the policies aforesaid, and that notwithstanding such intention, the plaintiff can maintain his actions on the said two policies. To which instruction the defendants excepted.

The verdict and judgment being in favor of the plaintiff, the defendants brought their writ of error.

P. B. Key, for the plaintiffs in error, contended,

1. That the court ought not to have permitted parol evidence to be given of the intention of Captain Travers to break the blockade, because the sentence of condemnation was conclusive evidence of that attempt. Curraçoa was not a port within the policy, because the policy did not give leave to sail to a blockaded port.

2. A neighboring port means a port on the Spanish Main, under the same government as Laguira.

St. Thomas was not a neighboring port; if it was, he deviated in going to Curraçoa.

He sailed for Curraçoa with a knowledge that

it was blockaded, and therefore the defendants are discharged.

Harper, contra.

The evidence is conflicting as to the knowledge of the captain of the blockade, and therefore upon that point this court can give no opinion. The only evidence of such knowledge is, that there was a blockade at a prior period, which had been notified to our government. But there is a difference between a blockade by notification and a blockade *de facto*. A vessel has a right to go and inquire of the blockading force. The British government had declared that no blockades should be considered as ex-

39*] isting *in the West Indies, except blockades *de facto*, and then not to capture them unless they should have been previously warned off. Under this order and declaration of the British government, Travers had a right to go and see whether the port was or was not actually blockaded. This court will not extend the principle of blockade farther than it has been extended by the British government.

The voyage, then, to Curraçoa, was lawful. Travers was in the due course of the voyage, and it was altogether immaterial whether he had any or what other port eventually in view.

Martin, in reply.

Travers had no right to sail for Curraçoa, knowing it to be blockaded. If there be in fact a blockade, no vessel knowing that fact has a right to go to the blockaded port for inquiry. If she does, she is not, by the law of nations, entitled to warning, but is good prize at once. *Ille hostis est qui dat auxilium hostibus.* If she sails to a blockaded port, knowing it to be blockaded, she assumes the hostile character, and is to be treated in all respects like an enemy. This was a blockade by notification as well as *de facto*. Our government had express notice, and all our citizens are to be presumed to have notice also.

The British treaty is not in force, but it is a correct exposition of the law of nations on the subject of blockade. (*Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 199.)

The sentence is conclusive evidence of the breach of blockade, notwithstanding the clause in the policy that proof of the property being American is to be made here only. We admit the property was American—we admit everything that is to be proved under that clause. But it was not agreed that the question of breach of blockade should be tried here only. If the clause is to be so construed, it would place the insurance companies entirely in the power

40*] *of the insured, because all the persons on board are the agents of the assured, and interested to justify their own conduct.

It is the duty of the insured and his agents to do nothing to increase the risk, and to do all in his power to avoid loss; and their negligence or improper conduct will discharge the underwriters. Thus in the case of the ship *Atlantic* (Marshall, 321), want of a passport at first sailing, although obtained before capture, and although the capture was not for want of that paper, yet the underwriters were discharged. The insured is answerable for all the improper conduct of the master if it do not amount to barratry.

Travers knew that Curraçoa was blockaded; at least he had the strongest grounds of believing it; and if he was not certain, he ought to have inquired at Laguira, or at Bonaire. This neglect increased the risk and discharged the underwriters.

Curraçoa was not a neighboring port within the meaning of the policy. It means only a port on the Spanish Main. General expressions may be restrained by the nature of the case. Thus, in the case of *Hogg* v. *Horner* (2 Marshall, 397), the expression in a policy on a voyage from Lisbon to London, "with liberty to touch at any port in Portugal," was construed to mean any port to the northward of Lisbon only.

The fifth exception was taken to the opinion of the court, to show a repugnance between that and the opinion stated in the second bill of exceptions; for if it was unlawful to go to Porto Rico and St. Thomas, it was equally so to go to Curraçoa.

As to the sixth exception to the opinion that the intention to go to St. Thomas in case Curraçoa should be blockaded did not vitiate the policy.

There must, at the commencement of the voyage *from Laguira, be a certain fixed [*

41 *terminus ad quem*. Otherwise the door would be open to fraud upon the underwriters, as there could be no deviation. It ought to have been entered in the log book to what port they were bound.

Neutral property may be condemned for violation of blockade. (1 Rob., 144, *Ship Neptunus.*) We admit the property to be American, and neutral, but this American neutral vessel attempted to break the blockade.

A notified blockade is presumed *prima facie* to continue until the contrary be notified, or the blockade be removed *de facto*. (2 Rob., 92, 93, 106, 108; 1 Marsh., 65; 1 Rob., 131. The *Columbia.*) This vessel, having knowledge of the blockade, was not entitled to the privilege of being warned off.

As to the right to go to Curraçoa to inquire, he cited 1. Rob., 280.

Harper, contra.

The case cited of the voyage from Lisbon to London, was a mere question as to the meaning of the parties. The nature of the voyage was called in aid of the construction, and it was decided to mean any port in the course of the voyage.

The clause as to proof of the neutrality of the property applies to its neutral character throughout the whole voyage.

Travers had a right to proceed towards the blockaded port for inquiry, even upon British principles, prior to the order of 1804. But after that order there can be no doubt.

Although there are *dicta* that a vessel sailing for a blockaded port knowingly is liable to be condemned, yet in no case is it the direct and sole ground of condemnation. In the case of the *Columbia*, *the vessel was taken in *[

42 the actual attempt to brake the blockade. But this doctrine is overruled by the Court of Errors and Appeals in New York. (1 Caines' Cases in Error, 8; 1 Caines' N. Y. Term Rep., 12; 1 Johns., 256, *Schmidt* v. *N. Y. Insurance Company.*)

In 1 Rob., 280, 281. The Betsy, the limitations of the rule as to sailing for a blockaded port knowingly are stated by Sir William Scott.

The distance of the place from whence the vessel sails may excuse. So may also the nature of the blockade. In the West Indies the blockades were so short and uncertain as to form an exception to the general rule. (2 Rob., 95, *The Neptunus.*) But the British order of 1804 is decisive.

Martin, in reply.

The British order will not bear that construction. It has never received that construction in their courts. If it had this vessel would not have been condemned.

Nothing but the neutrality of the property is to be proved in this country; not that the vessel did not conduct herself as a neutral.

The case of *Fitzsimmons* v. *The Newport Insurance Company*, was a case of naked intention, without an act in pursuance of such intention. Sailing with that intention is an act.

February, 16. MARSHALL, *Ch. J.*, delivered the following opinion of the court, viz.:

This cause comes on upon various exceptions to opinions delivered by the Circuit Court of Maryland.

The first exception, having been taken by the **43***] party *who prevailed in the cause, is passed over without consideration.

The 2d and 3d exceptions are so intimately connected with each other, that they can scarcely be discussed separately.

This action was brought by the owners of the cargo of the William & Mary, to recover from the Maryland Insurance Compauy the amount of the policy insuring the cargo of that vessel. The voyage insured was "from Baltimore to Laguira, with liberty of one other neighboring port, and at, and from them, or either of them, back to Baltimore." The cargo was warranted to be American property, and the vessel to be an American bottom, "proof of which was agreed to be required in the United States only."

Previous to the sailing of the William & Mary from Baltimore, the blockade of Curraçoa had been notified to the President of the United States, by the British government, and was generally known in Baltimore. The vessel arrived at Laguira, from which place she sailed for some other port, was captured within thirty miles of the port of Amsterdam, in Curraçoa, then actually blockaded, and was condemned for an attempt to break the blockade.

The proof whether the William & Mary sailed from Laguira for Curraçoa, or for St. Thomas's or Porto Rico, is not positive; and the evidence respecting the information which she sought, or might have received, at Laguira, respecting the blockade of Curraçoa, is contradictory. On the part of the plaiutiff below, evidence was given that, at Laguira, information of this fact was sought and could not be obtained. On the part of the underwriters, evidence was given, that no inquiry respecting it was made at Laguira, and further, that there was a small island called Bonaire, between Laguira and Curraçoa, not much out of the **44***] track from the former place *to the port of Amsterdam, at which no inquiry respecting the blockade of Amsterdam was made.

The counsel for the underwriters prayed the court to instruct the jury, that, if they believed these facts, the plaintiff could not recover.

This instruction the court refused to give, but did instruct the jury "that if they shall be satisfied, in this case, that Captain Henry Travers, master of the said schooner, sailed from Laguira for the port of Amsterdam, in the island of Curraçoa, with intent to enter the said port, if not actually blockaded, but, if blockaded, not to attempt to enter, but to sail for the island of St. Thomas's, and if the jury should be also satisfied, from the said evidence, that the said Henry Travers did not attempt to enter the said port, but was captured on his way to the said port, at the distance of 29 or 30 miles therefrom, the court are of opinion, and accordingly directed the jury, that such conduct, on the part of the said Henry Travers, was not unlawful, and that, notwithstanding such conduct, the plaintiff can maintain the present action."

This opinion and direction of the Circuit Court asserts two principles of law.

1. That the sentence and condemnation of a foreign court of admiralty, condemning a vessel as prize for attempting to enter a blockaded port, is not conclusive evidence of that fact, in an action on this policy.

2. That, under the circumstances of the case, the sailing from Laguira, and the passing Bonaire, without making any inquiry, at either place, respecting the blockade of Amsterdam, were not such acts of culpable negligence as to discharge the underwriters.

1. Is the sentence of a foreign court of admiralty, in this case, conclusive evidence of the fact it asserts?

*This depends entirely on the construc- [***45**
tion given to the policy. The question respecting the conclusiveness of a foreign sentence was, some time past, much agitated throughout the United States, and was finally decided, in this court, in the affirmative. Pending this controversy, a change was introduced in the form of the policy, at several offices, by inserting, after the warranty that the property was neutral, the words, "proof of which to be required in the United States only."

By the underwriters it is contended that these words go to the property only, and not to the conduct of the vessel. By the assured it is contended that they apply to both.

The underwriters insist that the words themselves import no more than that proof respecting the property may be received in the United States, and that a more extended construction is not necessarily to be given to them in consequence of their connection with the warranty of neutrality, because a neutral vessel attempting to enter a blockaded port would thereby discharge the underwriters, although no warranty of neutrality should be found in the policy.

There is much force in this argument, and if the question shall ever occur on such a policy, it will deserve serious consideration. But whatever might be the law in such a case, the majority of the court is of opinion that, under this policy, the sentence of the foreign Court of Admiralty is not conclusive.

The contract of insurance is certainly very loosely drawn, and a settled construction, different from the natural import of the words, is given, by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of courts. One of these

is on the warranty that the vessel is neutral property. It is not improbable that, without such warranty, the attempt of a neutral
46*] *vessel to enter a blockaded port might be considered as discharging the underwriters. But no such decision appears ever to have been made; nor is the principle asserted, so far as is known to the court, in any of the numerons treatises which have been written on the snbject. On the contrary, the judgments rendered in favor of the underwriters, in such cases, have been uniformly founded on the breach of the warranty of neutrality, which, though in terms extended only to the property, has been carried, by constrnction, to the conduct of the vessel. It is universally declared that anti-neutral conduct forfeits the warranty that the vessel is neutral.

This being the construction put by the parties, and, in consequence thereof, by courts, on the warranty of neutrality, it is fair to consider the reservation of the right of giving proof in the United States, which, in direct terms, refers to the whole warranty, as intended by the parties to be co-extensive with the warranty itself; and, as the conduct of the vessel was, in legal construction, comprehended in the warranty of her neutrality, that the conduct of the vessel would, in legal construction, be comprehended in the reservation of a right to make proof in the United States.

The majority of the court, therefore, is of opinion, that the Circuit Court did not err in submitting the testimony respecting the conduct of the vessel, in this case, to the jury.

2. Are the nnderwriters discharged by the conduct of the captain?

This question is susceptible of several subdivisions.

1. Was the port of Amsterdam, in Curraçoa, a neighboring port, within the policy?

2. Did the intention to pass Amsterdam, if blockaded, discharge the underwriters?

47*] *3. Was an omission to inquire at Laguira or Bonaire, respecting the blockade of Amsterdam, such a culpable negligence as to discharge the underwriters?

It is the opinion of the court that the port of Amsterdam was a neighboring port within the policy. The distance between the two places is inconsiderable. It is not stipulated that the neighboring port shall be one under the Spanish government, nor is it to be implied from the natnre of the case. Indeed, the common usage of Baltimore, which was given in evidence, for vessels sailing with cargoes assorted for the Spanish Main to and from Laguira to Curraçoa, if refnsed admittance into the former port, wonld be conclusive on this point, if, in other respects, it conld be doubtful.

Neither was the intention to sail for some other port, on the contingency of finding Amsterdam blockaded, a deviation.

It is admitted that the voyage from Laguira must be certain, and that only a certain voyage would be within the policy. But the opinion of the Circuit Court was founded on the jury's believing that the voyage from Laguira was for Amsterdam, a voyage which the vessel had a right to make, and that the intention to sail to another port, should Amsterdam be blockaded, constituted no deviation while on the voyage to Amsterdam.

Certainly an intention, not executed, will not deprive the insured of the benefit of his contract in a case in which he would not have been deprived of it, had he executed his intention. Had Captain Travers, on the voyage to Amsterdam, sustained a partial loss, and, after entering that port, determined to go to Porto Rico, or St. Thomas's, it is certain that, after sailing from Amsterdam, the voyage would have been no longer within the policy, nor would the underwriters have been answerable for a subsequent loss. But it could never be contended, with any *semblance of reason, that this [*48 discharged them from the loss sustained on the voyage to Amsterdam.

3. The omission of the captain to make any inquiry respecting the blockade of Amsterdam, at Laguira, or to call, for that purpose, at Bonaire, comes next to be considered.

The notoriety of the blockade of Curraçoa, before Captain Travers sailed from Baltimore, must affect him, especially as the instruction given to the jury is not made dependent on their believing that he had no actual knowledge of the fact. It seems a reasonable duty, in ordinary cases, to make inquiry in the neighborhood, if information be attainable, respecting the continuance of a blockade known previously to exist.

It is true, that upon this point contradictory evidence was given; but the opinion of the court is predicated on the jury's believing that Captain Travers made no inquiry at Laguira. The correctness of that opinion, therefore, depends on its having been the duty of the captain to make this inquiry.

In an ordinary blockade, this, perhaps, might have been necessary; but it is contended, that blockades in the West Indies were so qualified by the British government, as to have dispensed with this necessity.

It was proved, that orders had been given by that government to its cruisers and courts of vice-admiralty, which orders were communicated to, and published by, the government of the United States, "Not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them."

On the motives for this order, on the policy which *dictated this mitigation of the [*49 general rule, so far as respected blockades in the West Indies, this court does not possess information which would enable it to make any decision, bnt it appears essentially to vary the duty of the masters of neutral vessels sailing towards a port supposed to be blockaded.

The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having a notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not previously receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force, a neutral vessel

might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade, until she should be warned off.

There is, then, no error in the opinions to which the second and third exceptions are taken.

The 4th exception is taken to the refusal of the court to give an opinion to the jury, that, under the circumstances stated by the defendants below, the port of Curraçoa was not a neighboring port within the policy.

The merits of this opinion have been essentially discussed in the view taken of the second and third exceptions, and need not be repeated. The port of Curraçoa is considered as a port within the policy, and, consequently, the Circuit Court ought not to have given the opinion prayed for by the plaintiffs in error.

50*] *The 5th exception presents the extraordinary case of an exception to an opinion in favor of the party taking it, and, consequently, need not be examined.

The 6th exception presents a case not essentially varying from the second and third, and will therefore be passed over without other observation than that it is decided in the opinion on those exceptions.

The 7th exception is to a different point. The counsel for the defendants below prayed the court to instruct the jury, "that if they believed the said Travers sailed from Laguira on a voyage to St. Thomas's, or Porto Rico, but with an intention to proceed a small distance out of the way to see if Amsterdam was blockaded, and in case it was not blockaded, then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants are not answerable."

This opinion the court refused to give, and proceeded to repeat the instruction to which the second and third exceptions were taken.

If St. Thomas's, or Porto Rico, were not neighboring ports within the policy, as is most probably the fact, then the voyage from Laguira to either of those places was not insured. If they were neighboring ports, so that a voyage to either of them was within the policy, then going out of the way to see whether Amsterdam was blockaded was a deviation, and, of consequence, the underwriters are equally discharged.

The only doubt ever felt on this point, was, whether any testimony had been offered to the jury to establish this fact, which would authorize counsel to request the opinion of the court respecting the law. On examining the record, it appears that such testimony was offered. It is stated that the defendants below offered in evidence, that the captain, on finding he could not be permitted to dispose of his cargo at Laguira, but on terms which amounted to a total sacrifice of it, "determined to proceed to Porto **51*]** *Rico, and, as Curraçoa was very little out of the course, to ascertain whether the blockade still continued."

This evidence might be disbelieved by the jury, but the defendants were certainly entitled to the opinion of the court declaring its legal operation if believed.

It is the opinion of the court, that, in refusing to give the opinion prayed in the seventh exception, the Circuit Court erred, for which their judgment is reversed, and the cause remanded for a new trial.

Cited—14 How. 362; 2 Black, 686; 6 Blatchf. 325; Blatchf. Pr. 134, 135; 2 Sprague, 117.

YOUNG *v.* GRUNDY.

No writ of error or appeal lies to an interlocutory decree dissolving an injunction.

If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing; but upon a question of dissolution of an injunction they are to be taken to be true.

THIS was an appeal from an interlocutory decree of the Circuit Court of the District of Columbia, dissolving an injunction.

E. J. Lee, for the appellant.

The decree dissolves the injunction with costs; which is a final decree as to the costs. (2 Wash., 200, *Davenport* v. *Mason*.)

The material facts of the bill are not denied nor admitted by the answer; they are, therefore, to be taken as true. The court below must, therefore, have proceeded on the ground that the original equity between the maker and payee of the note did not affect the indorsee.

MARSHALL, *Ch. J.* If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction they are to be taken to be true.

But the court has no doubt upon the question.

*No appeal or writ of error will lie to [***52** an interlocutory decree dissolving an injunction.

Writ of error dismissed with costs.

Cited—10 Wheat. 504 (n); 16 Pet. 168; 7 Wall. 211; 17 Wall. 528; 23 Wall. 288; 2 Cranch, C. C., 600, 601, 603; Hemp. 12, 208.

WILSON EX PARTE.

The writ of *habeas corpus ad subjiciendum* does not lie to bring up a person confined in the prison bounds upon a *ca. sa.* issued in a civil suit.

WILSON petitioned the court for a writ of *habeas corpus*, and a *certiorari* to bring up the record of a civil cause in which judgment had been rendered against him, upon which a *ca. sa.* had issued, by which he was taken and was now in confinement within the prison bounds upon a prison bounds bond. His petition stated that the marshal had demanded of the creditor the daily allowance for the prisoner agreeably to the act of Congress concerning insolvent debtors within the District of Columbia (Laws U. S., vol. 6, p. 301, § 15), which the creditor had refused to pay, in consequence of which the marshal had no longer any authority to detain him.

The act of Congress provides that the Circuit Court of the District of Columbia shall, by a general order, fix the daily allowance for the support of prisoners in execution for debt in civil suits, and that "no person, taken in execution for debt or damages in a civil suit, shall be detained in prison therefor unless the

creditor, his agent or attorney, shall, after demand thereof by the marshal, pay, or give such security as he may require, to pay, such daily allowance, and the prison fees.

The marshal refused to discharge the petitioner; and his counsel, *E. J. Lee*, now moved for a *habeas corpus*.

MARSHALL, *Ch. J.*, after consultation with the other judges, stated that the court was not 53*] satisfied *that a *habeas corpus* is the proper remedy, in a case of arrest under a civil process.

Habeas corpus refused.

S. C. 2 Cranch, C. C. 7.
Cited—1 Cranch, C. C. 609; 2 Brock. 475.

ONEALE *v.* THORNTON.

The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed. By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defense, affirmed the title of the third purchaser.

ERROR to the Circuit Court of the District of Columbia, sitting in Washington, in an action of *assumpsit* upon a promissory note, dated August 6th, 1800, payable in nine months thereafter, and given by Oneale to William Thornton, surviving commissioner of the city of Washington, for the purchase money of lots No. 1 and 2 in the square No. 107 in that city.

The defense set up by Oneale was, that there was no consideration for the note, inasmuch as the superintendent of the city, who (by virtue of the act of Congress passed the 1st of May, 1802, entitled, "An act to abolish the board of commissioners in the city of Washington, and for other purposes,") (vol. 6, p. 126), succeeded to all the powers, duties, and rights, of the late commissioners, whose office was abolished by that act, had abandoned or rescinded the contract of sale, by having sold and conveyed the same lots to another person in fee simple.

The bill of exceptions taken at the trial, stated, in substance, the following case.

The states of Virginia and Maryland, having, in the year 1789, offered to the United States a cession of territory ten miles square for the permanent seat of government, the United States, by the act of Congress of the 16th of July, 1790 (vol. 1, p. 132), entitled, "An act for establishing the temporary and permanent seat of the government of the United States," accepted the same, and authorized the President 54*] *to appoint certain commissioners for the purpose of carrying the act into effect. In the summer of 1791, the greater part of the proprietors of the land included within the present bounds of the city of Washington, conveyed the same to Thomas Beall, son of George, and John M. Gantt, in trust, to be laid out as a city, and that after deducting streets, avenues, and public squares for the use of the United States, the residue should be equally divided; one moiety to be reconveyed to the original proprietors, and the other to be "sold at such time or times, in such manner, and on such terms and conditions as the President of the United States for the time being, shall direct;" the purchase money to be paid over to the President as a grant of money, and to be applied for the purposes mentioned in the act of Congress of 16th July, 1790. The lots so sold were to be conveyed by Beall and Gantt to the purchasers. "And because it might so happen that by the death or removal of the said Thomas Beall and John M. Gantt, or from other causes, difficulties might occur in fully perfecting the said trust by executing all the said conveyances, if no eventual provision should be made, it was therefore agreed and covenanted between all the said parties, that the said Thomas Beall and John M. Gantt, or either of them, or the heirs of either of them, lawfully might, and that they, at any time, at the request of the President of the United States for the time being, would convey all or any of the said lands which should not then have been conveyed in execution of the trusts aforesaid, to such person or persons as he should appoint, subject to the trusts then remaining to be executed, and to the end that the same may be perfected—." [1]

*The legislature of Maryland, by an act [*55 passed at their November session, 1791 (c. 45), subjected all the lands in the city belonging to absentees, minors, married women, and persons *non compos mentis*, to the same terms and conditions as are contained in the deeds of trust from the other proprietors, and vested the legal estate thereof in Beall and Gantt; and after declaring the manner in which a division of the property should be made between the original proprietors and the commissioners, it declares, that "all persons to whom allotments and assignments of lands shall be made by the commissioners, shall hold the same in their former estate, and interest, and in lieu of their former quantity, and subject in every respect to all such limitations, conditions and incumbrances, as their former estate and interest were subject to, and as if the same had been actually reconveyed pursuant to the said deed in trust."

By the 4th section it is further enacted, that "all squares, lots, pieces, and parcels of land, within the said city, which have been or shall be appropriated for the use of the United States, and also the streets, shall remain and be for the use of the United States; *and all the lots and parcels which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchases, according to the terms and conditions of their respective purchasers.*" The same section then proceeds to quiet the titles of all persons claiming by purchase from or under original proprietors, who have been in possession in their own right for five years before the passing of the act.

By the act of 1793 (c. 58, § 1), the legisla-

1.—In consequence of this clause in the original deeds of trust, and by order of the President, the trustees, Beall and Gantt, transferred the trust to Gustavus Scott, William Thornton, and Alexander White, then commissioners of the city of Washington, and the survivors and survivor of them, and the heirs of such survivor, by deed dated the 30th of November, 1796. This fact was omitted to be stated in the bill of exceptions, but the cause was argued as if it had been so stated.

ture of Maryland further provided, that "the certificates granted, or to be granted by the said commissioners, or any two of them, to purchasers of lots in the said city, with acknowledgment of the payment of the whole purchase money, and interest, if any shall have arisen thereon, and recorded, shall be sufficient to vest the legal estate in the purchasers, their **56***] heirs *and assigns, according to the import of such certificates, without any deed or formal conveyance."

By the second section of the same act it is enacted, that "on sales of lots in the said city by the said commissioners, or any two of them, under terms or conditions of payment being made therefor at any day or days after such contract entered into, if any sum of the purchase money or interest shall not be paid, for the space of thirty days after the same ought to be paid, the commissioners, or any two of them, may sell the same lots at vendue, in the city of Washington, at any time after sixty days' notice of such sale in some of the public newspapers of Georgetown and Baltimore town, and retain, in their hands, sufficient of the money produced by such new sale, to satisfy all principal and interest due on the first contract, together with the expenses of advertisements and sale; and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which shall have been actually received by them, or under their order, on the said second sale; and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns."

On the 29th of September, 1792, the President of the United States, by his order in writing, directed that the sale of lots in the city of Washington, to commence on the 8th of October then next, should be of such lots as the commissioners, or any two of them, should think proper. That the sale should be under their direction, and on the terms they should publish. And it was on the same day further ordered by the President, that any lot or lots in the city of Washington might, after the public sale which was to commence on the 8th of October, 1792, be sold and agreed for by the commissioners, or any two of them, at private sale, at such price, and on such terms, as they might think proper.

On the 24th of December, 1793, after the pas**57***] sing *of the above recited act of the Maryland legislature of November session, 1793 (c. 58), Robert Morris and James Greenleaf entered into a contract with the commissioners for the purchase of six thousand lots in the city of Washington; payable in seven annual installments. The lots to be selected by Morris and Greenleaf in the manner described in the contract. They selected, among others, the two lots sold afterwards to Oneale, and for the purchase of which by Oneale the note was given upon which the present suit was brought.

Morris and Greenleaf received conveyances for all the lots which they paid for under their contract, but having failed to pay some of the installments, the commissioners, by virtue of the act of Maryland, 1793 (c. 58), duly advertised for sale a large number of the lots contracted for by Morris and Greenleaf, including the lots in question. The terms of sale were, that the purchase money should be paid in three, six and nine months, and secured by good negotiable paper indorsed to the satisfaction of the commissioners. At this sale the defendant Oneale purchased lots No. 1 and 2 in the square No. 107, at a price considerably greater than the amount due thereon from Morris and Greenleaf, and gave his promissory notes therefor, upon one of which the present suit was brought.

By the act of Congress passed on the 1st of May, 1802 (vol. 6, p. 126), it is enacted, "That from and after the first day of June next, the offices of the commissioners appointed in virtue of an act passed on the 16th day of June, 1790, entitled, 'An act to establish the temporary and permanent seat of the government of the United States,' shall cease and determine; and the said commissioners shall deliver up to such person as the President shall appoint in virtue of this act, all plans, draughts, books, records, accounts, deeds, grants, contracts, bonds, obligations, securities, and other evidences of debt in their possession, which relate to the city of Washington, and the affairs heretofore under their superintendence *or [***58** care." And it was further enacted, "That the affairs of the city of Washington, which have heretofore been under the care and superintendence of the said commissioners, shall hereafter be under the direction of a superintendent to be appointed by, and to be under the control of, the President of the United States; and the said superintendent is hereby invested with all powers, and shall hereafter perform all duties which the said commissioners are now vested with, or are required to perform, by or in virtue of any act of Congress, or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots in the said city, or in any other manner whatsoever." And it was further enacted, "That the said superintendent shall, prior to the first day of November next, sell, under the directions of the President of the United States, all the lots in the said city which were sold antecedent to the sixth day of May, 1796, and which the said commissioners are authorized by law to resell, in consequence of a failure on the part of the purchasers to comply with their contracts."

Under this act Thomas Munroe was appointed superintendent, and having given the notice required by the act of Maryland, 1793 (c. 58), and Oneale having failed to pay his notes, the superintendent proceeded to sell again the lots No. 1 and 2 in the square No. 107, and one Andrew Ross became the purchaser for a sum less than the amount due thereon from Morris and Greenleaf, the first purchasers. Ross assigned his interest in the lots to James Moore, to whom the superintendent afterwards conveyed the lots in fee-simple, by a deed which recites the contract between Morris and Greenleaf, and the commissioners for the purchase of six thousand lots; the selection of lots No. 1 and 2 in square No. 107, as part thereof; the failure of Morris and Greenleaf to pay the purchase money therefor; the sale by the superintendent to Ross, and the assignment by Ross to Moore; but takes no notice of the intermediate sale to Oneale. The money received *upon the [***59** sale to Ross, was by the superintendent applied

to the credit of Morris and Greenleaf, the original purchasers.

The first resale of lots by the commissioners, for default of payment by purchasers, took place on the 2d of May, 1797. Another resale of other lots took place on the 28th of August, 1797. At these resales none of the lots contracted for by Morris and Greenleaf were resold, and in every instance except one, the lots produced, at such resale, as much as was due thereon from the first purchaser, with interest and expenses of sale. On the 18th of October, 1797, the first resale of Morris and Greenleaf's lots commenced, and the commissioners then laid it down as a rule, and from which they never afterwards departed during the existence of their offices, that no lot should be resold for less than the amount due thereon from the first purchaser, with interest and expenses of sale.

The commissioners, at the time of their resale to Oneale, had a right to resell the lots for the default of Morris and Greenleaf. The notes given by Oneale for the purchase money, were indorsed by Basil Wood, but he indorsed only as security, and the only consideration for the notes and the indorsement was the sale of the lots.

Upon second resales of lots it was the universal practice of the commissioners to apply the money actually received therefor to the credit of the account of the first purchaser, taking no notice of the intermediate purchaser, and they always sold as for the default of the first purchaser, and all the deeds which they made to purchasers at such resales, recited the first contract only for the purchase of the lot, and the default of the first purchaser as the only cause of such resale; wholly pretermitting all intermediate purchasers.

Upon this statement of the evidence, the defendant moved the court to instruct the jury, that **60***] if they *should find, from the evidence, that the bargain between the plaintiffs and defendant for the sale of the two lots was understood and made by the parties to be upon the condition and contingency that if the promissory notes given for the purchase money should be punctually paid, it should become an absolute sale to the defendant, but if the promissory notes should not be punctually paid, the commissioners should have the option of annulling the bargain for the sale, and of reselling the lots as for the original default of Morris and Greenleaf, the first purchasers. And if the jury should further find, from the evidence, that the superintendent, in reselling to Ross, and conveying to Moore his assignee, did so resell and convey the lots as for the original default of Morris and Greenleaf, in disaffirmance of the bargain to sell them to the defendant, and in pursuance and exercise of such option reserved to the commissioners; the plaintiffs are not entitled to recover the said purchase money in this action.

Which instruction the court refused to give.

The defendant then prayed the court to instruct the jury, that upon the evidence offered as above, if believed by the jury, the plaintiffs were not entitled to recover any part of the purchase money bidden by the defendant for the lots as above mentioned. But the court refused this instruction also; whereupon the defendant took a bill of exceptions and sued out his writ of error.

P. B. Key and *F. S. Key*, for the plaintiff in error.

These lots were originally sold to Morris and Greenleaf by the Commissioners, who, upon the default of Morris and Greenleaf, sold them to the plaintiff in error. Upon his default the superintendent, who succeeded to the rights, powers and duties of the commissioners, sold them to Ross, who assigned his right to Moore, to whom the superintendent conveyed them by a deed which passed the *legal estate in [***61** fee to Moore. The act of Congress, directing him to sell certain lots, does not affect the present question; for it only directs him to sell such lots as the commissioners were, at the time of passing that act, authorized by law to resell. The question then is, what were the rights and the authority which the commissioners then had respecting these lots?

We contend that the power of resale given to the commissioners by the act of Maryland, 1793 (c. 58, § 2), can be used but once, and expires in the using.

The evils intended to be remedied by that law, were these. Before that act was passed, whenever the commissioners had contracted to sell a lot, and the purchaser failed to pay the purchase money at the time stipulated, the commissioners could not enforce the payment by a resale of the lot without obtaining a decree for that purpose from a court of chancery. This was productive of great delay and expense, which became oppressive in proportion to the great number of sales which they were authorized to make. The expense would not only exhaust the funds intended to be raised from the donation of the lands, but the delay would defeat the object of the donors, which was to provide suitable buildings for the accommodation of the general government.

As the commissioners were public officers of the government, having no personal interest in the subject of their trust, it was deemed prudent and proper to confide to them a limited portion of the chancery jurisdiction, as to the sales of the public lots. Accordingly they are authorized by that act, in case the purchase money should not be paid in thirty days after it ought to have been paid, to sell the lots at vendue, upon sixty days' notice, and to retain sufficient of the money produced by such new sale, to satisfy all principal and interest due on the first contract, with the expenses of sale; and the original purchaser, or his assigns, was entitled to receive *the balance of the money [***62** which should be actually received by them on the second sale; and such lots were to be freed of all claim, legal and equitable, of the first purchaser, his heirs and assigns.

This was a short and summary mode of foreclosing the equity of the first purchaser, and of collecting the purchase money. It was, in effect, a statutory decree for those purposes. It not only does not contain an authority to continue to resell as often as default should be made, but it contains expressions inconsistent with such a construction.

Thus the commissioners are to retain only sufficient to satisfy the first contract, and the surplus is to be paid to the original purchaser only. Whatever, therefore, might have been the sum received from the sale to Ross, Oneale could derive no benefit therefrom; if he would

not have been entitled to the surplus, he cannot be chargeable with the deficieney, without attributing to the legislature the most palpable injustice; an imputation which can never be consistent with the true construction of a doubtful statute. Indeed, the statute does not contemplate the possibility of a deficiency; it makes no provision for such a case, and it speaks of the balance as being certainly in favor of the first purchaser in all cases. Nor does it contemplate the neeessity of a second resale. It seems to presume that the first resale would be for cash, and would certainly produce more than sufficient to satisfy the original purchase money, with interest and charges. If any person is liable for the deficieney it must be Morris and Greenleaf, who, by the express provisions of the act are entitled to the surplus. The legislature intended only to give a summary remedy against the lots, not to impose a new personal responsibility upon any third person for the deficieney of Morris and Greenleaf.

The commissioners, then, having a right to resell but once, and having actually resold to Ross, received from him the purchase money, **63***] and conveyed *the legal estate to his assignee by a good deed in fee-simple, cannot deny it to be a valid resale, it is not for them to say that it is not the exeeution of the power granted them by the statute; they are estopped by their deed to deny their authority to make that resale. If that resale was valid (which they cannot deny), it must be beeause the intermediate eontract for resale was void, or at least voidable at their option; it is also evidenee that they had made their election under such option if they had it. Besides, the legal estate is gone to the assignee of Ross, who is a *bona fide* purchaser for a valuable consideration without notice of Oneale's equity, if he ever had any, so that it is not now in the power of the commissioners specifieally to execute the contract on their part; and therefore they eannot elaim a eompliance with it on his.

The sale to Ross was made by the commissioners either in affirmance or disaffirmance of the sale to Oneale. If it was made in affirmance of the sale to Oneale, then it must have been sold as his property. The eommissioners ought to account with him for the proeeeds; he would be entitled to the surplus, and the commissioners would be authorized to retain in their hands suffieient of the money produced by such new sale to satisfy all principal and interest due on the second contract (*i. e.*, the eontract to sell to Oneale).

But the statute only authorizes the commissioners to retain in their hands suffieient to satisfy the amount due on the first eontract (*i. e.*, the contract with Morris and Greenleaf), and obliges them to pay over to them the balance.

And in conformity with these provisions of the statute, the commissioners always resold as for the default of the first purchasers, Morris and Greenleaf. They never pretended to retain more than the amount due from Morris and Greenleaf upon the first contract, and they always passed to their credit the surplus. The sale to Ross, therefore, could not have been in affirmanee, but must have been in disaffirmance **64***] of the contract with Oneale. *Having then by their acts disavowed that contract, they cannot now set it up again, after they have sold and conveyed away to another the very subject of the contract, and received its value.

The consideration of the notes has totally failed. The legislature of Maryland might have granted to the commissioners a continuing power to resell upon each default, and each resale might have foreelosed the equity of all preeeding parties: but they have not done so, and have used a language wholly inconsistent with such a provision.

Rodney, Attorney General, and *Jones*, contra.

The grounds taken by the opposite counsel depend upon the construction of the act of Maryland; and even admitting them to be right in their construction, the notes are not void.

But we contend they are not right in that construction. The act of assembly authorizes a resale as often as default shall be made by any purchaser. The right to resell, is, *ex vi termini*, eo-extensive with the original power to sell. Every resale is a new sale, and within the statute. The terms, "new sale," "first eontract," "original purchaser," "second sale," and "first purchaser," are all relative terms. Oneale is the original purchaser, the first purchaser, as to Ross; and his eontract is, as to Ross, the first eontract.

The expression in the second section of the act is extensive enough to eomprehend all the resales. It is that "on sales of lots in the said city by the said commissioners, under terms or conditions of payment being made at a future day," &e., "and if the purchase money shall not be paid," &e., "the commissioners may sell the same lots at vendue," &e.

"On sales of lots," means "on any sales of lots;" a resale is as much a sale as the original sale; consequently, if upon a resale the purchase *money should not be paid, the [***65** eommissioners would have as good a right to sell again as they had for the first default. It was clearly an error in them to credit the amount of sales to the account of Morris and Greenleaf. But if the commissioners could resell but once, the second resale to Ross was without authority, and void. The sale to Oneale remains good, and the notes are valid. In that case nothing passed to Ross by the deed to him: for the commissioners, being mere trustees, and having no interest, could convey only what they had authority to convey. But if the legal estate has passed to the assignee of Ross, that circumstanee does not invalidate the notes. It was the fault of Oneale himself, for he might have paid the purchase money according to his contract, and obtained a title. During the period of two years he could have availed himself of the eontract; he might have sold, or otherwise disposed of the lots. Before he can show the notes to be *nuda pacta*, he must show that there never was a consideration for them.

The act meant to give the commissioners the same right as to the sales of lots which a vendor of personal property has in England. If the purchaser does not pay for the goods on the day stipulated, the vendor may sell them again at the risk of the first vendee; and if they produce less, he may recover from him the difference; so that the sale to Ross may be valid, and yet Oneale liable for the difference between the sum paid by Ross, and the sum due from Morris and Greenleaf, upon the first contract.

P. B. Key, in reply, observed, that there must not only be a sufficient consideration for the notes at the time they were given, but there must be a consideration continuing up to the time of the trial.

As to the idea of charging Oneale with the difference between the amount due from Morris and Greenleaf, and the amount paid by Ross, **66*** he asked, *who would pay that difference, if there had been, as there might be, according to the construction contended for on the other side, fifteen intermediate purchasers who had all failed to pay their notes? Would all the notes be valid? Or to which of them should the commissioners resort?

February 15. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was instituted on a promissory note given by the plaintiffs in error, to the commissioners of the city of Washington, in payment for two lots originally sold to Morris and Greenleaf, and resold to the plaintiff in consequence of the failure of the original purchasers to pay the purchase money. The defendant having also failed to pay the purchase money, the lots were again resold by the superintendent, who succeeded to the powers of the commissioners, and were conveyed to the assignee of the third purchaser. Oneale, the defendant in the Circuit Court, contended that, by this subsequent sale and conveyance, a total failure of the consideration for which the note was given has been produced by the act of the creditor, and that he is consequently discharged from paying the note. This point having been decided against him, he has brought a writ of error to the judgment of the Circuit Court, and insists here, as in the court below,

1. That the consideration on which the note was given has totally failed, and that this failure is produced by the illegal conduct of the agent for the city.

In support of the judgment of the Circuit Court it is contended:

1. That the act of the legislature for the state of Maryland, under which both resales purport to have been made, authorizes a third **67*** sale on the *failure of the purchaser at the second sale to discharge his note.

2. If this be otherwise, that such subsequent sale could not affect the right of Oneale, whose title would still be good.

The first point depends on the second section of the act entitled a further supplement to the act "concerning the territory of Columbia, and the city of Washington."

This act enables the commissioners to sell at public vendue any lots sold by them on credit, if the purchaser shall fail to pay the purchase money thirty days after the same shall become due, and to "retain in their hands sufficient of the money, produced by such new sale, to satisfy all principal and interest due by the first contract, together with the expenses, &c., and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which may have been actually received by them, or under their order, on the the second sale, and all lots, so sold, shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns."

It has been argued, that the terms of this section allow a resale so long as the purchaser shall fail to pay the purchase money, and that every purchaser, so failing, remains liable for his note, notwithstanding such resale.

But this court is of opinion, that a single resale only is contemplated by the legislature, and that by such resale, the power given by the act is executed.

The proposition, that a power to resell, if not restricted by the terms in which it is granted, implies a gift of all the power possessed at the original sale, will not be denied; but the court is of opinion, that in this case the power of reselling is restricted by *the words which [***68** confer it. These words are such as, in their literal meaning, apply exclusively to a first and second sale. The words, "first contract," "original purchaser," and "first purchaser," designate, as expressly and exclusively as any words our language furnishes, the first sale made of the property, and the purchaser at that sale, and no other. It is true, that the natural import of words may be affected by the context, and that where other parts of the statute demonstrate an intent different from that which the words of a particular section of themselves would import, such manifest intent may be admitted to give to the words employed a less obvious meaning. But, in this statute, no such intent appears.

Men use a language calculated to express the idea they mean to convey. If the legislature had contemplated various and successive sales, so that any intermediate contract or purchaser was within the view of the lawmaker and intended to be affected by the power of resale given to the commissioners, the words employed would have been essentially different from those actually used. We should certainly have found words in the act applicable to the case of such intermediate contract. But we find no such terms; and the want of them might, in the event of different sales, for different prices, produce difficulties scarcely to be surmounted. No man, intending to draw a law for the purpose of giving the commissioners a continuing power to resell as often as default in payment should be made by the purchaser, could express that intention in the language of this act.

It has been argued by the defendants in error, that every subsequent default would produce the same necessity for reselling again that was produced by the default of the original purchaser, and that therefore the legislature, if their words will permit it, ought to be considered as having given the same remedy.

*The influence readily conceded to this [***69** argument in general cases is much impaired, if not entirely destroyed, by the particular circumstances attending this law.

A contract for 6,000 lots was concluded on the day that this act passed, immediately after its passage. In this large contract was merged a former contract for 3,000 lots made with one of the purchasers in this second contract. It is impossible to reflect on this fact without being persuaded that the law was agreed upon by the parties to this contract, and was specially adapted to it. The immensity of property disposed of by this sale, furnished motives for legislative aid by giving a speedy remedy to the commissioners which might not exist on the resale of

particular lots occasioned by any partial default in the purchasers. In consideration of the magnitude of the contract, the lots would, according to the ordinary course of human affairs, rate lower than in cases of a few sold to individuals. Consequently it could never enter the mind of the commissioners, or of the legislature, that one of these lots resold would not command a much higher price than the estimate made of it in the original contract. We therefore find no provision made, in the law, for the event of a lot's selling for a less sum, when resold, than was originally given for it. This furnishes additional inducements to the opinion that the legislature considered itself as having done as much as the state of the city required, by giving this summary remedy for the default of the first purchaser, and leaving the parties afterwards to the ordinary course of law.

It is, then, the opinion of the court that the act of assembly, under which the superintendent has acted, did not authorize the resale to Ross of the lots which had been previously resold to Oncale.

It remains, then, to inquire whether this sale and conveyance so affects the title of Oneale as to produce a failure of the consideration on which the note was given.

70*] *In this case, the impropriety, which has occurred in consequence of an agent's misconstruing his powers, is a fact *dehors* the title papers: It is not apparent on the face of the conveyances. They purport to pass a title which is entirely unexceptionable. How far such a conveyance may be valid in law, or how far it may be affected in equity by actual or implied notice to such subsequent purchaser, this court will not now decide.

The city, by reselling the property, and conveying it to the purchaser (an act to be justified by no state of things but the nullity of the previous sale), has not left itself at liberty to maintain the continuing obligation of that sale; and the plaintiff, by setting up this defense, has affirmed the title of the last purchaser.

This court is of opinion that the city has disabled itself from complying with its contract, and that, on the testimony in the cause, the plaintiff below ought not to have recovered.

Judgment reversed.

This cause came on to be heard on the transcript of the record from the Circuit Court, for the county of Washington, and was argued by counsel; all which being seen and considered, this court is of opinion that the Circuit Court erred in refusing to give the opinion prayed by the counsel for the defendants in that court, that, on the whole testimony, if believed, the plaintiffs in that court could not support their action. This court doth therefore reverse and annul the judgment rendered in this cause by the said Circuit Court, and doth remand the cause to that court for a new trial thereof.

71*] *KING
v.
THE DELAWARE INSURANCE COMPANY.

The questions whether the voyage be broken up, and whether the captain was justified in returning, are questions of law, and the finding thereupon by a jury is not to be regarded by the court.

The British orders in council of the 11th of November, 1807, did not prohibit a direct voyage from the United States to a colony of France.

If from fear, founded on misrepresentation, the voyage be broken up, the underwriters are not liable.

ERROR to the Circuit Court for the District of Pennsylvania, in an action of covenant upon a policy of insurance upon the freight of the Venus from Philadelphia to the Isle of France.

The vessel sailed early in December, 1807, before the British orders in council of the preceding November were known in the United States. On the afternoon of the 16th of January, 1808, while prosecuting her voyage, she was arrested by the British ship of war Wanderer, by whom she was detained until the morning of the 18th, when she was restored to the captain, her papers being first indorsed with these words: "Ship Venus warned off the 18th of January, 1808, by His Majesty's ship Wanderer, from proceeding to any port in possession of His Majesty's enemies."

"EDWARD MEDLEY, 2d Lieut."

The captain was verbally informed by an officer of the Wandcrer that the Isle of France was blockaded, and that the Venus would be a good prize if she proceeded thither.

The captain returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up by the arrest and detention of his vessel by the Wanderer, he on that account abandoned to the underwriters.

These facts were specially found by the jury, who also found that "by the interruption, detainment, and warning off of the British force, the voyage of the ship Venus was broken up."

They also found that the Isle of France was

NOTE.—In a criminal case the jury have the power and right to determiue the law as well as the facts. Commonwealth v. Shurlock, 14 Leg. Int. (Pa.), 33; Commonwealth v. Worcester, 2 Pick., 475. But have no right to determine questions of law against the instructions of the court. Commonwealth v. Rock, 10 Gray, 4; Commonwealth v. Huber, 12 Gray, 29.

The interpretation of a foreign law is for the court; not for the jury. Sidwell v. Evans, 1 P. & W. (Pa.), 383; Bock v. Lauman, 24 Penn. St., 435.

The construction of a written agreement is for the court. Richmond, &c., Co. v. Farquar, 8 Blackf., 89; Holman v. Crane, 6 Ala., 570; Kid v. Cromwell, 17 Ala., 648; Woodman v. Chesley, 39 Me., 45; Shepherd v. White, 11 Texas, 346; Bank v. Inloes, 7 Mel., 380; Addington v. Etheridge, 12 Gratt., 436; Bovill v. Pimm, 36 Eng. L. & Eq., 441; Brown v. Huger, 21 How., 105; Edelman v. Yeakel, 27 Penn. St., 26; Cox v. Freedley, 33 Penn. St., 124; Esser v. Linderman, 71 Penn. St. R.; Moore v. Miller, 4 Serg. & R., 279; Rapp v. Rapp, 6 Penn. St., 45; Estes v. Booth, 20 Ark., 583; Carpentier v. Thiston, 24 Cal., 268; Rogen v. Carey, 47 Mo., 235.

Whether certain acts amount to an estoppel is a question of law for the court. Keating v. Orne, 77 Penn. St., 89.

What is due notice of non-payment of a promissory note is question of law for the court. Brooks v. Elgin, 6 Gill., 254; Williams v. Smith, 2 Barn. & A., 496; Tindall v. Brown, 1 Term R., 167; Bk. N. A. v. Knight, 2 Dall., 158; Shorer v. East. Bk., 33 Penn. St., 134.

Where the facts are undisputed, what is due diligence in giving notice of dishonor to an indorser, or in making demand on the maker of a note, is a question of law for the court. Breuzer v. Wightman, 7 Watts & S., 264; Stuckert v. Auderson, 3 Whart., 116; Bennett v. Young, 18 Penn. St., 261; Smith v. Fisher, 24 Penn. St., 222. Also, what is rea-

72*] not *actually blockaded, from the 6th of December, 1807, to the 1st of February, 1808. And that by the information and warning given by the officers of the British fleet to the captain of the Venus, he was fully justified in returning to Philadelphia; and that by reason of the embargo she was unable to renew the voyage.

By the British orders in council of the 11th of November, 1807, as found by the jury, it is ordered "That all the ports and places of France and her allies, or of any other country at war with His Majesty, and all other ports or places in Europe from which, although not at war with His Majesty, the British flag is excluded, and all ports or places in the colonies belonging to His Majesty's enemies, shall from henceforth be subject to the same restrictions in point of trade and navigation, with the exceptions herein after mentioned, as if the same were actually blockaded by His Majesty's naval forces in the most strict and rigorous manner."

"But although His Majesty would be fully justified, by the circumstances and considerations above recited, in establishing such system of restrictions with respect to all the countries and colonies of his enemies, without exception or qualification; yet His Majesty, being nevertheless desirous not to subject neutrals to any greater inconvenience than is absolutely inseparable from the carrying into effect His Majesty's just determination to counteract the designs of his enemies, and to retort upon his enemies themselves, the consequences of their own violence and injustice; and being yet willing to hope that it may be possible (consistently with that object) still to allow to neutrals the opportunity of furnishing themselves with produce for their own consumption and supply; and even to leave open for the present such trade with His Majesty's enemies as shall be carried on directly with the ports of His Majesty's dominions, or of his allies, in the manner herein after mentioned.

His Majesty is therefore pleased further to order, *and it is hereby ordered, that [*73 nothing herein contained shall extend to subject to capture, or condemnation, any vessel, or the cargo of any vessel, belonging to any country, not declared by this order to be subjected to the restrictions incident to a state of blockade which shall have cleared out with such cargo from some port or place of the country to which she belongs, (either in Europe or America, or from some free port in His Majesty's colonies, under circumstances in which such trade from such free port is permitted,) direct to some port or place in the colonies of His Majesty's enemies, or from those colonies direct to the country to which such vessel belongs, or to some free port in His Majesty's colonies, in such cases and with such articles as it may be lawful to import into such free port: nor to any vessel, or the cargo of any vessel, belonging to any country not at war with His Majesty, which shall have cleared out from some port or place in this kingdom, or from Gibralter, or Malta, under such regulations as His Majesty may think fit to prescribe, or from any port belonging to His Majesty's allies, and shall be proceeding direct to the port specified in her clearance; nor to any vessel, or the cargo of any vessel, belonging to any country not at war with His Majesty, which shall be coming from any port or place in Europe which is de-

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sonable time, or undue delay, in electing to rescind a contract, for fraud, is for the court. Leaming v. Wise, 73 Penn. St., 173; Morgan v. McKee, 77 Penn. St., 228; Commonwealth v. Riter, 78 Penn. St., 161. So, what is sufficient part performance to take a parol contract for land out of the statute of frauds. Myers v. Black, 17 Penn. St., 193; Irwin v. Irwin, 34 Penn. St., 525. So, whether parol evidence be sufficient to convert an absolute deed into a mortgage. De France v. De France, 34 Penn. St., 385. So, whether a party has proved every element necessary to constitute a title under the statute of limitations. De Haven v. Landell, 31 Penn. St., 120; Nearhoff v. Addleman, 31 Penn. St., 279.

Whether a sale of personal property be fraudulent in law, in consequence of the vendors retaining possession, is, in Pennsylvania, a question for the court. Milne v. Henry, 40 Penn. St., 352. In New York, the question of fraud, arising from want of change of possession, is exclusively for the jury. Conkling v. Shelley, 28 N. Y., 360; Miller v. Lockwood, 32 Id., 293; 2 N. Y. R. S., 137, § 4.

The following are questions for the court: What circumstances are sufficient to rebut the presumption of payment arising from lapse of time, the truth of the facts being left to the jury? Delany v. Robinson, 2 Whart., 503; Reed v. Reed, 46 Penn. St., 239. What circumstances will justify the presumption of a deed? Stown v. Whitman, 6 Binn., 416; Newman v. Rutter, 8 Watts, 51. A presumption of fact (such as the loss of a paper), preliminary to the giving of secondary proof to the jury. Yoter v. Sanno, 6 Watts, 164; Graff v. Pitts., &c., R. R. Co., 31 Penn. St., 489. In case of interference of adjoining surveys, where there is no conflicting evidence, the question as to which party has the better title. Ramage v. Peterman, 25 Penn. St., 349 In slander, imputing perjury, the materiality of plaintiff's testimony, alleged to be false, is for the court. Steinman v. McWilliams, 6 Penn. St., 170. The right to recover interest. Robinson v. Corn Ex. Ins. Co., 1 Robt., 14; 3 Caines, 226.

The jury have the right to find, not only the facts, but also the inferences fairly deducible from the facts. Myers v. Hart, 10 Watts., 104.

The following are questions of fact for the jury: The identity of a tract of land purchased at a tax sale. Burns v. Lyon, 4 Watts., 363; Thompson v. Fisher, 6 Watts. & S., 320; Russel v. Werntz, 24 Penn. St., 337; Miller v. Hale, 26 Penn. St., 432; D. C. Co. v. Fisher, 19 Penn. St., 267. Whether a description applies to the land, or describes it. Duncan v. Currey, 3 Binn., 14; Mans v. Montgomery, 15 Serg. & R., 221; Naglee v. Ingersoll, 7 Penn. St., 185; Robinson v. Stewart, 2 Serg. & R., 84. When the description refers to extrinsic matters, resting in parol. Nourse v. Lloyd, 1 Penn. St., 229. Whether a survey was made, and whether the land was abandoned. Burchfield v. McAuley, 3 Watts., 9; Star v. Bradford, 2 Pen. & Watts., 384. With what intent an act was done. Roder v. Wade, 47 Barb., 53; People v. Hall, 6 Park Cr., 642; Seeley v. North, 16 Conn., 92; Miller v. Shaw, 7 Serg. & R., 129; Coxe v. Wolcott, 27 Penn. St., 154; Stokes v. People, 53 N. Y., 179; Hooper v. Gawn, 15 Penn. St., 517; Jones v. Brownfield, 2 Penn. St., 55; Edwards v. Goldsmith, 16 Penn. St., 43; Olion v. State, 17 Ala., 587; Journey v. Sharp, 4 Jones, N. C., 165; Mullins v. State, 37 Tex., 337; Oliver v. Chapman, 15 Tex., 400; Miller v. Stewart, 24 Cal., 502; Van Schaick v. Third Av. R. R. Co., 38 N. Y., 346. Whether defendant in ejectment entered in hostility to plaintiff. Jones v. Porter, 3 Pen. & W., 132; McHenry v. McCall, 10 Watts., 456. The question of an actual ouster in partition. Swayze v. Ormsby, 2 Watts., 494. Whether one tenant in common entered in hostility to his co-tenant. Blackmore v. Gregg, 2 Watts. & S., 182.

The question of boundary, and the true location of a boundary line. Comeggs v. Carley, 3 Watts., 280; McCormick v. McMurtrie, 4 Watts., 192; Venango Oil Co. v. Lewis, 62 Penn. St., 383; Brown v. Willey, 42 Penn. St., 205; Kellum v. Smith, 65 Penn. St., 86; Hecker v. Stirling, 36 Penn. St., 423. Whether the facts raise a presumption of a grant. Lewis v. Carstairs, 5 Watts & S., 205. Alteration in the date

clared by this order to be subject to the restrictions incident to a state of blockade, destined to some port or place in Europe belonging to His Majesty, and which shall be on her voyage direct thereto; but these exemptions are not to be understood as exempting from capture, or confiscation, any vessel or goods which shall be liable thereto in respect of having entered or departed from any port or place actually blockaded by His Majesty's squadrons or ships of war, or for being enemies' property, or for any other cause than the contravention of this present order."

"And the commanders of His Majesty's ships of war, &c., are hereby instructed to warn every vessel which shall have commenced her voyage prior to any notice of this order, and [*74] shall be destined to any port *of France, or of her allies, or of any other country at war with His Majesty, or to any port or place from which the British flag as aforesaid is excluded, or to any colony belonging to His Majesty's enemies, and which shall not have cleared as is herein before allowed, to discontinue her voyage, and to proceed to some port or place in this kingdom, or to Gibralter, or Malta; and every vessel which, after having been so warned, or after a reasonable time shall have been afforded for the arrival of information of this His Majesty's order, at any port or place from which she sailed, or which, after having notice of this order, shall be found in the prosecution of any voyage contrary to the restrictions contained in this order, shall be captured, and, together with her cargo, condemned as lawful prize to the captors."

The Venus returned to the Delaware on the 21st of February, 1808, and, on the 22d, the following letter of abandonment was written by Vanuxem and Clark, the agents of the plaintiff:

Thomas Fitzsimmons, Esq.

SIR:—The ship Venus, Captain King, bound from hence to the Isle of France, having had the register indorsed, and warned by the British ship Wanderer from proceeding to her destination, has returned to this port; by which circumstance her voyage is broken up. We do therefore hereby abandon to your office the freight insured by policy of 5th December last, for 6,000 dollars, on freight out valued at 8,000 dollars.

Yours,

VANUXEM and CLARK.

Thomas Fitzsimmons, Esq.,
Pres. Del. Ins. Co.

The jury further found that the possession was not *as prize, but merely to pre- [*75 vent the Venus from prosecuting her voyage to the Isle of France.

Upon this special verdict, judgment, in the court below, was rendered for the defendants.

Ingersoll, Jun., for plaintiff in error, contended,

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of an instrument. Farm. Ins. Co. v. Bair, 82 Penn. St., 33. The authenticity of an instrument, if there be any evidence of its execution. Berk's Turnpike Road v. Myers, 6 Serg. & R., 12. The conclusion to be drawn from circumstantial evidence. Cambria Co. v. Tomb., 48 Penn. St., 387. The sufficiency of parol evidence to prove a contract. Taylor v. Preston, 79 Penn. St., 436. Whether a proposition were an offer of compromise, or of terms of payment, when the language is equivocal. Swan v. Scott, 11 Serg. & R., 155; Cabarga v. Seeger, 17 Penn. St., 514. The nature and extent of agency. McClure v. Cain, 2 Keyes, 203; Thurman v. Wells, 18 Barb., 500; McMorris v. Simpson, 21 Weed, 610; Noble v. McClintock, 2 Watts & S., 152; Slonecker v. Ganett, 48 Penn. St., 415; London Soc'y v. Hagerstown Bk., 36 Penn. St., 498. Evidence of identity and locality, on latent ambiguity in a writing. Lycoming Ins. Co. v. Sailer, 67 Penn. St., 108. Existence of facts sufficient to take a parol sale out of the statute of frauds. Burns v. Sutherland, 7 Penn. St., 103. The meaning of words used in conversation. Brabaker v. Okeson, 36 Penn. St., 519. The deciphering of an illegible instrument. Armstrong v. Barrow, 6 Watts, 266. Whether a parol contract is sufficiently proved. Hastings v. Eckley, 8 Penn. St., 194. Whether it has been rescinded by the acts of the parties. White v. Reynolds, 3 Pen. & W., 96; Magan v. Lothrop, 4 Watts & S., 316. Whether the circumstances, in the absence of direct proof, show that a deed was intended merely as security for a debt. Rhines v. Baird, 41 Penn. St., 256. Whether, from the acts and declarations of parties through a series of years, an alleged parol trust exists. Achmuts v. Achmuts, 2 Pitts., 58. Whether a seal is that of a corporation. Cressman v. Hilltown Turnpike Co., 15 Leg. Int., 77. Fraud in fact. Therasson v. Peterson, 2 Keyes, 636; Topping v. Lynch, 2 Robt., 484; Ostrander v. Fay, 2 Keyes, 568. But an agreement between mortgagees that former may sell for his own benefit is fraudulent *per se*. Russell v. Winne, 37 N. Y., 591; Byrd v. Hall, 2 Keyes, 646; Dormick v. Reichenback, 10 Serg. & R., 84; Jack v. Dougherty, 3 Watts, 151; Avery v. Street, 6 Watts, 247; Graham v. Smith, 25 Penn. St., 323; Loncheim v. Hensey, 77 Penn. St., 305; McIlvaine v. McIlvaine, 8 Serg. & R., 559; Carter v. Grinells, 67 Ill., 270; Pocock v. Hendricks, 8 Gill. & J., 421; Painter v. Drum, 40 Penn. St., 467; Sherwood v. Marwick, 5 Me., 295. Negligence. Collins v. Barnes, 83 Penn. St., 15; Snively v. Commonwealth, 40 Penn. St., 75; Seabrook v. Herker, 4 Robt., 344. Mistake in instrument. Chonteaux v. Leech, 18 Penn. St., 224; Union R. Co. v. Riegel, 73 Penn. St., 72. Actual notice. Rhines v. Baird, 41 Penn. St., 256. Waiver of notice. Drake v. F. Ins. Co., 3 Grant C., 325. Waiver of tort. Williams v. Wood, 1 Phila., 29. Payment. Homer v. Horner, 40 Penn. St., 475. Ownership of debt sued on. Childerston v. Hammond, 9 Serg. & R., 68. Whether same matter of defense was passed upon in former suit. Crotzer v. Russell, 9 Serg. & R., 81. Whether a note or security was received in satisfaction, or as collateral. Shewell v. Meredith, 3 Pen. & W., 13; Hart v. Boller, 15 Serg. & R., 162; Evans v. Railroad Co., 5 Leg. & Ins. Rep., 4; Edminster v. Harris, 30 Leg. Int., 110. Whether credits on a written instrument, and receipts produced, though differing slightly, were for the same moneys. Slasher v. Washington Co., 27 Penn. St., 205. Due diligence in making demand. Bennett v. Young, 18 Penn. St., 261. Whether due notice was given of non-payment. Neely v. Merrick, 7 Phila., 170. What is due diligence to charge a guarantor. Woods v. Sherman, 71 Penn. St., 100. The credibility of a witness. Lamb v. Irwin, 69 Penn. St., 436.

An admixture of parol and written evidence draws the whole to the jury.

Sidwell v. Evans, 1 Pen. & W., 383; Youst v. Martin, 3 Serg. & R., 423; Curcier v. Phil. Ins. Co., 5 Serg. & R., 113; Stoever v. Stoever, 9 Serg. & R., 434; Harper v. Kean, 11 Serg. & R., 280; Mehaffy v. Share, 2 Pen. & W., 361; McDowell v. Shotwell, 2 Whart., 26; Bomeisler v. Dobson, 5 Whart., 398; Lever v. Van Buskirk, 4 Penn. St., 309; Moore v. Miller, 8 Penn. St., 272.

When the case is mixed up of law and fact, the judge may and should leave the whole to the jury. Poorman v. Smith, 2 Serg. & R., 464; Duffey v. Pres. Cong., 48 Penn. St., 46; Porter v. Blood, 5 Pick., 56; Valentine v. Piper, 22 Pick., 94; Chase v. Breed, 5 Gray, 440.

In all questions depending upon a general inference from many particular facts, the inference is always one of fact, unless the law has established some fixed rule, or the inference is one which admits of no doubt. In such cases the court may determine it as they do other cases. Sessions v. Newport, 23 Vt., 9; Justice v. Lang, 52 N. Y., 323; Hazman v. Improvement Co., 50 N. Y., 53.

1. That no abandonment at all was necessary in this case.

2. That the abandonment was sufficient.

3. That this was a loss within the policy.

4. That the justification of the captain, from all the circumstances of the case, was a matter of fact to be decided by the jury, and that their finding upon that point was conclusive.

5. If the justification be not a matter of fact for the jury, yet the facts found by the jury are in law a justification.

1 and 2. Upon the question of abandonment he cited 2 Emerig., 174, 175; Marsh., 480; 5th edit., 148; Le Guidon, c. 7, Roccus, in notis, 44, 95; 3 Atk., 195; 1 T. R., 608; Park, 171, 192, 239; Marsh., 517, 559; 2 Valin, 99; Pothier, n. 128; 1 Johns. N. Y. Rep., 181; Emerig., 197; 1 T. R., 304; Millar, 308, 282; 2 Burr., 1209; Park, 143; 5 Bos. & Pull., 310, *Lucena* v. *Crauford.*

Upon the 3d, 4th and 5th points, which included the question of justification of the captain in returning to Philadelphia, he cited Doug., 219, *Ship Hope;* Marsh., 498, 505; Park, 168, *Ship Grace;* 3 Bos. & Pull., 474, *Ship Tartar;* 3 Caines, 188; 1 Johns., 301; 5 Bos. & Pull., 434; 2 Johns., 264; 1 Rob., 146; Amer. edit. 1 Camp., 454, *Blackenhagen* v. *London Assurance Company.* And the case of *Dœderer* v. *Delaware Insurance Company*, in the Circuit Court for the District of Pennsylvania, in April, 1807, to show that the justification *of the captain was matter of fact to be [*76 left to the jury.

And to show that in point of law the captain was justified in returning, he cited 2 Burr., 696, *Goss* v. *Withers;* Marsh., 486; Roccus, not., 64; 4 Cranch, 29, *Rhinelander* v. *Penn. In. Co.*

That the abandonment was sufficient, and related back to the time of arrest, when the loss was total. (1 Emerig., 440; Marsh., 519; 4 Cranch, 202, *Marshall* v. *Del. In. Co.*, which case has been confirmed in England, in B. R., 10 East, 329, *Bainbridge* v. *Nielson;* 2 Valin, 123; 1 Emerig., 537, 538; Marsh., 434; 3 Rob., 180, *The Hiram;* 2 Johns., 336, 352, *Scott* v. *Libby*, and *Barker* v. *Cheviott;* 1 Bos. & Pull., 634, *Curling* v. *Long;* 7 T. R., 331, *Cook* v. *Jennings;* Doug., 219, *Milles* v. *Fletcher;* 1 Salk., 198, *Brewster* v. *Kitchell;* 1 Emerig., c. 12, § 31, p. 542, 543, 544; Case of the *Colomb. Roccus*, not., 63; 1 Johns., 301; 4 Dal. 417, *Symonds* v. *Union In. Co.;* 9 East, 283, *Barker* v. *Blakes;* 1 Emerig., 508; 1 Johns., 249,

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The question of what is a reasonable time to do an act is one of law, when the facts are ascertained. Commonwealth v. Borton, 16 Pick., 442; Gilmore v. Wilbur, 12 Pick., 120; Holbrook v. Burt, 22 Pick., 546; Torrey v. Bryant, 16 Pick., 528; Ellis v. Page, 1 Pick., 43; Pratt v. Farrar, 10 Allen, 519.

But the question of reasonable time, when there is no precise rule of law which governs, is for the jury. Joy v. Sears, 9 Pick., 4; D. M. Co. v. Gardner, 10 Cush., 88; Haskins v. Ham. Ins. Co., 5 Gray, 432, 438.

Preliminary questions of fact are for the court, and not for the jury. Gorton v. Hadsell, 9 Cush., 508, 511; Lake v. Clark, 97 Mass., 346; Dana v. Kemble, 19 Pick., 112; Donelson v. Taylor, 8 Pick., 390; Com. v. Morrell, 99 Mass., 542; Emerson v. Prov. H. Co., 12 Mass., 240.

The construction of written instrument is for the court when no question arises as to the use of words of art. Howel v. Dewing, 2 Gray, 476; Allen v. Ins. Co., 5 Gray, 384; Ricker v. Cutter, 8 Gray, 248; Smith v. Faulkner, 12 Gray, 251.

Where the contract is oral, the question what it is, is for the jury; where its terms are undisputed, its construction and effect are for the court. Rice v. D. M. Co., 2 Cush., 80; Short v. Woodward, 13 Gray, 86; Pratt v. Langdon, 12 Allen, 544; Globe Works v. Wright, 106 Mass., 207; Short v. Woodward, 13 Gray, 86.

What is due diligence in giving notice to indorser, is a question partly of fact and partly of law, according to the circumstances of each case. Bartlett v. Robinson, 39 N. Y., 187; 3 N. Y., 272; 7 N. Y., 266; 2 Sandf., 171; 8 John., 173; 5 Barb., 681; 3 Hill, 250; 21 Wend., 643.

The following questions are for the jury:

Alteration of instrument, Artisans' Bank v. Backus, 31 How. Pr., 242.

Adverse possession. Muuro v. Merchant, 28 N. Y., 9.

Fraud. Booth v. Bunce, 33 N. Y., 139; Dygert v. Remerschnider, 32 N. Y., 629; Matthews v. Rice, 31 N. Y., 457; Knapp v. Smith, 27 N. Y., 277.

What is necessary or reasonable baggage. Ranson v. R. R. Co., 2 Abb. Pr. N. S., 22; Merrill v. Grinnell, 30 N. Y., 594.

Credibility of evidence. Hutchinson v. Bank, 48 Barb., 302.

Fraudulent intent. Topping v. Lyneh, 2 Robt., 484; Loeschigk v. Peck, 3 Robt., 700.

Negligence. Newson v. N. Y. C. R. Co., 29 N. Y., 383; Wilds v. Railroad Co., 29 N. Y., 315, 14 N. Y., 310; Ernst v. Hudson R. Co., 35 N. Y., 9; McPadden v. N. Y. C. R. Co., 47 Barb., 247; Burrill v. Wat. &c. Co., 51 Barb., 105; 25 Hun., 405; 84 N. Y., 241; 83 N. Y., 133, 572, 121, 620.

Probable cause. Miller v. Milligau, 48 Barb., 30; Latham v. Libby, 38 Barb., 339.

Reasonable time. Smith v. Ins. Co., 4 Mass., 668, 670; Reynolds v. Ins. Co., 22 Pick., 191; Roth v. B. & S. R. Co., 34 N. Y., 548; Hanks v. Drake, 49 Barb., 186; 1 Hilt., 254; 6 Duer, 375; 11 John., 241.

Sale by sample. Stone v. Browning, 49 Barb., 244; Audrews v. Kneeland, 6 Cow., 354.

Waiver. Matthews v. Hobby, 48 Barb., 167.

Meaning of slanderous words. 5 Cow., 714; 5 John., 211; 12 John., 239; 2 Cow., 479; 6 Cow., 76; 4 Wend., 320; 12 Wend., 48.

Acceptance of goods sold. 5 Wend., 253; 25 Wend., 665; 10 N. Y., 285.

Sale. 13 John., 294; 26 Barb., 256.

Warranty. 8 Cow., 25; 10 Wend., 412; 13 Wend., 277; 15 Wend., 490; 1 Den., 378; 5 Den., 617; 22 Barb., 134; 1 Hilt., 266.

Whether signers of petition are a majority. 15 Barb., 255.

Reasonable search. Clark v. Owens, 18 N. Y., 434.

Deceit. 16 Wend., 494; 15 John., 186; 21 Barb., 585; 10 N. Y., 207.

Diligence. Wakeman v. Gowdy, 10 Bosw., 208.

Weight of evidence. Tuttle v. Buck, 41 Barb., 417.

False representations. Bruck v. Peyser, 28 How., Pr., 292.

Handwriting. Magee v. Osborn, 32 N. Y., 669.

Personal identity. 33 N. Y., 501.

Usurious intent. Sumner v. People, 29 N. Y., 337; Elwell v. Chamberlain, 31 N. Y., 611; Price v. Lyons Bank, 33 N. Y., 55; Beales v. Benjamin, 33 N. Y., 61, 67.

Credit to be given witness. Duun v. People, 29 N. Y., 523.

Alteration of instrument, whether before or after execution. Maybee v. Sniffin, 10 N. Y. Leg. Obs., 18; S. C. 2 E. D. Smith, 1; Pringle v. Chambers, 1 Abb., Pr. 58.

Contract, whether it was made, is question of fact; what it means is question of law. Latham v. Westervelt, 26 Barb., 256; Chapin v. Potter, 1 Hilt., 366.

Date of instrument bearing no date, question of fact. Coons v. Chambers, 1 Abb. Pr., 165.

Deceit, and whether plaintiff misled, for the jury. Moore v. Meacham, 10 N. Y., 207; Peop. v. Dalton; 2 Wheel., Cr. C., 161; 15 John., 186; 21 Barb., 585.

Delivery, whether absolute or conditional. 25 Barb., 474; 6 Hill., 208.

Exemption of articles from execution. 1 Den., 462.

Law of foreign country, what is, question of fact. 12 N. Y., 258.

Schmidt v. *United In. Co.;* 1 Bos. & Pull., 200, *Driscol* v. *Bovil;* 1 Bos. & Pull., 213, *Driscol* v. *Passmore.*)

Binney and *Hopkinson*, contra.

The assured at the time of abandonment must state a good cause of abandonment. The only causes assigned by the plaintiff are those stated in the special verdict, none of which are suffieient.

The special verdict finds matters of law which ought not to have been submitted to the jury, viz., that the voyage was broken up, and that the captain was justified in returning. He was opposed by no physical or legal impediment. The jury have found that the arrest was not as prize, but only to prevent the prosecution of the voyage. The exemption from the general operation of the orders in council of the 11th of November, embraces the case of a vessel sailing from a neutral port direct to an enemy's colony. The words are: "Nothing **77***] herein contained shall *extend to subject to capture or condemnation any vessel," "belonging to any country not declared by this order to be subjected to the restrictions incident to a state of blockade, which shall have cleared out" "from some port" "of the country to which she belongs," "direct to some port" "in the colonies of His Majesty's enemies." The expression *shall have* must, in grammatical construction, allude to a time which was future when the order was passed, and also to a time which should have passed, before the arrival of that future time. "Which shall have cleared out." That is, which shall then have cleared out. When? At the time of the seizure. If at the time of seizure the vessel shall have cleared out from a neutral port direct to an enemy's colony, she is within the exception to the general order. If it had been intended to except only those which had cleared out before the 11th of November, the date of the order, the expression would have been, which have cleared out, &c.

If the Venus was within the exception to the order, the officer of the Wanderer had no right to prohibit her from proceeding on her voyage; and his prohibition was no justification to the captain in returning to Philadelphia.

But even if the order did include this vessel, yet the prohibition was no justification to the captain; because the Isle of France was only nominally, not actually blockaded.

A coustructive blockade, if it be a peril insured against, must be considered as within the denomination of restraints, but, from the terms of the policy, it must be a restraint which comes to the hurt, damage or detriment of the thing insured. It must therefore have been either an actual or legal restraint.

A constructive blockade is not known to the law of nations. Our courts reject it. It is not a legal restraint. (2 Caines, 11; 1 Johns., 253.)

If the circumstances of the present case are **78***] a justification, *then every ill founded apprehension of a timorous man may justify an abandoument. There must be peril in point of fact. The misapprehension of a weak man is not sufficient. (3 Bos. & Pull., 392; 5 Esp., 50; Park, 226.) The captain ought to have proceeded, that he might himself see whether the port was actually blockaded or uot.

He ought not to have depended upon the information he received from the Wanderer.

Harper, in reply.

The captain was under a moral incapacity to proceed on his voyage, and was therefore justified in returning. The policy of Great Britain was to interdict this neutral commerce; it was the great object of the order of the 11th of November, 1807. The words shall have cleared out, mean, shall have now cleared out, *i. e.*, before the date of the order. It is immaterial whether this order was warranted by the law of nations, because it was still within the peril of restraiut of princes. A probability of capture and condemnation was sufficient. Such a reasonable apprehensiou as a man of firmness might indulge.

February 17. MARSHALL, *Ch. J.*, delivered the opiniou of the court as follows:

This suit was instituted on a policy insuring the freight of the Venus, from Philadelphia to the Isle of France. The vessel sailed early in December, 1807, before the British orders in council, of the preceding November, were known in the United States. On the afternoon of the 16th of January, 1808, while prosecuting her voyage, she met the British ship of war Wanderer, by whom she was arrested and detained until the morning of the 18th, when she was restored to the captain, her papers being first indorsed with these words, "Ship Venus warned off the 18th of January, 1808, by H. M. S. Wanderer, from proceeding *to any [***79** port in possession of His Majesty's enemies."

EDWARD MEDLEY, second lieutenant.

The captain was verbally informed by an officer of the Wanderer that the Isle of France was blockaded, and that the Venus would be a good prize if she proceeded thither.

The captain returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the Wanderer, he on that account abandoned to the underwriters.

The principal question arising on this case is, was the captain of the Venus justified iu returning to Philadelphia, after having proceeded about 1,000 miles ou his voyage, either by the indorsement on his papers, or the verbal information given by an officer of the Wanderer?

A point preliminary to the examination of this question on its merits has been made by the plaintiff in error.

The jury have found, that "by the interruption, detainment, and warning off of the British force, the voyage of the said ship Venus was broken up."

After stating the verbal information given by the British officer respecting the blockade of the Isle of France, is this further finding, "We find, in consequence thereof, that the said Elisha King was fully justified in returning to the port of Philadelphia."

These findings, it is urged, conclude the court, and render this special verdict equivalent to a general one.

But this court is not of that opinion. It has been truly said, that finding the breaking up of the voyage finds nothing. The question recurs, was the voyage broken up by one of the perils insured against, or by *the fault of the [***80** captain? The auswer to this question determines the liability of the underwriters.

It has beeu also truly said that the question of justification is a question of law, uot of fact. If, as in this case, the jury find the fact specially, and draw the legal conclusion that the fact amounts to a justification, the court is not bound by that conclusion.

The case, then, is open to examination on its real merits, unaffected by the particular findings which have been noticed.

Iu proceeding to inquire whether the circumstances which actually occurred justified the captain of the Venus in returning to Philadelphia, it beeomes important to ascertain the real hazard of prosecuting his voyage. This essentially depends on the construction of the British orders of council issued in November, 1807. By the plaintiff in error it is insisted, that thesc orders extend to the direct trade between a neutral port and the colony of an enemy. In support of this construction, a very acute and elaborate criticism has been bestowed on those orders, which appears to the court merely to furnish additional proof of the imperfection of all human language. The intent of the orders to exclude from their operation this direct trade, an intent alike manifested by the context, and by the particular words forming the exception, the universal understanding of both countries, which has been, on more than one occasion, publicly and officially expressed, are too conclusive on this point to render it necessary that the court should proceed to review that analysis of this document which has been so well made at the bar.

According to the construction contended for by the plaintiffs in error, an exception profcssedly made to mitigate the rigor of the general rule, "and still to allow to neutrals the opportunity of furnishing themselves with colonial produce for their own consumption and supply," would be more rigorous than the rule itself, and would interdict that trade by **81***] which *they were to be supplied with this produce for their own use, with as jealous circumspection as the trade professedly prohibited by the general rule.

It is, then, the clear and unanimous opinion of the court, that the words "shall have," which are used in the excception, relate as well to the time of capture as to the time of issuing the orders, and that a direct voyage from the United Statcs to a colony of France, was not prohibited.

It being found that the Isle of France was not actually blockaded, and the orders not prohibiting the voyage, it remains to inquirc whether the apprehension excited by the warning, or by the verbal cominunication of a British officer, justified the return of the Vcnus to Philadelphia.

It has been very truly observed that, in this case, the Venus was not physically incapacitated from prosccuting her voyage.

With equal truth has it been observed, that there was no legal impediment to her proceeding, because the voyage was not prohibited by the orders of November, 1807; and, cousequently, the indorsement on her papers would not have increased the danger.

There did not, then, at the time the voyage was abandoned, exist, either in fact, or in law, the restraint or detention against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure.

Whether this might be justified under any circumstances it is unneccssary to determine. But the court is of opinion that the circumstances of this case did not justify it. The Venus might have proceeded, and ought to have proceeded, until she could obtain further information. It would be dangerous in the extreme if any false intelligence received on a voyage *might justify a captain in acting [***82** as if that intelligence were true.

The case of *Blackenhagen* v. *The London Assurance Company* has a strong bearing on this case, and though that was a decision at *Nisi Prius*, it is entitled to all the respect which is due to the Court of Common Pleas. After the same opinion had been successively given by Lord Ellenborough, and by Sir James Mansfield, it was affirmed by the whole court, and the jury having found against the opinion of the judge, a new trial was granted.

The court gives no opinion on the question how far the underwriters would have beeu liable, had the orders of council prohibited the trade to the Isle of France. This decision is not intended in any manner to affect that question.

Judgment affirmed with costs.

LEWIS *v.* HARWOOD.

A bond in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia.

ERROR to the Circuit Court for the District of Virginia, in an action of debt upon a bond dated February 3, 1784, the condition of which was, that if the obligor should pay to William Whetcroft, his attorney, heirs, executors, administrators or assigns, the sum of 3,000*l.* current money of Virginia, on or before the 1st of January, 1785, then the obligation to be void.

Provided that if the obligor, on application by the obligee at the town of Fredericksburg, on or after the 1st of January, 1785, should pay to the obligee 3,000*l.* in officers' certificates of a certain description, or should pay the interest of 6 per cent. from the date of the bond, on such certificates, if not paid, aud should annually and punctually pay the said 6 per cent. *when applied to as before mentioued, [***83** in doing of which the condition of the bond was to be dischargeable by payment of the 3.000*l.* officers' certificates, otherwise the bond was to have its full force and effect.

Upon the pleas of payment, and conditions performed, the verdict and judgment below were for the plaintiff.

The defendant brought his writ of error.

Terrell and Swann, for the plaintiff in error, contended,

That the bond was not assignable under the act of assembly of Virginia, and therefore the plaintiff below, who was the assignee, could not recover in his own uame.

The act of 1748 applies only to a bond given

for a debt. And by a subsequent act, it is explained to mean a money debt.

The subsequent act makes tobacco bonds assignable. In the case of *Henderson* v. *Hepburn* (2 Call, 232, 238), it is decided that an assignee cannot maintain an action of debt in his own name upon a bond with a collateral condition. (*Craig* v. *Craig*, 1 Call, 483.)

The condition of the bond is either to pay 3,000*l.* by a certain day, or to pay 3,000*l.* in certificates, or to pay interest on the certificates.

A bond is not assignable unless it be for a debt so certain, as not to require the aid of a jury to assess the damages, or to ascertain the sum due.

February 24. LIVINGSTON, *J.*, delivered the opinion of the court as follows: On the 3d **84***] day of February, 1784, the *plaintiff executed his bond to William Whetcroft, in the penal sum of 6,000*l.*, to which there is a condition in the following words: "The condition of the above obligation is such, that if the said John Lewis shall well and truly pay to the said William Whetcroft the full sum of three thousand pounds, current money of Virginia, on or before the first day of January, 1785, then this obligation to be void. Provided, and it is to be understood, that in case the said Lewis, on application by the said Whetcroft to him, in the town of Fredericksburg, on or after the said first day of January, shall pay unto the said William, or his attorney, the sum of three thousand pounds in officers' certificates issued under an act of assembly passed November, 1781, for pay or arrearages of pay and depreciation, or shall well and truly pay the interest of six per centum from the date hereof, on the said certificates, if not paid, and shall moreover annually and punctually pay the said six per cent. when applied to as before mentioned, in doing of which the condition of this bond is dischargeable by payment of the said three thousand pounds officers' certificates; otherwise the bond shall have its full force and effect.

This bond was assigned to the defendant on the 3d of August 1790, and an action at law was brought on it in the name of the assignee in the Circuit Court of the United States for the District of Virginia, when judgment was rendered for the defendant.

On this judgment a writ of error has been sued out, and the plaintiff alleges that the same should be reversed, because the bond on which this action is brought is not assignable under the laws of Virginia, so as to enable the assignee to prosecute at law in his own name. Other causes of error have been assigned, but the opinion of the court being with the plaintiff on the first point, it will not be necessary to take any notice of the objections which have been made to the pleadings, or to the imperfect finding of the jury.

85*] *A bond not being assignable at common law, the present question must turn altogether on the statutes of Virginia. It seems to have been for a long time doubted, after passing the act of 1748 (c. 27), whether any but bonds conditioned to pay money or tobacco were assignable. That question was, however, at last settled by the Court of Appeals, in the case of *Henderson* v. *Hepburn*, in which it was decided that a bond with a collateral condition was not, within the meaning of this act, assignable. With this decision the court not only feels no inclination to interfere, but thinks it a fair and just exposition of the acts which had then been passed on this subject. The bonds intended by the legislature were most clearly such as were to become void on the payment of a sum certain, and where no intervention or assessment of a jury was necessary. Bonds which require particular breaches to be assigned, damages on which were to be estimated or liquidated by a jury, do not appear to have been contemplated.

It being then settled that bonds with collateral conditions were not assignable under the laws in force at the time of the making of this assignment, it only remains to ascertain the true character of the condition of the bond on which this action is brought.

Although by payment of 3,000*l.* on or before a certain day, the obligor might have discharged himself from the penalty, it was part of the condition that, on the application of the obligee, by a certain day, a payment in certain certificates, which were not money, might be substituted. This created an alternative by which the penalty might be discharged either by money or officers' certificates; and although the consent of both parties might be necessary to a payment in the latter way, still, as it made part of the written contract, the court cannot but perceive that, on a certain contingency, it was to be considered as a bond on which it might, as it did, become necessary to assign breaches and call in a jury to assess damages. If we look at the record, we shall find the *parties, their counsel and the jury [***86** treating it as a bond of this description.

It is the opinion, therefore, of the court, that this bond was not assignable under the laws of Virginia, and that the jugdment of the Circuit Court for the District of Virginia must be reversed, and judgment on the verdict be arrested.

RIDDLE AND COMPANY *v.* MANDEVILLE AND JAMESSON.

The court below upon a mandate on reversal of its judgment may award execution for the costs of the appellant in that court.

A MANDATE had been issued upon the reversal of the decree in this case at the last term, in which, "this court, proceeding to give such decree as the said Circuit Court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of 1,500 dollars, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due, you are hereby commanded, that such execution and proceedings be had on the said decree of the said Supreme Court, as, according to equity and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding."

Nothing having been said respecting the costs, the court below had not issued execution for the costs of the appellant.

E. J. Lee moved the court for a further mandate to the court below, to award the costs of that court.

MARSHALL, *Ch. J.* The court below is always competent to award costs in a chancery suit in that court, and, in case of a mandate, may issue execution therefor.

Cited—2 Wood. & M. 419, 422.

87*] *FLETCHER *v.* PECK.

If the breach of covenant assigned be, that the state had no authority to sell and dispose of the land, it is not a good plea in bar to say that the governor was legally empowered to sell and convey the premises, although the facts stated in the plea as inducement, are sufficient to justify a direct negative of the breach assigned.

It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it show a substautial breach.

The court will not declare a law to be unconstitutional unless the opposition between the constitution and the law be clear and plain.

The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the aet is a nullity in consequence of the impure motives which influenced certain members of the legisiature which passed the law.

When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.

A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.

A grant is a contract executed.

A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.

The proclamation of the King of Great Britain in 1763 did not alter the boundaries of Georgia.

The nature of the Indian title is not such as to be absolutely repugnant to seizure in fee on the part of the state.

ERROR to the Circuit Court for the District of Massachusetts, in an action of covenant brought by Fletcher against Peck.

The first count of the declaration states that Peck, by his deed of bargain and sale dated the 14th of May, 1803, in consideration of 3,000 dollars, sold and conveyed to Fletcher 15,000 acres of land lying in common and undivided in a tract described as follows: beginning on the river Mississippi, where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude a due east course to the Tombigby River, thence up the said Tombigby River to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude a due west course to the Mississippi; thence down the said river to the place of beginning; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps, by deed dated the 27th of February, 1796, and of which the said Phelps conveyed four-fifths to Benjamin Hichborn, and the said Peck, by deed dated the 8th of December, 1800; the said tract of 500,000 acres, being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed dated the 23d of September, 1795, and is parcel of that tract which James Gunn, Mathew M'Allister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet and Wade Hampton, by deed dated 22d of August, 1795, conveyed to the said James Greenleaf; the same being part of that tract which was granted by letters patent under the great seal of the state of Georgia, and the signature of George Matthews, Esq., Governor of that state, dated the 13th of Janu-

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NOTE.—Vested rights defined. Westervelt v. Gregg., 12 N.Y., 202; Butler v. Palmer, 1 Hill, 324.

Where right to damages has vested repeal of statute giving them cannot destroy that right that is beyond scope of legislative power. People v. Supervisors of Westchester Co., 4 Barb., 64.

Vested rights in property acquired under a statute cannot be destroyed by repeal or modification of statute. Benson v. Mayor, &c., 10 Barb., 223; People v. Platt, 17 John., 195.

The right to a particular remedy is not a vested right. 11 Week. Dig., 483; People v. Tweed, 5 Hun, 382; S. C. 63 N. Y., 202; 11 Hun, 195; People v. Supervisors of Essex Co., 70 N. Y., 228; Commonwealth v. Hampden, 6 Pick., 501.

Effect of act of Congress on state legislation on same subject, does not repeal, but supersedes the state laws, but does not effect rights vested under them. Sturgis v. Spofford, 42 N. Y., 446; Henderson v. Same, 59 N. Y., 131.

When an act of legislature is equivalent to a contract executed a subsequent legislature cannot impair the rights thereby created. Trustees of the Bishop's Fund v. Rider, 13 Conn., 87; State of N. J. v. Wilson, 7 Cranch, 164.

Rights vested in a corporation by the act creating it cannot be destroyed or controlled by subsequent legislation unless power for that purpose is reserved in the incorporating act. Wales v. Stetson, 2 Mass., 143, 146; McLaren v. Pennington, 1 Paige, 102.

Legislature cannot alter existing contract or its legal effect, nor give it a construction binding on parties or courts. King v. Dedham B'k, 15 Mass., 447; Foster v. Essex B'k, 16 Mass., 245.

Courts of U. S. cannot pronounce state law void because it interferes with vested rights provided it does not in its operation impair the obligation of a contract and is not *ex post facto*. Satterlee v. Matthewson, 2 Pet., 380; Watson v. Mercer, 8 Pet. 88; Balt. & Susq. R. R. Co. v. Nesbit, 10 How., 395; Benuett v. Boggs, Baldw., 60, 74; Griffing v. Gibbs McAll., 212, 220.

The act of a state exempting property of a company from taxation upon couditions, when accepted by company, is a coutract the state cannot impair, even by a coustitutional amendment. Pacific R. R. Co. v. Maguire, 20 Wall., 36.

State may alter laws governing remedy on contract so long as an effective remedy is preserved. Tenn. v. Sneed, 6 Otto, 69, but where it so lessens or impairs the value of remedy as to lessen and impair the value of contract, law is void. Edwards v. Kearzcy, 6 Otto, 595.

Vested rights acquired by a creditor under state statute are not affected by repeal of the statute. Memphis v. U. S., 7 Otto, 293.

State constitution is a "law" aud state cannot by it impair obligation of contracts. Railroad Co. v. McClure, 10 Wall., 511.

Clause in a charter prohibiting erection of a "bridge within a distance of two miles" means that legislature will not give any person authority to do so, as well as that no person shall without grant. The Binghamton Bridge, 3 Wall., 51.

In New York, by general statute, the charter of every corporation is subject to alteration, suspension and repeal, by the legislature. 1 Rev. Stat. (N. Y.) 600, § 8.

As to the extent to which such power may be exercised, to alter the charter, without consent of the corporation. See 14 Barb., 559; 21 Barb., 554; 17 Barb., 581; 25 Barb., 457.

uary, 1795, to the said James Gunn and others, under the name of James Gunn, Mathew **88***] M'Allister, and George *Walker and their associates, and their heirs and assigns in fee-simple, under the name of the Georgia Company; which patent was issued by virtue of an act of the legislature of Georgia, passed the 7th of January, 1795, entitled "An act supplementary to an act for appropriating part of the unlocated territory of this state for the payment of the late state troops, and for other purposes therein mentioned, and declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes."

That Peck, in his deed to Fletcher, covenanted "that the state of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof (entitled as aforesaid), legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. And that the legislature of the said state at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act. And that the governor of the said state had lawful authority to issue his grant aforesaid, by virtue of the said act. And further, that all the title which the said state of Georgia ever had in the aforegranted premises has been legally conveyed to the said John Peck by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the state of Georgia, and finally vested in the said Peck, has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said state of Georgia."

The breach assigned in the first count was, that at the time the said act of 7th of January, 1795, was passed, "the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act."

The 2d count, after stating the covenants in the deed as stated in the first count, averred, "that at Augusta, in the said state of Georgia, on the 7th day of January, 1795, the said James **89***] Gunn, Mathew M'Allister *and George Walker, promised and assured divers members of the legislature of the said state then duly and legally sitting in general assembly of the said state, that if the said members would assent to and vote for the passing of the act of the said general assembly, entitled as aforesaid, the same then being before the said general assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands, which they the said Gunn, M'Allister and Walker, and their associates, should purchase of the said state by virtue of and under authority of the same law: and that divers of the said members to whom the said promise and assurance was so made as aforesaid, were unduly influenced thereby, and under such influence did then and there vote for the passing the said bill into a law; by reason whereof the said law was a nullity, and from the time of passing the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; and that the title which the said state of Georgia had in the aforegranted premises at any time whatever was never legally conveyed to the said Peck, by force of the conveyances aforesaid."

The third count, after repeating all the averments and recitals contained in the second, further averred, that after the passing of the said act, and of the execution of the patent aforesaid, the general assembly of the state of Georgia, being a legislature of that state subsequent to that which passed the said act, at a session thereof, duly and legally holden at Augusta, in the said state, did, on the 13th of February, 1796, because of the undue influence used as aforesaid, in procuring the said act to be passed, and for other causes, pass another certain act in the words following, that is to say, "An act declaring null and void a certain usurped act passed by the last legislature of this state at Augusta, the 7th day of January, 1795, under the pretended title of 'An act supplementary to an act entitled an act for appropriating a part of the unlocated *territory [***90** of the state for the payment of the late state troops, and for other purposes therein mentioned, declaring the right of this state to the unappropriated territory thereof for the protection of the frontiers, and for other purposes,' and for expunging from the public records the said usurped act, and declaring the right of this state to all lands lying within the boundaries therein mentioned."

By which, after a long preamble, it is enacted, "That the said usurped act passed on the 7th of January, 1795, entitled, &c., be, and the same is hereby declared, null and void, and the grant or grants, right or rights, claim or claims, issued, deduced, or derived therefrom, or from any clause, letter or spirit of the same, or any part of the same, is hereby also annulled, rendered void, and of no effect; and as the same was made without constitutional authority, and fraudulently obtained, it is hereby declared of no binding force or effect on this state, or the people thereof, but is and are to be considered, both law and grant, as they ought to be, *ipso facto*, of themselves, void, and the territory therein mentioned is also hereby declared to be the sole property of the state, subject only to the right of treaty of the United States to enable the state to purchase under its pre-emption right, the Indian title to the same."

The 2d section directs the enrolled law, the grant, and all deeds, contracts, &c., relative to the purchase, to be expunged from the records of the state, &c.

The 3d section declares that neither the law nor the grant, nor any other conveyance, or agreement relative thereto, shall be received in evidence in any court of law or equity in the state so far as to establish a right to the territory or any part thereof, but they may be received in evidence in private actions between individuals for the recovery of money paid upon pretended sales, &c.

The 4th section provides for the repayment of money, funded stock, &c., which may have been paid into the treasury, provided it was then remaining *therein, and provided [***91** the repayment should be demanded within eight months from that time.

The 5th section prohibits any application to Congress, or the general government of the

United States for the extinguishment of the Indian claim; and

The 6th section provides for the promulgation of the act.

The count then assigns a breach of the covenant in the following words, viz.: "And by reason of the passing of the said last-mentioned act, and by virtue thereof, the title which the said Peck had, as aforesaid, in and to the tenements aforesaid, and in and to any part thereof, was constitutionally and legally impaired, and rendered null and void."

The 4th count, after reciting the covenants as in the first, assigned as a breach, "that at the time of passing of the act of the 7th of January, 1795, the United States of America were seized in fee-simple of all the tenements aforesaid, and of all the soil thereof, and that at that time the state of Georgia was not seized in fee-simple of the tenements aforesaid, or of any part thereof, nor of any part of the soil thereof, subject only to the extinguishment of part of the Indian title thereon."

The defendant pleaded four pleas, viz.:

1st plea. As to the breach assigned in the first count, he says,

That on the 6th of May, 1789, at Augusta, in the state of Georgia, the people of that state by their delegates, duly authorized and empowered to form, declare, ratify, and confirm a constitution for the government of the said state, did form, declare, ratify, and confirm such constitution, in the words following:

Here was inserted the whole constitution, the 16th section of which declares, that the general assembly shall have power to make all laws and **92***] ordinances *which they shall deem necessary and proper for the good of the state which shall not be repugnant to this constitution. The plea then avers, that until and at the ratification and confirmation aforesaid of the said constitution, the people of the said state were seized, among other large parcels of land, and tracts of country, of all the tenements described by the said Fletcher in his said first count, and of the soil thereof in absolute sovereignty, and in fee-simple (subject only to the extinguishment of the Indian title to part thereof); and that upon the confirmation and ratification of the said constitution, and by force thereof, the said state of Georgia became seized in absolute sovereignty, and in fee-simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid; the same being within the territory and jurisdiction of the said state, and the same state continued so seized in fee-simple, until the said tenements and soil were conveyed by letters patent under the great seal of the said state, and under the signature of George Matthews, Esq., Governor thereof, in the manner and form mentioned by the said Fletcher, in his said first count. And the said Peck further saith, that on the 7th of January, 1795, at a session of the general assembly of the said state duly holden at Augusta within the same, according to the provisions of the said constitution, the said general assembly, then and there possessing all the powers vested in the legislature of the said state by virtue of the said constitution, passed the act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which act is in the words following, that is to say, "An act supplementary," &c.

Here was recited the whole act, which, after a long preamble, declares the jurisdictional and territorial rights, and the fee-simple to be in the state, and then enacts, that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, "The Georgia Company," "The Georgia Mississippi Company," "The Upper Mississippi Company," and "The Tennessee Company."

The tract ordered to be sold to James Gunn and *others (the Georgia Company), was [***93** described as follows: "All that tract or parcel of land, including islands, situate, lying and being within the following boundaries; that is to say, beginning on the Mobile Bay where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay to the mouth of Lake Tensaw; thence up the said Lake Tensaw to the Alabama River, including Curry's, and all other islands therein; thence up the said Alabama River to the junction of the Coosa and Oakfushee Rivers; thence up the Coosa River above the big shoals to where it intersects the latitude of thirty-four degrees north of the equator; thence a due west course to the Mississippi River; thence down the middle of the said river to the latitude 32 deg. 40 min.; thence, a due east course to the Don or Tombigby River; thence down the middle of the said river to its junction with the Alabama River; thence down the middle of the said river to Mobile Bay; thence down the Mobile Bay to the place of beginning.

Upon payment of 50,000 dollars, the governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, being 200,000 dollars, payable on the first of November, 1795.

The plea then avers, that all the tenements described in the first count are included in, and parcel of, the lands in the said act to be sold to the said Gunn, M'Allister and Walker, and their associates, as in the act is mentioned.

And that by force and virtue of the said act, and of the constitution aforesaid, of the said state, the said Matthews, Governor of the said state, was fully and legally empowered to sell and convey the tenements aforesaid, and the soil thereof, subject as aforesaid, in fee-simple by the said patent under the seal of the said state, and under his signature, according to the terms, limitations, and conditions in the said act mentioned. And all this he is ready to verify; wherefore, &c.

*To this plea there was a general [***94** demurrer and joinder.

2d plea. To the second count the defendant, "protesting that the said Gunn, M'Allister and Walker, did not make the promises and assurances to divers members of the legislature of the said state of Georgia, supposed by the said Fletcher in his second count, for plea saith, that until after the purchase by the said Greenleaf, as is mentioned in the said second count, neither he the said defendant, nor the said Prime, nor the said Greenleaf, nor the said Phelps, nor the said Hichborn, nor either of them, had any notice nor knowledge that any such promises and assurances were made by the said Gunn, M'Allister and Walker, or either of them, to any of the members of the legislature of the said state of Georgia, as is supposed

by the said Fletcher in his said second count, and this he is ready to verify," &c.

To this plea also there was a general demurrer and joinder.

3d plea to the third count was the same as the second plea, with the addition of an averment that Greenleaf, Prince, Phelps, Hichborn and the defendant were, until and after the purchase by Greenleaf, on the 22d of August, 1795, and ever since have been, citizens of some of the United States other than the state of Georgia.

To this plea also there was a general demurrer and joinder.

4th plea. To the fourth count, the defendant pleaded that at the time of passing the act of the 7th of January, 1795, the state of Georgia was seized in fee-simple of all the tenements and territories aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and of this he puts himself on the country, and the plaintiff likewise.

95*] *Upon the issue joined upon the fourth plea, the jury found the following special verdict, viz.:

That his late majesty, Charles the second, King of Great Britain, by his letters patent under the great seal of Great Britain, bearing date the thirtieth day of June, in the seventeenth year of his reign, did grant unto Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkeley, Antony Lord Ashby, Sir George Carteret, Sir John Colleton, and Sir William Berkeley, therein called lords proprietors, and their heirs and assigns, all that province, territory, or tract of ground, situate, lying and being in North America, and described as follows: extending north and eastward as far as the north end of Carahtuke River or gullet, upon a straight westerly line to Wyonoahe Creek, which lies within or about the degrees of thirty-six and thirty minutes of northern latitude, and so west in a direct line as far as the South Seas, and south and westward as far as the degrees of twenty-nine inclusive, northern latitude, and so west in a direct line as far as the South Seas (which territory was called Carolina), together with all ports, harbors, bays, rivers, soil, land, fields, woods, lakes, and other rights and privileges therein named; that the said lords proprietors, grantees aforesaid, afterwards by force of said grant, entered upon and took possession of said territory, and established within the same many settlements, and erected therein fortifications and posts of defense.

And the jury further find, that the northern part of the said tract of land, granted as aforesaid to the said lords proprietors, was afterwards created a colony by the King of Great Britain, under the name of North Carolina, and that the most northern part of the thirty-fifth degree of north latitude was then and ever afterwards the boundary and line between North Carolina and South Carolina, and that the land, described in the plaintiff's declaration, is situate in that part of said tract, formerly called Carolina, which was afterwards a colony called South Carolina, as aforesaid; that afterwards, on the twenty-sixth day of July, in the third **96***] *year of the reign of His late Majesty George the second, King of Great Britain, and in the year of our Lord one thousand seven hundred and twenty-nine, the heirs or legal representatives of all the said grantees, except those of Sir George Carteret, by deed of indenture, made between authorized agents of the said King George the second, and the heirs and representatives of the said grantees, in conformity to an act of the parliament of said kingdom of Great Britain, entitled, "An act for establishing an agreement with seven of the lords proprietors of Carolina for the surrender of their title and interest in that province to his majesty," for and in consideration of the sum of twenty-two thousand five hundred pounds of the money of Great Britain, paid to the said heirs and representatives of the said seven of the lords proprietors, by the said agent of the said king, sold and surrendered to his said majesty, King George the second, all their right of soil, and other privileges to the said granted territory; which deed of indenture was duly executed and was enrolled in the Chancery of Great Britain, and there remains in the chapel of the rolls, That afterwards, on the ninth day of December, one thousand seven hundred and twenty-nine, His said Majesty, George the second, appointed Robert Johnson, Esq., to be Governor of the province of South Carolina, by a commission under the great seal of the said kingdom of Great Britain; in which commission the said Governor Johnson is authorized to grant lands within the said province, but no particular limits of the said province is therein defined.

And the jury further find, that the said Governor of South Carolina did exercise jurisdiction in and over the said colony of South Carolinia under the commission aforesaid, claiming to have jurisdiction by force thereof as far southward and westward as the southern and western bounds of the aforementioned grant of Carolina, by King Charles the second, to the said lords proprietors, but that he was often interrupted therein and prevented therefrom in the southern and western parts of said grants by the public enemies of the King of Great Britain, who at divers times *had actual possession of the [***97** southern and western parts aforesaid. That afterwards the Right Honorable Lord Viscount Percival, the Honorable Edward Digby, the Honorable George Carpenter, James Oglethorpe, Esq., with others, petitioned the lords of the committee of his said majesty's privy council for a grant of lands in South Carolina, for the charitable purpose of transporting necessitous persons and families from London to that province, to procure there a livelihood by their industry, and to be incorporated for that purpose; that the lords of the said privy council referred the said petition to the board of trade, so called, in Great Britain, who, on the seventeenth day of December, in the year of our Lord one thousand seven hundred and thirty, made report thereon, and therein recommended that his said majesty would be pleased to incorporate the said petitioners as a charitable society, by the name of "The Corporation for the purpose of establishing charitable colonies in America, with perpetual succession." And the said report further recommended, that his said majesty be pleased "to grant to the said petitioners and their successors forever, all that tract of land in his province of South Carolina, lying between the rivers Savannah and Alatamaha, to

be bounded by the most navigable and largest branches of the Savannah, and the most southerly branch of the Alatamaha." And that they should be separated from the province of South Carolina, and be made a colony independent thereof, save only in the command of their militia. That afterwards, on the twenty-second day of December, one thousand seven hundred and thirty-one, the said board of trade reported further to the said lords of the privy council, and recommended that the western boundary of the new charter of the colony, to be established in South Carolina, should extend as far as that described in the ancient patents granted by King Charles the second to the late lords proprietors of Carolina, whereby that province was to extend westward in a dircet line as far as the South Seas. That afterwards, on the ninth day of June, in the year of our Lord one thousand seven hundred and thirty-two, His **98***] said Majesty, George the *second, by his letters patent, or royal charter, under the great seal of the said kingdom of Great Britain, did incorporate the said Lord Viscount Percival and others, the petitioners aforesaid, into a body politic and corporate, by the name of "The trustees for establishing the colony of Georgia, in America, with perpetual succession;" and did, by the same letters patent, give and grant in free and common socage, and not *in capite*, to the said corporation and their successors, seven undivided parts (the whole into eight equal parts to be divided) of all those lands, countries and territories, situate, lying and being in that part of South Carolina in America, which lies from a nothern stream of a river there commonly called the Savannah, all along the sea-coast to the southward unto the most southern branch of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers respectively in direct lines to the South Seas, and all the lands lying within said boundaries, with the islands in the sea, lying opposite to the eastern coasts of the same, together with all the soils, grounds, havens, bays, mines, minerals, woods, rivers, waters, fishings, jurisdictions, franchises, privileges, and pre-eminences within the said territories. That afterwards, in the same year, the Right Honorable John Lord Carteret, Baron of Hawnes, in the county of Bedford, then Earl Granville, and heir of the late Sir George Carteret, one of the grantees and lords proprietors aforesaid, by deed of indenture between him and the said trustees for establishing the colony of Georgia in America, for valuable consideration therein mentioned, did give, grant, bargain and sell under the said trustees for establishing the colony of Georgia aforesaid, and their successors, all his one undivided eighth part of or belonging to the said John Lord Carteret (the whole into eight equal parts to be divided) of, in, and to the aforesaid territory, seven undivided eighth parts of which had been before granted by his said majesty to said trustees.

And the jury further find, that one-eighth part of the said territory, granted to the said lords proprietors, and called Carolina as afore-**99***] said, which eighth part belonged *to Sir George Carteret, and was not surrendered as aforesaid, was afterwards divided and set off in severalty to the heirs of the said Sir George Carteret in that part of said territory which was afterwards made a colony by the name of North Carolina. That afterwards, in the same year, the said James Oglethorpe, Esq., one of the said corporation, for and in the name of and as agent to the said corporation, with a large number of other persons under his authority and control, took possession of said territory, granted as aforesaid to the said corporation, made a treaty with some of the native Indians within said territory, in which, for and in behalf of said corporation, he made purchases of said Indians of their native rights to parts of said territory, and erected forts in several places to keep up marks of possession. That afterwards, on the sixth day of September, in the year last mentioned, on the application of said corporation to the said board of trade, they, the said board of trade, in the name of his said majesty, sent instructions to said Robert Johnson, then Governor of South Carolina, thereby willing and requiring him to give all due countenance and encouragement for the settling of the said colony of Georgia, by being aiding and assisting to any settlers therein; and further requiring him to cause to be registered the aforesaid charter of the colony of Georgia, within the said province of South Carolina, and the same to be entered of record by the proper officer of the said province of South Carolina.

And the jury further find, that the Governor of South Carolina, after the granting the said charter of the colony of Georgia, did exercise jurisdiction south of the southern limits of said colony of Georgia, claiming the same to be within the limits of his government; and particularly that he had the superintendency and control of a military post there, and did make divers grants of land there, which lands have ever since been holden under his said grants. That afterwards, in the year of our Lord one thousand seven hundred and fifty-two, by deed of indenture made between His said Majesty, George the second, of the one part, and the said trustees for establishing the *colony [***100** in America of the other part, they, the said trustees, for divers valuable considerations therein expressed, did, for themselves and their successors, grant, surrender, and yield up to His said Majesty, George the second, his heirs and successors, their said letters patent, and their charter of corporation, and all right, title and authority, to be or continue a corporate body, and all their powers of government, and all other powers, jurisdictions, franchises, pre-eminences and privileges therein, or thereby granted or conveyed to them; and did also grant and convey to His said Majesty, George the second, his heirs and successors, all the said lands, countries, territories and premises, as well the said one-eighth part thereof granted by the said John Lord Carteret to them as aforesaid, as also the said seven-eighths parts thereof, granted as aforesaid by his said majesty's letters patent or charter as aforesaid, together with all the soils, grounds, havens, ports, bays, mines, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminences, within said territories, with all their right, title, interest, claim or demand whatsoever in and to the premises; and which grant and surrender aforesaid, was then ac-

cepted by his said majesty for himself and his successors; and said indeuture was duly executed on the part of said trustees, with the privity and by the direction of the common council of the said corporation by affixing the common seal of said corporation thereunto, and on the part of his said majesty by causing the great seal of Great Britain to be thereunto affixed. That afterwards, on the sixth day of August, one thousand seven hundred and fifty-four, His said Majesty, George the second, by his royal commissiou of that date under the great seal of Great Britain, constituted and appointed John Reynolds, Esq., to be captain-general and commauder-in-chief in aud over said colouy of Georgia in America, with the following boundaries, viz.. lying from the most northerly stream of a river there commonly called Savannah, all along the sea coast to the southward unto the most southeru stream of a certain other great water or river called the Alatamaha, and westward from the heads of the said rivers respectively, in straight lines to the South Seas, and all the space, circuit and **101***] precinct of *land lying within the said boundaries, with the islands in the sea lyiug opposite to the eastern coast of said lands within twenty leagues of the same. That afterwards, on the tenth day of February, in the year of our Lord one thousand seven hundred and sixty-three, a definitive treaty of peace was concluded at Paris, between His Catholic Majesty, the King of Spain, and His Majesty, George the third, King of Great Britain; by the twentieth article of which treaty, His said Catholic Majesty did cede and guarauty, in full right to His Britannic Majesty, Florida, with Fort St. Augustin, and the bay of Pensacola, as well as all that Spaiu possessed on the continent of North America, to the east or to the south-east of the river Mississippi, and in general all that depended on the said countries and island, with the sovereignty, property, possession, and all rights acquired by treaties or otherwise, which the Catholic king aud the crown of Spaiu had till then over the said countries, lands, places, and their inhabitauts; so that the Catholic king did cedc aud make over the whole to the said kiug and the said crown of Great Britain, and that in the most ample manner and form.

That afterwards, on the seventh day of October, in the year of our Lord one thousand seven hundred and sixty-three, His said Majesty, George the third, King of Great Britain, by and with the advice of his privy council, did issue his royal proclamation, therein publishing and declaring, that he, the said King of Great Britain, had, with the advice of his said privy council, granted his letters patent, under the great seal of Great Britain, to erect withiu the couutries and islands ceded and coufirmed to him by the said treaty, four distiuct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada; in which proclamation the said government of West Florida is described as follows, viz.: Bounded to the southward by the Gulf of Mexico, including all islauds within six leagues of the coast from the river Apalachicola to Lake Pontchartrain, to the westward by the said lake, the Lake Maurepas, and the river Mississippi; to the northward by a *liue drawn due east from that part of [***102** the river Mississippi which lies in thirty-one degrees of north latitude, to the river Apalachichola or Catahouchee; and to the eastward by the said river. And in the same proclamation the said governmeut of East Florida is described as follows, viz., bounded to the westward by the Gulf of Mexico and the Apalachichola River; to the northward by a liue drawn from that part of the said river where the Catahouchee and Flint rivers meet, to the source of St. Mary's River, and by the course of the said river to the Atlantic ocean; and to the east and south by the Atlantic ocean and the Gulf of Florida, including all islands within six leagues of the sea coast. And in and by the same proclamation, all lands lyiug between the rivers Alatamaha and St. Mary's were declared to be annexed to the said province of Georgia; and that in and by the same proclamatiou, it was further declared by the said king as follows, viz.: "That it is our royal will and pleasure for the present, as aforesaid, to reserve uuder our sovereiguty, protectiou and dominion, for the use of the said Indians, all the land aud territories not included within the limits of our said three uew governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

And the jury find, that the land described in the plaintiff's declaration did lay to the westward of the sources of the rivers which fall iuto the sea from the west and north-west as aforesaid. That afterwards, on the twenty-first day of November, in the year of our Lord one thousand seven hundred and sixty-three, and in the fourth year of the reign of said King George the third, he, the said king, by his royal commission under the great seal of Great Britaiu, did constitute and appoint *George [***103** Johnstoue, Esq., captain-general aud governor in chief over the said province of West Florida in America; in which commission the said province was described in the same words of limitation and extent, as in said proclamation is before set down. That afterwards, on the twentieth day of January, in the year of our Lord one thousaud seven huudred and sixty-four, the said Kiug of Great Britain, by his commission under the great seal of Great Britain, did coustitute and appoint James Wright, Esq., to be the captain-general and goveruor in chief in and over the colony of Georgia, by the following bounds, viz., bounded on the north by the most northeru stream of a river there commonly called Savannah, as far as the head of the said river; and from thence westward as far as our territories extend; on the east, by the sea coast, from the said river Savannah to the most southern stream of a certain other river, called St. Mary (including all islands within twenty leagues of the coast lying between the said river Savannah and St. Mary, as far as the head thereof); and from thence

westward as far as our territories extend by the north boundary line of our provinces of East and West Florida.

That afterwards, from the year one thousand seven hundred and seventy-five, to the year one thousand seven hundred and eighty-three, an open war existed between the colonies of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, called the United States, on the one part, and His said Majesty, George the third, King of Great Britain, on the other part. And on the third day of September, in the year of our Lord one thousand seven hundred and eighty-three, a definitive treaty of peace was signed and concluded at Paris, by and between certain authorized commissioners on the part of the said belligerent powers, which was afterwards duly ratified and confirmed by the said two respective powers; by the first article of which treaty, the said King George the third, by the name of His Britannic Majesty, acknowl-
104*] edged the aforesaid United *States to be free, sovereign and independent states; that he treated with them as such, and for himself, his heirs and successors, relinquishes all claim to the government, proprietary and territorial rights of the same, and every part thereof; and by the second article of said treaty, the western boundary of the United States is a line drawn along the middle of the river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; and the southern boundary is a line drawn due east from the determination of the said line, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Catahouchee; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence down along the middle of St. Mary's River to the Atlantic Ocean.

And the jury further find, that in the year of our Lord one thousand seven hundred and eighty-two, the Congress of the United States did instruct the said commissioners, authorized on the part of the United States to negotiate and conclude the treaty aforesaid, that they should claim in this negotiation, respecting the boundaries of the United States, that the most northern part of the thirty-first degree of north latitude should be agreed to be the southern boundary of the United States, on the ground that that was the southern boundary of the colony of Georgia; and that the river Mississippi should be agreed to be the western boundary of the United States, on the ground that the colony of Georgia and other colonies, now states of the United States, were bounded westward by that river; and that the commissioners on the part of the United States did, in said negotiation, claim the same accordingly, and that on those grounds the said southern and western boundaries of the United States were agreed to by the commissioners on the part of the King of Great Britain. That afterwards, in the same year, the legislature of the state of Georgia passed an act, declaring her right, and proclaiming her title to all the lands lying within her boundaries to the river Mississippi. And in the year of our Lord one thousand seven hundred *and eighty-five, the [*
105 legislature of the said state of Georgia established a county, by the name of Bourbon, on the Mississippi, and appointed civil officers for said county, which lies within the boundaries now denominated the Mississippi territory; that thereupon a dispute arose between the state of South Carolina and the state of Georgia, concerning their respective boundaries, the said states separately claiming the same territory; and the said state of South Carolina, on the first day of June, in the year of our Lord one thousand seven hundred and eighty-five, petitioned the Congress of the United States for a hearing and determination of the differences and disputes subsisting between them and the state of Georgia, agreeably to the ninth article of the then confederation and perpetual union between the United States of America; that the said Congress of the United States did thereupon on the same day resolve, that the second Monday in May then next following should be assigned for the appearance of the said states of South Carolina and Georgia, by their lawful agents, and did then and there give notice thereof to the said state of Georgia, by serving the legislature of said state with an attested copy of said petition of the state of South Carolina, and said resolve of Congress. That afterwards, on the eighth day of May, in the year of our Lord one thousand seven hundred and eighty-six, by the joint consent of the agents of said states of South Carolina and Georgia, the Congress resolved that further day be given for the said hearing, and assigned the fifteenth day of the same month for that purpose. That afterwards, on the eighteenth day of May aforesaid, the said Congress resolved, that further day be given for the said hearing, and appointed the first Monday in September, then next ensuing, for that purpose. That afterwards, on the first day of September then next ensuing, authorized agents from the states of Carolina and Georgia attended in pursuance of the order of Congress aforesaid, and produced their credentials, which were read in Congress, and there recorded, together with the acts of their respective legislatures; which acts and credentials authorized the said agents to settle and compromise all the differences *and disputes aforesaid, as well as to [*
106 appear and represent the said states respectively before any tribunal that might be created by Congress for that purpose, agreeably to the said ninth article of the confederation. And in conformity to the powers aforesaid, the said commissioners of both the said states of South Carolina and Georgia, afterwards, on the 28th day of April, in the year of our Lord one thousand seven hundred and eighty-seven, met at Beaufort, in the state of South Carolina, and then and there entered into, signed, and concluded a convention between the states of South Carolina and Georgia aforesaid. By the first artiele of which convention it was mutually agreed between the said states, that the most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers then called Tugaloo and Keowee; and from thence the most northern branch or stream of said river Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or

stream of Tugaloo extends so far north, reserving all the islands in the said rivers Savannah and Tugaloo, to Georgia; but if the head, spring, or source of any branch or stream of the said river Tugaloo does not extend to the north boundary line of South Carolina, then a west course to the Mississippi, to be drawn from the head, spring, or source of the said branch or stream of Tugaloo River, which extends to the highest northern latitude, shall forever thereafter form the separation, limit, and boundary between the states of South Carolina and Georgia. And by the third article of the convention aforesaid, it was agreed by the said states of South Carolina and Georgia, that the said state of South Carolina should not thereafter claim any lands to the eastward, southward, south-eastward, or west of the said boundary above established; and that the said state of South Carolina did relinquish and cede to the said state of Georgia all the right, title, and claim which the said state of South Carolina had to the government, sovereignty, and jurisdiction in and over the same, and also the right and pre-emption of soil from the native Indians, and all the estate, property, and claim which the said state of South Carolina had in or to the said lands.

107*] *And the jury further find, that the land described in the plaintiff's declaration is situate south-west of the boundary line last aforesaid; and that the same land lies within the limits of the territory granted to the said lords proprietors of Carolina, by King Charles the second, as aforesaid, and within the bounds of the territory agreed to belong and ceded to the King of Great Britain, by the said treaty of peace made in seventeen hundred and sixty-three, as aforesaid; and within the bounds of the United States, as agreed and settled by the treaty of peace in seventeen hundred and eighty-three, as aforesaid; and north of a line drawn due east from the mouth of the said river Yazoos, where it unites with the Mississippi aforesaid. That afterwards, on the ninth day of August, in the year of our Lord one thousand seven hundred and eighty-seven, the delegates of said state of South Carolina in Congress moved, that the said convention, made as aforesaid, be ratified and confirmed, and that the lines and limits therein specified be thereafter taken and received as the boundaries between the said states of South Carolina and Georgia; which motion was by the unanimous vote of Congress committed, and the same convention was thereupon entered of record on the journals of Congress; and on the same day John Kean and Daniel Huger, by virtue of authority given to them by the legislature of said state of South Carolina, did execute a deed of cession on the part of said state of South Carolina, by which they ceded and conveyed to the United States, in Congress assembled, for the benefit of all the said states, all their right and title to that territory and tract of land included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary line of the state of North Carolina; and continuing along the said boundary line, until it intersects the ridge or chain of mountains which divides the eastern from the western waters; then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo River to the said mountains, and thence to run a due west course to the river Mississippi; which deed of cession was *thereupon received [***108** and entered on the journals of Congress, and accepted by them.

The jury further find, that the Congress of the United States did, on the sixth day of September, in the year of our Lord one thousand, seven hundred and eighty, recommend to the several states in the Union having claims to western territory, to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the Union. That afterwards, on the ninth day of August, in the year of our Lord one thousand seven hundred and eighty-six, the said Congress resolved, that whereas the states of Massachusetts, New York, Connecticut, and Virginia had, in consequence of the recommendation of Congress on the sixth day of September aforesaid, made cessions of their claims to western territory to the United States in Congress assembled, for the use of the United States, the said subject be again presented to the view of the states of N. Carolina, S. Carolina and Georgia, who had not complied with so reasonable a proposition; and that they be once more solicited to consider with candor and liberality the expectations of their sister states, and the earnest and repeated applications made to them by Congress on this subject. That afterwards, on the twentieth day of October, one thousand seven hundred and eighty-seven, the Congress of the United States passed the following resolve, viz., that it be and hereby is represented to the states of North Carolina and Georgia, that the lands, which have been ceded by the other states in compliance with the recommendation of this body, are now selling in large quantities for public securities; that the deeds of cession from the different states have been made without annexing an express condition, that they should not operate till the other states, under like circumstances, made similar cessions; and that Congress have such faith in the justice and magnanimity of the states of North Carolina and Georgia, that they only think it necessary to call their attention to these circumstances, not doubting but, upon consideration of the subject, they will feel those obligations which will induce similar cessions, and that confidence which has been *placed justify [***109** in them. That afterwards, on the first day of February, one thousand seven hundred and eighty-eight, the legislature of said state of Georgia, then duly convened, passed an act for ceding part of the territorial claims of said state to the United States; by which act the state of Georgia authorized her delegates in Congress to convey to the United States the territorial claims of said state of Georgia to a certain tract of country bounded as follows, to wit: beginning at the middle of the river Catahouchee or Apalachicola, where it is intersected by the thirty-first degree of north latitude, and from thence due north one hundred and forty miles, thence due west to the river Mississippi; thence down the middle of the said river to where it intersects the thirty-first degree of north latitude, and along the said degree to the place of beginning; annexing the pro-

visions and conditions following, to wit: That the United States in Cougress assembled, shall guaranty to the citizens of said territory a republican form of government, subject only to such changes as may take place in the federal constitution of the United States; secondly, that the navigation of all the waters included in the said cession shall be equally free to all the citizens of the United States; nor shall any tonnage on vessels, or any duties whatever, be laid on any goods, wares, or merchandises that pass up or down the said waters, unless for the use and benefit of the United States. Thirdly, that the sum of one hundred and seventy-one thousand and twenty-eight dollars, forty-five cents, which has been expended in quieting the minds of the Indians, and resisting their hostilities, shall be allowed as a charge against the United States, and be admitted iu payment of the specie requisition of that state's quotas that have been or may be required by the United States. Fourthly, that in all cases where the state may require defense, the expenses arising thereon shall be allowed as a charge against the United States, agreeably to the articles of confederation. Fifthly, that Congress shall guaranty and secure all the remaining territorial rights of the state, as pointed out and expressed by the definitive treaty of peace between the United States and Great Britain, the convention be-
110*] tween the said *state and the state of South Carolina; entered into the twenty-eighth day of April, in the year of our Lord one thousand seven hundred and eighty-seveu, and the clause of an act of the said state of Georgia, deseribing the boundaries thereof, passed the seventeenth day of February, in the year one thousand seven hundred and eighty-three, which act of the said state of Georgia, with said conditions annexed, was by the delegates of said state in Congress presented to the said Congress, and the same was, after being read, committed to a committee of Congress; who, on the fifteenth day of July, in the said year one thousand seven hundred and eighty-eight, made report thereon to Congress, as follows, to wit: "The committee, having fully considered the subject referred to them, are of opinion, that the cession offered by the state of Georgia cannot be accepted on the terms proposed; first, because it appears highly probable that on running the boundary line between that state and the adjoining state or states, a claim to a large tract of country extending to the Mississippi, and lying between the tract proposed to be ceded, and that lately ceded by South Carolina, will be retained by the said state of Georgia; and therefore the land which the state now offers to cede must be too far removed from the other lands hitherto ceded to the Union to be of any immediate advantages to it. Secondly, because there appears to be due from the state of Georgia, on specie requisitions, but a small part of the sum mentioned in the third proviso or conditiou before recited; and it is inipropei in this case to allow a charge against the specie requisitions of Congress which may hereafter be made, especially as the said state stands charged to the Uuited States for very considerable sums of money loaned. And, thirdly, beeause the fifth proviso or condition before recited contains a special guaranty of territorial rights, and such a guaranty has not been made by Congress to any state, and which, cousidering the spirit and meaning of the confederation, must be unnecessary and improper. But the committee are of opinion, that the first, second, and fourth provisions, before recited, and also the third, with some variations, may be admitted; and that, should the said state extend the bounds of her cession, *and vary the [***111** terms thereof as herein after mentioned, Congress may accept the same. Whereupon they submit the following resolutions: That the cession of claims to western territory, offered by the state of Georgia, cannot be accepted on the terms contained in her act passed the first of February last. That in case the said state shall authorize her delegates in Congress to make a cession of all her territorial claims to lands west of the river Apalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude, and shall omit the last proviso in her said act, and shall so far vary the proviso respecting the sum of one hundred and seveuty-one thousand four hundred and twenty-eight dollars, and forty-five cents, expended in quieting and resisting the Indians, as that the said state shall have credit in the specie requisitions of Congress, to the amount of her specie quotas on the past requisitions, and for the residue, in her account with the United States for moneys loaned, Congress will accept the cession." Which report beiug read, Congress resolved, that Congress agreed to the said report.

The jury further find, that in the year of our Lord one thousand seven hundred and ninety-three, Thomas Jefferson, Esq., then Secretary of State for the United States, made a report to the then President of the United States, which was intended to serve as a basis of instructions to the commissioners of the United States for settling the points which were theu in dispute between the King of Spain and the government of the United States; one of which points in dispute was, the just boundaries between West Florida and the southern line of the United States. On this point, the said Secretary of State, in his report aforesaid, expresses himself as follows, to wit: "As to boundary, that between Georgia and West Florida is the only oue which needs any explanation. It (that is, the court of Spain) sets up a claim to possessions withiu the state of Georgia, founded on her (Spain) having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply. The several states now composing the Uuited States *of America were, from their first es- [*112 tablishment, separate and distinct societies, dependent on no other society of men whatever. They continued at the head of their respective governments the executive magistrate who presided over the one they had left, and thereby secured in effect a constant amity with the nation. In this stage of their government their several boundaries were fixed, and particularly the southern boundary of Georgia, the only one now in questiou, was established at the thirty-first degree of latitude, from the Apalachicola westwardly. The southern limits of Georgia depend chiefly on, first, the charter of South Carolina, &c. Secondly, on the proclamation of the British king, in one thousand seveu hundred and sixty-

three, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in thirty-one degrees of north latitude, and running eastwardly to the Apalachicola, &c. That afterwards, on the seventh day of December, of the same year, the commissioners of the United States for settling the aforesaid disputes, in their communications with those of the King of Spain, express themselves as follows, to wit: 'In this stage of their (meaning the United States) government, the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the proclamation of the King of Great Britain, their chief magistrate, in the year one thousand seven hundred and sixty-three, at a time when no other power pretended any claim whatever to any part of the country through which it ran. The boundary of Georgia was thus established: to begin in the Mississippi, in latitude thirty-one north, and running eastward to the Apalachicola,' &c. From what has been said, it results, first, that the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year seventeen hundred and sixty-three. Secondly, that it has been confirmed by the only power that could at any time have pretensions to contest it."

That afterwards, on the tenth day of August, in the year 1795, Thomas Pinckney, **113***] Esq., minister plenipotentiary *of the United States at the court of Spain, in a communication to the prince of peace, prime minister of Spain, agreeably to his instructions from the President of the United States on the subject of said boundaries, expresses himself as follows, to wit: "Thirty-two years have elapsed since all the country on the left or eastern bank of the Mississippi, being under the legitimate jurisdiction of the King of England, that sovereign thought proper to regulate with precision the limits of Georgia and the two Floridas, which was done by his solemn proclamation, published in the usual form; by which he established between them precisely the same limits that, near twenty years after he declared to be the southern limits af the United States, by the treaty which the same King of England concluded with them in the month of November, seventeen hundred and eighty-two."

That afterwards, on the 27th day of October, in the year seventeen hundred and ninety-five, a treaty of friendship, limits and navigation, was concluded between the United States and His Catholic Majesty the King of Spain; in the second article of which treaty it is agreed, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the river Apalachicola or Catahouchee, thence along the middle thereof to its junction with the Flint, thence straight to the head of St. Mary's river, and thence down the middle thereof to the Atlantic Ocean."

But whether, upon the whole matter, the state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the plaintiff, in his assignment of the breach in the fourth count of his declaration, was seized in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title *to part thereof, the jury are ignorant, [***114** and pray the advisement of the court thereon; and if the court are of opinion that the said state of Georgia was so seized at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was seized in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not broken, but hath kept the same.

But if the court are of opinion that the said state of Georgia was not so seized at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher in his assignment of the breach in the fourth count of his declaration, was not seized of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof; and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not kept, but broken the same; and assess damages for the plaintiff, for the breach thereof, in the sum of three thousand dollars, and costs of suit.

Whereupon it was considered and adjudged by the court below, that on the issues on the three first counts, the several pleas are good and sufficient, and that the demurrer thereto be overruled; and on the last issue, on which there is a special verdict, that the state of Georgia was seized, as alleged by the defendant, and that the defendant recover his costs.

The plaintiff sued out his writ of error, and the case was twice argued, first by Martin, for the plaintiff in error, and by J. Q. Adams and R. G. Harper, for the *defendant, at [***115** February term, 1809, and again at this term by Martin, for the plaintiff, and by Harper and Story, for the defendant.

Martin, for the plaintiff in error.

The first plea is no answer to the first count. The breach of the covenant complained of is, that "the legislature had no authority to sell and dispose of" the land, but the plea is, that "the said Matthews, governor of the said state, was fully and legally empowered to sell and convey" the land. Although the governor had authority to sell, *non constat* that the legislature had.

The same objection applies to the second plea; it is an answer to the inducement, not to the point of the plea. The breach assigned in the second count is, "that the title which the state of Georgia at any time had in the premises was never legally conveyed to the said Peck by force of the conveyances aforesaid."

The improper influence upon the members of the legislature was only inducement.

The plea is, the defendant had no notice nor

knowledge of the improper means used. It is no answer to the breach assigned.

The same objection applies also to the third plea.

It appears upon the special verdict that the state of Georgia never was seized in fee of the lands. They belonged to the crown of Great Britain, and at the revolution devolved upon the United States, and not upon the state of Georgia.

When the colonies of North Carolina and South Carolina were royal colonies, the king limited the boundaries, and disannexed these lands from Georgia.

Argument for the defendant in error.

The first fault of pleading is in the declaration.

116*] *The breach of the covenant is not well assigned in the first count. The covenant is, that the legislature had good right to sell. The breach assigned is, that the legislature had no authority to sell. Authority and right are words of a different signification. Right implies an interest: authority is a mere naked power.

But if the breach be well assigned, the plea is a substantial answer to it, for if the governor derived full power and authority from the legislature to sell, the legislature must have had that power to give. The plea shows the title to be in the state of Georgia.

The objection is only to the form of the plea, which cannot prevail upon a general demurrer.

Two questions arise upon the issue joined upon the 4th plea.

1st. Whether the title was in the state of Georgia; and, 2d. Whether it was in the United States.

At the beginning of the revolution the lands were within the bounds of Georgia. These bounds were confirmed by the treaty of peace in 1783, and recognized in the treaty with Spain in 1795, and by the cession to the United States in 1802.

The United States can have no title but what is derived from Georgia.

The title of Georgia depends upon the facts found in the special verdict.

The second charter granted by George the 2d, in 1732, includes these lands, the bounds of that grant being from the Savannah to the Alatamaha, and from the heads of those rivers respectively, in direct lines, to the South Sea.

It is not admitted that the king had a right to enlarge or diminish the boundaries even of royal provinces.

117*] *The exercise of that right, even by parliament itself, was one of the violations of right upon which the revolution was founded; as appears by the declaration of independence, the address to the people of Quebec, and other public documents of the time.

This right, claimed by the king, was denied by Virginia and North Carolina in their constitutions. See the article of the constitution of Virginia respecting the limits of that State, and the 25th section of the declaration of rights of North Carolina. (1 Belsham's Hist. of Geo. 3d, The Quebec Act, and the Collection of State Constitutions, p. 180.)

The right was denied by the commissioners on the part of the United States, who formed the treaty, and was given up by Great Britain when the present line was established.

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But the proclamation of 1763 did not profess or intend to disannex the western lands from the province of Georgia. The king only declares that it is his royal will and pleasure for the present "as aforesaid," to reserve under his sovereignty, protection and dominion, for the use of the Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest; and he thereby forbids his subjects from making purchases or settlements, or taking possession of the same.

This clause of the proclamation cannot well be understood without the preceding section to which it refers, by the words "as aforesaid."

The preceding clause is, "that no governor or commander-in-chief of our other colonies or plantations in America, *i. e.* (other than the colonies of Quebec, East Florida and West Florida), do presume for the present, and until our further pleasure be known, to grant warrants of surveys, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic ocean from the west or north-west; or upon any lands whatever which, not having been *ceded to, [***118** or purchased by us, as aforesaid, are reserved to the said Indians, or any of them."

Then comes the clause in question, which is supposed to have disannexed these lands from Georgia, as follows: "And we do further declare it to be our royal will and pleasure for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid," &c.

It was a prohibition to all the governors of all the colonies, and a reservation of all the western lands attached to all the colonies. But it was only a temporary reservation for the use of the Indians.

If this proclamation disannexed these lands from Georgia, it also disannexed all the western lands from all the other colonies. But if they were disannexed by the proclamation, they were re-annexed three months afterwards by the commission to Governor Wright, on the 20th of January, 1764.

It appears by the report of the Attorney General, as well as by Mr. Chalmers's observations, that it never was the opinion of the British government that these lands were disannexed by the proclamation.

If they were not re-annexed before, they certainly were by the treaty of peace.

At the commencement of the revolution, the lands then belonged to and formed a part of the province of Georgia.

By the declaration of independence the several states were declared to be free, sovereign and independent states; and the sovereignty of each, not of the whole, was the principle of the revolution; there was no connection between them, but that of necessity and self-defence, and in what manner each should contribute to the *common cause was a [***119** matter left to the discretion of each of the states. By the second article of the confederation the sovereignty of each state is confirmed, and all the rights of sovereignty are declared to be retained which are not by that instrument

expressly delegated to the United States in Congress assembled. It provides also that no state shall be deprived of territory for the benefit of the United States.

On the 25th of February, 1783, the legislature of Georgia passed an act declaring her boundaries, before the definitive treaty of peace. This declaration of Georgia was not contradicted by the United States in any public act.

In 1785, Georgia passed an act erecting the county of Bourbon in that territory; this produced a dispute with South Carolina, which ended in the acknowledgment of the right of Georgia to these lands. (See the third article of the convention between South Carolina and Georgia.)

The same boundaries are acknowledged by the United States in their instructions, given by the Secretary of State, Mr. Jefferson, in 1793, to the commissioners appointed to settle the dispute with Spain respecting boundaries.

The United States certainly had no claim at the commencement of the revolution, nor at the declaration of independence, nor under the articles of confederation.

During the progress of the revolution a demand was made by two or three of the states, that crown lands should be appropriated for the common defense. But Congress never asserted such a right. They only recommended that cessions of territory should be made by the states for that purpose.

The journals of Congress are crowded with proofs of this fact. See journals of Congress, 16th September, 1776, vol. 2, p. 336; 30th of **120***] October, 1776; 15th *October, 1777, vol. 3, p. 345; 27th October, 1777, vol. 3, p. 363; 22d June, 1778, vol. 4, p. 262; 23d and 25th June, 1778. p. 269; 1779, vol. 5, p. 49; 21st May, 1779, vol. 5, p. 158; 1st March, 1781; Resolution of 1780, vol. 6, p. 123; 12th February, 1781, vol. 7, p. 26; 1st March, 1781; 29th October, 1782, vol. 8, p. —.

At the treaty of peace, there was no idea of a cession of land to the United States by Great Britain. The bonnds of the United States were fixed as the bonnds of the several states had been before fixed. The United States did not claim land for the United States as a nation; they claimed only in right of the individual states. Great Britain yielded the principle of the royal right to disannex lands from the colonies, and acquiesced in the principle contended for by the United States, which was the old boundary of the several states. See Chief Justice Jay's opinion in the case of *Chisholm* v. *The State of Georgia*, reported in a pamphlet published in 1793.

The United States then had no title by the treaty of peace. She has since (viz., in 1788) declined accepting a cession of the territory from Georgia, not because the United States had already a title, but because the lands were too remote, &c.

There is nothing in the constitution of the United States which can give her a title. By the third section of the fourth article the claims of particular states are saved.

The public acts since the adoption of the new constitution are the instructions to the commissioners in 1793, to settle the boundaries with Spain; the treaty with Spain, 27th October, 1795; the act of Congress of 7th April, 1798, (vol. 4, p. 90); the act of 10th of May, 1800; the remonstrance of Georgia, in December, 1800; and the cession by Georgia to the United States in 1802. All these public acts recognized the title to be in Georgia.

*If, then, Georgia had good title on [***121** the 7th of January, 1795, the next question is, had the legislature of that state a right to sell?

By the revolution, all the right and royal prerogatives devolved upon the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of disposing of the lands belonging to the state naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. The sale itself was not a legislative act. It was not an act of sovereignty, but a mere conveyance of title. (2 Tucker's Bl. Com., 53, 57; Montesquieu, b. 26, c. 15; 2 Dal., 320; 4 Dal., 14, *Cooper* v. *Telfaire*. Constitution of Georgia, Art. 1, § 16. Digest of Georgia Laws of 7th June, 1777, 1780, 1784, 1785, 1788, 1789, and 1790.) These show the universal practice of Georgia in this respect.

A doubt has been suggested whether this power extends to lands to which the Indian title has not been extinguished.

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. (Vattel, b. 1, § 81, p. 37, and § 209; b. 2, § 97; Montesquieu, b. 18, c. 12; Smith's Wealth of Nations, b. 5, c. 1.) It is a right not to be transferred but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

Although the power to extinguish this right by treaty is vested in Congress, yet Georgia had a right to sell subject to the Indian claim. The point has never been decided in the courts of the United States, because it has never before been questioned.

The right has been exercised and recognized by all the states.

*There was no objection to the sale [***122** arising from the constitution of Georgia. With regard to state constitutions, it is not necessary that the powers should be expressly granted, however it may be with the constitution of the United States. But it is not constitutional doctrine even as it applies to the legislature of the United States.

The old articles of confederation limited the powers of Congress to those expressly granted. But in the constitution of the United States, the word expressly was purposely rejected. See the Federalist, and Journals of House of Rep., 21st August, 1789. Journal of Senate, 7th September, 1789.

But if the legislature of Georgia could only exercise powers expressly given, they had no power to abrogate the contract.

A question has been suggested from the bench whether the right which Georgia had before the extinguishment of the Indian title, is such a right as is susceptible of conveyance, and whether it can be said to be a title in fee-simple?

The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil but a right of occupation. A right not individual but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives. Even Penn claimed under the right of conquest. He took under a charter from the King of England, whose right was the right of conquest. Hence the feudal tenures in this country. All the treaties with the Indians were the effect of conquest. All the extensive grants have been forced from them by successful war. The conquerers permitted the conquered tribes to occupy part of the land until it should be wanted for the use of the conquerors. Hence **123***] the acts of legislation *fixing the lines and bounds of the Indian claims; hence the prohibition of individual purchasers, &c.

The rights of governments are allodial. The crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When that claim was extinguished, the grantee was always admitted to have acquired a complete title. The Indian title is a mere privilege which does not affect the allodial right.

The legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void; that is the exercise of a judicial, not a legislative function. It is the province of the judiciary to say what the law is, or what it was. The legislature can only say what it shall be.

The legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contract. A grant is a contract executed, and it creates also an implied executory contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant.

The validity of a law cannot be questioned because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal to disregard the law.

This would open a source of litigation which could never be closed. The law would be differently decided by different juries; innumerable perjuries would be committed, and inconceivable confusion would ensue.

But the parties now before the court are innocent of the fraud, if any has been practiced. They were *bona fide* purchasers, for a valuable consideration, without notice of fraud. They cannot be affected by it.

124*] *Martin*, in reply.

All the western lands of the royal governments were wholly disannexed from the colonies and reserved for the use of the Indians. Georgia never had title in those lands. It is true that Great Britain did undertake to extend the bounds of the royal provinces. The right was not denied, but the purpose for which it was executed.

By the proclamation, if offenders should escape into those territories, they are to be arrested by the military force and sent into the colony for trial.

In Governor Wright's commission the western boundary of the colony is not defined. The jury has not found whether the lands were within Governor Wright's commission.

As to the Indian title.

The royal provinces were not bodies politic for the purpose of holding lands. The title of the lands was in the crown. There is no law authorizing the several states to transfer their right subject to the Indian title. It was only a right of pre-emption which the crown had. This right was not by the treaty ceded to Georgia, but to the United States. The land when purchased of the Indians is to be purchased for the benefit of the United States. There was only a possibility that the United States would purchase for the benefit of Georgia. But a mere possibility cannot be sold or granted.

The declarations and claims of Georgia could not affect the rights of the United States.

An attempt was made in Congress to establish the principle that the land belonged to the United States; but the advocates of that doctrine were overruled by a majority. This, however, did not decide the question of right.

*The states which advocated that prin- [**125** ciple did not think proper to refuse to join the confederacy because it was not inserted among the articles of confederation, but they protested against their assent to the Union being taken as evidence of their abandonment of the principle.

Nor is the assent of Congress to the commission for settling the bounds between South Carolina and Georgia, evidence of an acknowledgment, on the part of the United States, that either of those states was entitled to those lands.

March 11, 1809. MARSHALL, *Ch. J.*, delivered the opinion of the court upon the pleadings, as follows:

In this cause there are demurrers to three pleas filed in the Circuit Court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant.

To support this judgment, this court must concur in overruling all the demurrers; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words: "that the legislature of the said state (Georgia), at the time of the passing of the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act."

The breach of this covenant is assigned in these words: "now the said Fletcher saith that, at the time when the said act of the legislature of Georgia, entitled an act, &c., was passed, the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act."

*The plea sets forth the constitution [**126** of the state of Georgia, and avers that the lands lay within that state. It then sets forth the act of the legislature, and avers that the lands described in the declaration are included within those to be sold by the said act; and that the

governor was legally empowered to sell and convey the premises.

To this plea the plaintiff demurred; and the defendant joined in the demurrer.

If it be admitted that sufficient matter is shown, in this plea, to have justified the defendant in denying the breach alleged in the count, it must also be admitted that he has not denied it. The breach alleged is, that the legislature had not authority to sell. The bar set up is, that the governor had authority to convey. Certainly an allegation, that the principal has no right to give a power, is not denied by alleging that he has given a proper power to the agent.

It is argued that the plea shows, although it does not, in terms, aver, that the legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative.

Had the plaintiff tendered an issue in fact upon this plea, that the governor was legally empowered to sell and convey the premises, it would have been a departure from his declaration; for the count to which this plea is intended as a bar alleges no want of authority in the governor. He was therefore under the necessity of demurring.

But it is contended that although the plea be substantially bad, the judgment, overruling the demurrer, is correct, because the declaration is defective.

The defect alleged in the declaration is, that [*127] the *breach is not assigned in the words of the covenant. The covenant is, that the legislature had a right to convey, and the breach is, that the legislature had no authority to convey.

It is not necessary that a breach should be assigned in the very words of the covenant. It is enough that the words of the assignment show, unequivocally, a substantial breach. The assignment under consideration does show such a breach. If the legislature had no authority to convey, it had no right to convey.

It is, therefore, the opinion of this court, that the Circuit Court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought therefore to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration.

The cause having been again argued at this term,

March 16, 1810. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach *in the second covenant con- [*128] tained in the deed. The covenant is, "that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in the manner pointed out by the said act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the *year 1789, the court can [*129] perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the Circuit Court committed no error.

The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers

of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c., and so the title of the state of Georgia did not pass to the said Peek, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

130*] *That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme soverign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to **131***] the court, by *this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The Circuit Court, therefore, did right in overruling this demurrer.

The 4th covenant in the deed is, that the title to the premises has been in no way, constitutionally or legally, impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practiced on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The *count proceeds to recite [***132** at large, this rescinding act, and concludes with averring that, by reason of this act the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions, presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be

assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the peo- **133*** ple can *act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be inse- **134*** cure, and the intercourse *between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that *guilt which]***135** infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyanees have been made; those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a faet, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the aet of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

*To the legislature all legislative [***136** power is granted; but the question, whether the act of transferring the property of an indi-

vidual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract [*137] executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent [*138] acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This [*139] cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the

courts of the United States for that violation. Would it have been a defense in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof subject only to the extinguishment of part of the Indian title thereon.

140*] *The 4th count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this count the defendant pleads, that the state of Georgia was seized; and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina by Charles second to the Earl of Clarendon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas surrendered to George second in the year 1729, who appointed a governor of South Carolina.

That, in 1732, George the second granted, to the Lord Viscount Percival and others, seven-eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia.

That the governor of South Carolina continued to exercise jurisdiction south of Georgia.

That, in 1752, the grantees surrendered to the crown.

That, in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between **141***] Great *Britain and Spain, in 1763, in which the latter ceded to the former Florida, with fort St. Augustine and the bay of Pensacola.

That, in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That, in November, 1763, a commission was issued to the governor of Georgia, in which the boundaries of that province are described as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent states.

That in April, 1787, a convention was entered into between the states of South Carolina and Georgia settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians, contained in the proclamation *of 1763, [***142** excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state

of Georgia, and that the state of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seized in fee of lands, subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly **143***] to be respected *by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.

Judgment affirmed with costs.

JOHNSON, *J.* In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

144*] *As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt.

The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and effect of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word "obligation," *which [***145** certainly imports an existing moral or physical necessity. Now, a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count we are *called upon [***146**

substantially to decide, "that the state of Georgia, at the time of passing the act of cession, was legally seized in fee of the soil (then ceded), subject only to the extinguishment of part of the Indian title." That is, that the state of Georgia was seized of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favor of it, but to me it appears that the facts in the case are sufficient to support the opinion that the state of Georgia had not a fee-simple in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles.

The question is, whether it can be correctly predicated of the interest or estate which the state of Georgia had in these lands, "that the state was seized thereof, in fee-simple."

To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyanee thereof could operate legally only as a covenant to convey or to stand seized to a use.

The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside: others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties **147***] formed with them *acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an interest to them and their heirs. A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was anything more than a mere possibility, it certainly was reduced to that state when the state of Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, *however, [***148** in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

Distinguished—4 Pet. 563; 6 McLean, 582.
Approved—4 Wheat. 656, 682; 8 Wheat. 92; 16 Wall. 232; 1 Woods, 423.
Cited—7 Cranch, 166; 12 Wheat. 294; 2 Pet. 413; 5 Pet. 48, 57, 70; 6 Pet. 738; 11 Pet. 634, 645; 12 Pet. 454, 729; 13 Pet. 201; 6 How. 331; 9 How. 469; 10 How. 402; 16 How. 384; 17 How. 463; 18 How. 371, 378, 534; 19 How. 50; 1 Black, 374; 4 Wall. 322, 326, 549; 9 Wall. 38; 12 Wall. 531, 581; 13 Wall. 213; 15 Wall. 489; 17 Wall. 206; 2 Otto 754; 6 Otto 525, 597; 7 Otto 384; 9 Otto 313; 11 Otto. 410; 1 Abb. U. S. 52, 76, 253; 1 Bald. 220; Id. 316; 7 Bank. Reg. 258; 2 Gall. 138; 4 McLean 267; 1 Sum. 510; 3 Wash. 541, 542; 2 Ware (Dav.) 356; 2 Paine 80; 3 Cranch C. C. 686; 4 Cranch C. C. 600.

MASSIE *v.* WATTS.

The practice in Kentucky to call a jury to ascertain the facts in chancery causes is incorrect.

A suit in chancery by one who has the prior equity against him who has the eldest patent is in its nature local, and if it be a mere question of title, must be tried in the district where the land lies.

But if it be a case of contract, or trust, or fraud, it is to be tried in the district where the defendant may be found.

If, by any reasonable construction of an entry, it can be supported, the court will support it.

When a given quantity of land is to be laid off on a given base, it shall be included within four lines forming a square, as nearly as may be, unless the form be repugnant to the entry.

If the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of certain principles, they will complete it.

If a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry, may be discarded.

The rectangular figure is to be preserved, if possible.

If an agent locate land for himself which he ought to locate for his principal, he is in equity a trustee for his principal.

THIS was an appeal from the decree of the Circuit Court of the United States, for the District of Kentucky, in a suit in equity brought

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NOTE.—An agent, or trustee, cannot directly, or indirectly, become the purchaser of property confided to his care. Church v. Mar. Ins. Co., 1 Mason, 341; Torrey v. B'k Orleans, 9 Paige, 649; 7 Hill., 260; Dobson v. Racey, 3 Sand., Ch. 60; Baker v. Whiting, 3 Sumner, 476.

by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the state of Ohio, the defendant having obtained the legal title with notice of the plaintiff's equitable title.

The bill stated that the defendant Massie (the appellant) had contracted with a certain Ferdinand Oneale, to locate and survey for him a military warrant for 4,000 acres in his name, (which the plaintiff afterwards purchased for a valuable consideration,) and to receive for his services in locating and surveying the same, the sum of 50*l.*, which the plaintiff paid him. That the defendant located the said warrant with the proper surveyor, and being himself a surveyor, he fraudulently made a survey purporting to be a survey of part of the entry, but variant from the same, and contrary to law, whereby the survey was entirely removed from the land entered with the surveyor, for the fraudulent purpose of giving way to a claim of the defendant's which he surveyed on the land entered for the plaintiff, whereby the plaintiff lost the land, and the defendant obtained the legal title. That the land adjoins the town of Chillicothe, and is worth fifteen dollars an acre. The bill prays that the defendant may **149*]** be compelled to convey the *land to the plaintiff, or if that is not in his power, that he make compensation in damages.

The defendant, by his answer, denied that he contracted with the plaintiff to locate and survey the warrant in the name of Oneale, but admits that, in 1787, he was requested by W. Ellzey, to locate the warrant for Oneale; that Ellzey informed him he was not authorized to make any special contract with the defendant for his services, but he had no doubt, if he did the business, he would receive the customary compensation, which was 12*l.* 10*s.* per 1,000 acres, or one third of the land.

He admits that he made the entry, and that the plaintiff has paid him the 50*l.* But he denies that he made the survey improperly, or with a fraudulent intention. He says that in the year 1793, as a deputy surveyor, he surveyed the land on the Scioto, on which the claim of Oneale depended; but not wishing to take upon himself the construction of Oneale's entry, he merely meandered the river, and referred the question to the principal surveyor, by whose directions he made the survey for Oneale in 1796, and without any instructions from Oneale or any agent for him. That when the entry was made, the country had been but recently explored, and none of the locators knew by survey the meanders of the Scioto. He does not admit that the entry has been surveyed contrary to location, but he surveyed it as he would have surveyed it for himself.

He admits he made an entry for himself, and intended to appropriate the vacant land, but it was not by any procurement of his that his patent was prior to Oneale's. That the plaintiff did not become wholly interested in the claim until long after the survey was made.

After the defendant's answer came in, the plaintiff amended his bill by making Anderson (the principal surveyor) a defendant, and charged that if the survey for Oneale was made by the directions of Anderson, as alleged by the defendant Massie, it was with a fraudulent design on the part of Anderson to appropriate *to himself the land described in Oneale's [***150** entry, and that if he had no design, he was still responsible for the consequences of the illegal survey.

Anderson by his answer denies all fraud, and most positively denies that he gave Massie any instructions to make the survey, as falsely stated in the bill. That the survey was made of 530 acres, in part of the entry, which survey was returned to his (Anderson's) office, and which he did not record for about the term of one year from the time he received it, doubting whether the survey had been properly made; but after a critical examination of the subject he concluded that it was not improperly made and recorded it.

The plaintiff amended his bill again by charging that the defendant Massie was the owner of Powell's entry, and had surveyed and obtained a grant therefor, and calling upon

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A purchase by agent, will be, in equity, a purchase for the principal. Baker v. Whiting, 3 Sumn., 475.

If agent discovers a defect in title of his principal, he cannot misuse it to acquire title to himself; if he does, he will be held trustee for his principal. Ringo v. Binns, 10 Pet., 269.

If agent, redeeming land sold for taxes, takes title to himself, he will hold as trustee for his principal. Schedda v. Sawyer, 4 McLean, 181; Curts v. Cisna, 7 Biss., 260.

Where one entrust another as his agent to purchase land for him, and the agent purchases the land in his own name, equity will compel such faithless agent to respond to his principal. Heacock v. Coatesworth, Clarke, Ch., 84; Manning v. Hayden, 5 Sawyer, 360; 7 Reporter, 423; 13 West. Jur., 317.

Agent, employed to purchase for another, cannot purchase for himself. In such case, he is trustee for his employer. The principal is the equitable owner, and can maintain action for conveyance of the land. Church v. Sterling, 16 Conn., 388; Banks v. Judah, 8 Conn., 145; Johnson v. Blackman, 11 Conn., 342; Massy v. Davis, 1 Vesey, Jr., 317; East I. Co. v. Henchman, 1 Ves. Jr., 289; Taylor v. Salmon, 2 Croup. & Mees., 139; Bartholomew v. Leach, 7 Watts, 472; Lear v. Matthews, Wright R., 374; Parkhist v. Alexander, 1 John, Ch., 394; 18 N. Y., 448; 11 Barb., 399, 400, 382; 2 Paige, 238; Safford v. Hynds, 39 Barb., 625; Beal v. McKiernan, 6 Mill, Louis, 407.

An agent employed to collect a mortgage, cannot purchase the property at foreclosure sale, either directly, or through the agency of a third person. Moore v. Moore, 5 N. Y., 256; S. C., 4 Sandf. Ch., 37, except by express assent of his principal. Dobson v. Racey, 8 N. Y., 216.

Agent employed to buy, cannot buy from himself, without full knowledge and consent of his principal. 17 Barb., 132; 14 N. Y., 85; 3 Beav., 78; 3 Sim., 216; Conkey v. Bond, 34 Barb., 276; Copeland v. Ins. Co., 6 Pick. 196; Reed v. Warner, 5 Paige, 650; Lowther v. Lowther, 13 Ves., 103.

Agent cannot act for both parties. Cussan v. Hinman, 6 Bosw., 8; nor in regard to a contract in which he has any interest. The act of the agent is unauthorized, and contract void. Claflin v. Farm & Cit. B'k, 24 How., Pr., 1, reversing S. C., 36; Barb., 540; Reed v. Norris, 2 M. & Craig, 374; 2 Mylne & K., 819; 1 Russ. & Mylne, 53; Wright v. Dannah, 2 Camp., 203; 2 Chitty R., 205.

Agent employed to sell cannot buy the property in question. McDould v. Lord, 2 Robt., 7.

An agent who confessedly buys property for his principal, but by mistake or fraud takes the title in his own name, will not be permitted to profit by his omission to take the conveyance in the name of his principal. Reitz v. Reitz, 80 N. Y., 538, reversing S. C., 14 Hun., 536.

him to answer when he became the purchaser of Powell's right.

To this Massie answered, that after surveying Oncale's entry in the spring of 1797, he purchased Robert Powell's survey, before which time he had no interest in the land, and has sold the whole of it, but made a conveyance of only a part.

There had been certain facts found in the cause by a jury according to a practice heretofore adopted in chancery suits in the courts of Kentucky, but the court ordered "that the facts found by the jury should be set aside."

The following opinion of Judge Innis (Judge Todd being absent), states the facts of the case so fully that nothing need be added in stating the case.

"The complainant having acquired the equitable right to certain lands conferred on Ferdinand Oncale by the state of Virginia, as a bounty for military services performed by him as an officer during the revolutionary war, has instituted this suit with a double aspect, first, to recover one thousand acres of land, which **151*]** *had been entered for Oncale on the Scioto river, upon a suggestion that the defendant Massie, who was the locator, had wrongfully deprived him of the land, by surveying Robert Powell's entry so as to cover part of Oncale's land, and, by a subsequent entry and survey of his own, hath taken the balance. Secondly, if the complainant shall establish his right to the land in contest, and cannot obtain a conveyance therefor, that the decree may be for the value thereof, in money. It appears from the pleadings in the cause that the defendant Massie has purchased Powell's land, and that he has appropriated, by entry and survey, the adjoining land. The three following entries were made upon the Scioto River adjoining each other. "No. 480, 1787, August 13, Major Thomas Massie enters 1,400 acres of land beginning at the junction of Paint Creek with the Scioto, running up the Scioto 520 poles when reduced to a straight line, thence off at right angles from the general course of the river so far that a line parallel thereto will include the quantity."

"No. 503, Captain Robert Powell enters one thousand acres of land beginning at the upper corner, on the Scioto, of Major Thomas Massie's entry. No. 480, running up the river 520 poles when reduced to a straight line, thence from the beginning, with Massie's line so far that a line parallel to the general course of the river shall include the quantity,"

"No. 509, Captain Ferdinand Oneale enters one thousand acres beginning at the upper corner on the Scioto of Robert Powell's entry. No. 503, running up the river 520 poles when reduced to a straight line, and from the beginning with Powell's line so far that a line parallel with the general course of the river shall include the quantity." Surveys have been made upon the entries of Thomas Massie and Robert Powell, so as to cover almost the whole base of 1,560 poles, the space which was allotted for the three claims on the river, and 530 acres of land have been surveyed for Oncale, by the defendant Massie in part of his entry, which it is impossible upon any construction he can hold. **152*]** *To form a correct opinion in this case, the several entries of Massie, Powell and Oneale, must be brought into one view, and, as far as it is possible, consistent with the entries, to ascertain the object and intention of the locator. It is evident, from the manner in which these entries are worded, that the locator had no doubt in his mind, at the time the entries were made, of having given that space which would enable him to secure, by legal surveys, the quantity of land located for each person. It becomes, then, the duty of the court to consider the case with a reference to this object. No difficulty arises as to the manner in which the entry of Thomas Massie ought to be surveyed, the calls of his entry being express and positive. His entry ought to have been surveyed in the following manner: to begin, as he has done, at the junction of Paint Creek and the Scioto, and then to run up the river so far as will ascertain the termination of the 520 poles called for on the river, when reduced to a straight line. This will reduce his base to a point below the first flooded land represented in the connected plat, above the mouth of Paint Creek, thence he is to run out at right angles with the general course of the river. The unexpected bends in the Scioto river have induced such a construction to be placed on the entries of Powell and Oneale, by the defendant Massie, that, in executing the surveys of Thomas Massie and Powell, he considered Oneale as being excluded from obtaining any part of the land upon the base of 1,560 poles, the space allotted for three entries.

The contest in this case, in consequence of the manner which has been pursued in making Massie's and Powell's surveys, rests principally upon the construction which is to be given to Powell's and Oneale's entries; and, as the latter is dependent on the former, equity requires that, if it be possible to secure to each his portion of land agreeably to their entries, it ought to be so decided, provided it can be done consistently with the spirit of the entries, and the real intention of the locator.

From an attentive consideration of the entries, the *object of the locator was evi- [***153** dently to give to each of the proprietors of the warrants an equal base on the river, and make it the ruling principal in shaping the surveys. It only remains, then, to be considered whether the words in the entries will bear such a construction as to effectuate the object, and secure the lands to Powell and Oneale, which the locator intended at the time he made the entries.

Powell's first call is to run up the river Scioto; and the description given of the land contemplated to be covered by the entry, is that portion which shall lie within a line parallel to the general course of the river. From a view of the Scioto river, as laid down in the connected plat, and the shape which Thomas Massie's land will assume when run out agreeably to his entry, it becomes necessary, in order to give Powell the land parallel to the general course of the river, to lay it off by commencing the survey on the river at the extremity of the 520 poles above Massie, and thence to run out at right angles to the general course of the river, so far that a parallel line to the river, extending to Massie's back line, and binding on Massie's lines, will include his one thousand acres. Reverse this mode of surveying Powell's entry, and begin at Massie's upper corner

on the river and run out with Massie's line, it will make Massie's line the governing principle of the survey, and not the river, which construction will be contrary to the true meaning expressed in the entry, the intention of the locator, and place the survey on the land of Oneale, whose interest, as a subsequent locator, is equally entitled to protection with that of the prior.

The rule adopted in construing this entry must justify the manner of executing a survey a greeably thereto by running five lines instead of four to circumscribe the land. This proceeds from an accidental circumstance occasioned by the great bend immediately above the mouth of Paint Creek, which renders it necessary to comply with the governing principle in the entry for the land to be "parallel to the general course of the river." By thus executing Powell's survey, a portion of land will remain on the river, and parallel thereto **154***] *sufficient to satisfy Oneale, the calls of whose entry are similar to Powell's calling for him as he does for Massie.

Oneale's survey ought, therefore, to have been executed in the same manner as it is now decided. Powell's ought to have been made by beginning at the termination of 520 poles on the river, and thence to run off at right angles from that point.

Having decided the manner in which the entries of Massie, Powell, and Oneale ought to have been surveyed, it remains yet to say what is the situation of the survey for 530 acres of land made for Oneale, and placed on the record book of the surveyor. To make this act obligatory on the party it was necessary that all the acts done should have been performed or approved by Oneale himself or some one of his assignees, or by some agent authorized for that purpose. There is no evidence in the cause to this effect: the placing the survey on the surveyor's book is therefore an unauthorized and void act.

In the case of Wilson and Mason, in the late district court, the court decided that a survey once recorded was not afterwards in the power or control of the party. This opinion was predicated on two facts found in that cause, that William Mason was the agent of the defendant, and approved of what had been done by registering the surveys of Mason although cautioned of his danger.

Upon this view of the case, the court is of opinion that the complainant recover of the defendant one thousand acres of land, to be laid off agreeably to the mode pointed out as the proper manner for surveying Oneale's entry.

That upon the defendant Massie's conveying the said one thousand acres of land to the complainant, he, the complainant, shall assign to the said defendant all his right in and to one thousand acres of the warrant issued to the said Oneale.

155*] *So far as this suit relates to the defendant Anderson, it is decreed and ordered that the bill be dismissed as to him with costs, the court being of opinion he was improperly made a party. It is therefore considered by the court, that the defendant Anderson recover of the complainant his costs by him in this behalf expended.

And afterwards, at the same term, the following order was made herein. The court in pursuance of the opinion and decree delivered in this cause on the eighth day of this month (December) doth order, that the surveyor of Ross county do go on the land in controversy and lay off the same as follows: Thomas Massie's entry by beginning at the mouth of Paint Creek, thence up the Scioto so far as will amount to 520 poles when reduced to a straight line, and from each end of this base at right angles from the general course so far that a line parallel with that general course will produce the quantity of fourteen hundred acres. Robert Powell's entry by beginning at the upper corner of Thomas Massie's entry, that is, 520 poles from the mouth of Paint Creek, thence up the river so far as will amount to 520 poles when reduced to a straight line, and from the end of this base line, a line is to be run at right angles to the general course of that portion of the river which is occupied by the base line and from the beginning with the lines of Thomas Massie, that is, his second and third lines, so far that a line parallel to the general course of this base line will produce the quantity of one thousand acres. Ferdinand Oneale's entry by beginning at the upper corner of Robert Powell's entry when laid off as aforesaid, thence up the Scioto so far as will amount to 520 poles when reduced to a straight line, and from the end of this base line a line is to be run at right angles from the general course of that portion of the river which is occupied by the base line, and from the beginning with the second and third lines of Powell so far that a line parallel to the general course of the base line will produce the quantity of one thousand acres.

And the court doth further order, that the said surveyor *do make and bound the [***156** said survey of Oneale when laid off as aforesaid, and make report of the metes and bounds and his proceedings herein to the next court."

At May term, 1808, the surveyor having made his report, a final decree was entered in conformity with the principles laid down in the interlocutory order, from which the defendant appealed.

Pope, for the plaintiff in error, contended that the Circuit Court in Kentucky had no jurisdiction of a case involving the title of land lying in Ohio, unless it be upon a personal contract. Here was no personal contract. Although the bill states an agreement respecting the surveying of the land, yet it is denied by the answer, and not proved. Besides, if there was such a contract, it is not upon the contract that the suit is brought. It is a mere question which of the parties has the better right under their several entries. The remedy in chancery in Kentucky is merely a substitute for a *caveat*. It is in the nature of a real action, which is local. A court in New York could not try the title of land in Virginia, unless it were upon a personal contract. Even the action of trespass *quare clausum fregit* is a local action, although it sounds in damages, and seems to be of a personal nature.

P. B. Key, contra. The bill is for a specific performance of a trust. The party who has the legal estate by a younger entry, is a trustee for him who had the elder entry; and upon this is founded the jurisdiction of a court of equity. The action is *in personam*, not *in rem*. The

remedy sought is a decree that the defendant should convey the land to the plaintiff. If the defendant refuses to perform the decree, the compulsory process is *in personam*, by way of attachment for a contempt of court. The whole and original jurisdiction of a court of equity is *in personam*, and not *in rem*.

But the act of Congress is imperative. The Circuit Court of Kentucky has jurisdiction in all cases at law and in equity between citizens **157***] of different states, if *the defendant be found in the District of Kentucky. The same jurisdiction might have been exercised by the state courts of Kentucky.

H. Clay, same side. The question is, whether the nature of the case controls the general expressions of the constitution, and the act of Congress.

If Watts could not sue Massie in Kentucky, he would be without remedy. He could not sue in Ohio, because the defendant could not be found there.

The ground of jurisdiction is trust. The case also contains the peculiar relation of the parties to each other. Massie was employed by Watts's assignor to locate the land. In this respect it is a case of contract.

Pope, in reply. The circuit courts of the United States have concurrent jurisdiction with the courts of the state in which they sit.

The state courts of Ohio unquestionably had jurisdiction. The Circuit Court, therefore, of the District of Ohio, is the court of the United States which had cognizance of the case.

The court having intimated an opinion in favor of the jurisdiction of the court below, the counsel proceeded to argue the question of location. But as the subject is very intricate without a copy of the plats in the case, and as the opinion of the court is very full, it is deemed unnecessary to report the arguments of counsel upon that point.

February 28. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit having been originally instituted, in the Court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the state of Ohio, an objection is made by the **158***] plaintiff in error, who was the *defendant below, to the jurisdiction of the court by which the decree was rendered.

Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a *caveat* introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the state in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of *Penn* v. *Lord Baltimore*, the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vezey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the chancellor says, "This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries." The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well *as property, was exclusively [***159** reserved to the king in council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree *in rem*, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, *in personam*, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person, against whom the decree was prayed, be found in England.

In the case of *Arglasse* v. *Muschamp* (1 Vernon, 75), the defendant, residing in England, having fraudulently obtained a rent charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court the chancellor replied, "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so wholly eludes the jurisdiction of this court." The chancellor, in that case, sustained his jurisdiction on principle, and on the authority of Archer and Preston, in which case a contract made respecting lands in Ireland, the title to which depended on the act of settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North this decree was affirmed.

In the case of *The Earl of Kildare* v. *Sir Morrice *Eustace* and *Fitzgerald* (1 [***160** Vern., 419), it was determined that if the trustee live in England, the chancellor may enforce the trust, although the lands lie in Ireland.

In the case of *Tollor* v. *Carteret* (2 Vern.,

494), a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgageor being within it.

Subsequent to these decisions was the case of *Penn* against *Lord Baltimore* (1 Vez., 444), in which the specific performance of a contract for lands lying in North America was decreed in England.

Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust or contract.

The facts in this case, so far as they affect the question of jurisdiction, are, that, in 1787, the land warrant, of which Watts is now the proprietor, and which then belonged to Oneale, was placed without any special contract in the hands of Massie, as a common locator of lands. In the month of August in the same year he located 1,000 acres, part of this warrant, to adjoin a previous location made on the same day for Robert Powell.

In the year 1793 Massie, as deputy surveyor, surveyed the lands of Thomas Massie, on which Robert Powell's entry depended, and the land of Robert Powell, on which Oneale's entry, now the property of Watts, depended. On the 27th of June, 1795, Nathaniel Massie, the plaintiff in error, entered for himself 2,366 [**161*] acres *of land to adjoin the surveys made for Robert Powell, Thomas Massie and one Daniel Stull. The entry of Daniel Stull commences at the upper corner of Ferdinand Oneale's entry on the Scioto, and the entry of Ferdinand Oneale commences at the upper corner of Robert Powell's entry on the Scioto; so that the land of Oneale would be supposed, from the entries, to occupy the space on the Scioto between Powell and Stull. Nathaniel Massie's entry, which was made after surveying the lands of Thomas Massie and of Robert Powell, binds on the Scioto, and occupies the whole space between Powell's survey and Stull's survey.

In the year 1796, Nathaniel Massie surveyed 530 acres of Oneale's entry, chiefly within Stull's survey, and afterwards, in the spring of 1797, purchased Powell's survey. Nathaniel Massie's entry is surveyed and patented. In 1801 Massie received from Watts, in money, the customary compensation for making his location.

It is alleged that Nathaniel Massie has acquired for himself the land which was comprehended within Oneale's entry, and has surveyed for Oneale land to which his entry can by no construction be extended.

If this allegation be unsupported by evidence, there is an end of the case. If it be supported, had the Court of Kentucky jurisdiction of the cause?

Although no express contract be made, yet it cannot be doubted that the law implies a contract between every man who transacts business for another at the request of that other and the person for whom it is transacted. A common locator who undertakes to locate lands for an absent person is bound to perform the usual duties of a locator, and is entitled to the customary compensation for those duties. If he fails in the performance of those duties, he is liable to the action of the injured party, which may be instituted wherever his person is found. If his compensation be refused, he may sue therefor in any court within whose jurisdiction the person for whom the location was made *can be found. In either action the [*162 manner in which the service was performed is inevitably the subject of investigation, and the difficulty of making it cannot oust the court of its jurisdiction.

From the nature of the business, and the situation of the parties, the person for whom the location is made being generally a non-resident, and almost universally unacquainted with the country in which his land is placed, it is the duty of the locator not only to locate the lands, but to show them to the surveyor. He also necessarily possesses the power to amend or to change the location if he has sufficient reason to believe that it is for the interest of his employer so to do. So far as respects the location, he is substituted in the place of the owner, and his acts done *bona fide* are the acts of the owner.

If, under these circumstances, a locator finding that the entry he has made cannot be surveyed, instead of withdrawing it or amending it so as to render it susceptible of being carried into execution, secured the adjoining land for himself, and shows other land to the surveyor which the location cannot be construed to comprehend, it appears to this court to be a breach of duty, which amounts to a violation of the implied contract, and subjects him to the action of the party injured.

If the location be sustainable, and the locator, instead of showing the land really covered by the entry, shows other land, and appropriates to himself the land actually entered, this appears to the court to be a species of *mala fides* which will, in equity, convert him into a trustee for the party originally entitled to the land.

In either case the jurisdiction of the court of the state in which the person is found is sustainable.

If we reason by analogy from the distinction between actions local and transitory at common law, this action would follow the person, because it would *be founded on an im- [*163 plied contract, or on neglect of duty.

If we reason from those principles which are laid down in the books relative to the jurisdiction of courts of equity, the jurisdiction of the Court of Kentucky is equally sustainable, because the defendant, if liable, is either liable under his contract, or as trustee.

The case, then, as presented to the court, gives it jurisdiction, and the testimony must be examined to ascertain how far the bill is supported.

The entry of Thomas Massie begins at the junction of Paint Creek with the Scioto, and runs up the Scioto 520 poles, when reduced to a straight line, thence off at right angles from the general course of the river, so far that a line parallel thereto will include the quantity.

Respecting this entry there is no controversy

Robert Powell enters 1,000 acres of land, "beginning at the upper corner on the Scioto, of Major Thomas Massie's entry, No. 480, running up the river 520 poles, when reduced to a straight line, thence from the beginning with Massie's line, so far that a line parallel with the general course of the river shall include the quantity."

Then Ferdinand Oneale enters 1,000 acres of land, beginning at the upper corner on the Scioto, of Robert Powell's entry, No. 503, running up the river 520 poles, when reduced to a straight line, and from the beginning with Powell's line, so far that a line parallel with the general course of the river shall include the quantity.

As Oneale's entry depends on Powell's, it is necessary to ascertain the land taken by Powell, before that of Oneale can be accurately determined.

Had the general course of the Scioto con-
164*] tinued *nearly the same, no difficulty would have been found in this case. The surveys might have conformed literally to all the calls of each entry, and each tract would have constituted nearly a rectangular figure with a base of 520 poles on the river, and a back line parallel to that base. But the unexpected bends of the Scioto have deranged the uniformity of this chain of locations, and produced questions of considerable intricacy respecting the ground which must be covered by them.

Thomas Massie's entry being of 1,400 acres, and Powell's of only 1,000 acres, with a base of the same length on the river, it probably was thought certain that Massie's upper line would extend beyond Powell's land, and that the line of Powell, which was to run parallel to the river, would intersect Massie's upper line. Powell's entry, therefore, calls to run from the river with Massie's line, so far that a line parallel to the general course of the river will include the quantity. Upon actual survey the course of the river is found to be such that a line parallel thereto, drawn from the end of Massie's line, would not include 200 acres of land. Under these circumstances Powell must lose between 800 and 900 acres of land, if his entry cannot be so construed as to extend beyond the length of Massie's line.

From the peculiar situation of titles acquired under the land law of Virginia, a law which offered for sale an immense unexplored wilderness, covered with savages equally fierce and hostile, leaving to the purchaser the right to place his warrant, which was the evidence of his purchase, on any land not previously appropriated, and requiring him to make his entries so certainly that any other person might locate the adjacent residuum, it followed inevitably that immense difficulties would occur, and that locations must often be lost, or receive that certainty which the law required from principles adapted to the general state of things in the country, but which were not precisely foreseen when the locations were made.

165*] *These principles have been laid down by the courts, and must be considered as expositions of the statute. A great proportion of the landed property of the country depends on adhering to them.

The great and equitable foundation on which they stand is this. If, by any reasonable construction of an entry, it can be supported, the courts will support it. This principle absolutely requires that all discretion, with respect to the mode of surveying an entry, should be surrendered. For if a location might be surveyed in various ways, then it is vague, and no subsequent locator would know how to enter the adjacent residuum. The court, therefore, is compelled to say in what manner every location, which appears, in its terms, to reserve some power in the locator to vary its form, shall be surveyed.

In the exercise of this essential and necessary power, they have declared that when a given quantity of land is to be laid off on a given base, it shall be included within four lines, so that the lines proceeding from the base shall be at right angles with it, and the line opposite the base shall be parallel to it, unless this form be repugnant to the entry.

The consequence of this principle is, that if the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of certain principles, they will complete it.

They have also decided that, if a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry may be discarded.

These principles, it is believed, will enable the court to ascertain, in a reasonable manner, the land covered by Powell's location.

The beginning is the upper corner of Massie on the *Scioto. A base line upon the [*166 river is then given to consist of 520 poles, when reduced to a straight line. Massie's upper line, to its whole extent, if necessary, is also given, and a back line parallel to the base is given. The side line opposite Massie's line, and the course from the termination of Massie's line to the back line are wanting, and are to be supplied by construction.

The material inquiry, so far as respects the present cause, is, in what direction shall Powell's upper line, extending back from the river to the line parallel to the general course of the river, be run? That line is not given, and is consequently to be supplied by construction.

According to the uniform course of decisions, Powell's upper line must project from the base at right angles with it, unless there shall be some other call in the entry which controls this general principle. It is contended that it is controlled by the call to run with Massie's line from the beginning. Massie's line not being at right angles with the base line, it is argued that Powell's opposite line, discarding the rectangular principle, must be parallel to the line from the beginning.

But the court does not concur with the counsel for the plaintiff in error in this opinion. The principle that the rectangular figure is to be preferred to any other, and is to be preserved whenever it can be preserved, originates in the necessity of adopting some regular figure in order to give to locations that certainty which is not always to be found in their terms, and in the superior convenience of that figure over every other, with respect to the adjacent residuum. These motives apply to a part as

well as to the whole of an entry. If one location be made upon another so that the lines of that other bind the entry on one side, and then a precise line be called for from the beginning to run a certain distance, from the end of which a line is to be drawn, and to continue until a line, parallel to the first or base line, or to some
167*] given point in *the lines of the person on whom the location is made, shall include the quantity, the same respect for certainty and convenience which induced originally the adoption of the rectangular figure would seem to require its adoption with respect to those lines which did not receive a different direction from the positive calls of the location. On one side there might be several different lines; but this would not seem to demand that, on the opposite side, the same variety should be preserved. It would be departing from the principle unnecessarily to require that the lines of the opposite side of the tract should be multiplied in order to be all parallel to the lines by which one side was unavoidably bounded. To the court it seems that the rectangular principle is always to be preserved where it can be preserved, that is, where there is no call in the entry applying to the lines which control them, and that, where it is necessarily departed from, the departure should not be extended further than the necessity requires.

In this particular case the location does not call for a line parallel to Massie's line, and, as Massie's line was to run at right angles from the general course of the river, and it was obviously expected Powell's line would not extend the whole length of Massie's line, it is clear that the locator expected that Powell's upper line, when at right angles with the course of the river, would be nearly parallel to Massie's line.

This may be considered as, in some degree, an auxiliary argument in favor of the opinion which is entertained by this court, that the Circuit Court did right in laying down the upper line of Powell at right angles with his base line.

This line being established, it is of little importance to Oneale's claim in what manner the remaining lines of Powell may be run.

The call of the location, so far as respects the side binding on Massie, is said to stop at Massie's north-western corner. Is that line to be continued?

168*] *The conclusive objection to it is, that it would intersect the upper line before the quantity was obtained, and would, consequently, entirely defeat the call for a back line parallel to the course of the river.

Is a line at right angles with the general course of the river to be run from Massie's corner and continued until a line parallel to the base line would include the quantity?

This would be less exceptionable, but it would be departing further from the square, and might, in some instances, exhibit a plat the breadth of which would not be one-third of its length. This point, however, is not critically examined, because it is of very little importance in the present cause. The upper line of Powell, on which Oneale binds, would be the same as far as it now runs, and should it be continued further, it would only take a small angle of Oneale's survey as made by order of the Circuit Court.

The court is of opinion that Powell's entry is rightly surveyed by order of the Circuit Court, and it is an additional argument in support of this opinion, that, with the exception of the angle unavoidably made by the interference of Massie, the general form of the land approaches a square more nearly than if laid off in any other manner.

If Powell's entry be correctly surveyed, Oneale's cannot be laid off otherwise than it is.

Were it even to be admitted that the original survey made for Powell was correct, it is entirely possible that the case of the plaintiff would not be materially improved thereby.

Powell's back line would probably terminate on the river; in which event, that would be his upper corner on the Scioto, which is called for as the beginning of Oneale's entry. Oneale then calls to run on the river a distance of 520 poles on a straight line, and with Powell's line so far as that a line parallel to the general *course of the river shall include 1,000 [***169**
acres. Either this entry is rendered totally incapable of being surveyed in consequence of the call for Powell's line, or it must be so surveyed as to include almost the whole town of Chillicothe, and to take a considerable part of Massie's land.

It is, however, unnecessary to inquire what would be the rights of the person claiming Oneale's entry, in that event, since the court is satisfied that the survey, as directed by the Circuit Court, is correct.

The case, then, as made out in evidence, is this: Nathaniel Massie, employed to locate a military warrant for Oneale, has entered the warrant in pursuance of his engagement. On surveying the entries on which that of Oneale depended, he either believed that Oneale's entry was void from the repugnancy of its calls, or if not absolutely void, was incapable of covering the land which, according to legal construction, and the common understanding of those who might read the entries, it must be considered as covering; or he thought that, by obtaining a prior patent for the land he might resist any claim which might afterwards be made by Oncale, or those claiming under him. If Massie really believed that Powell's entry was properly surveyed, and that Oneale's entry, as made, could not be surveyed, it was his duty to amend it, or, if that was not his duty, to place it elsewhere. For omitting so to do he is chargeable with such gross neglect of duty as to render him responsible in damages, had his construction of Oneale's location even been correct. But, if in this he was mistaken, it would be dangerous in the extreme, it would be a cover for fraud which could seldom be removed, if a locator, alleging difficulties respecting a location, might withdraw it and take the land for himself. He, however, has not withdrawn it, except so far as it may be impliedly withdrawn by the survey of 530 acres. With that exception the entry still covers the land on which it was originally placed, and is still entitled to that land. But Massie, the agent of Oncale, has entered and surveyed a portion of that land for himself, and obtained a patent for it in his own name. *According to the clearest and [***170**
best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for

himself otherwise than as trustee for his principal.

So far, then, as Oneale's land is within Massie's survey, Massie is a trustee for Oneale and his assignees, and upon the principle stated in the early part of this opinion, the Court of Kentucky had jurisdiction of the cause.

But a part of Oneale's land is surveyed for Powell, and in a contest between his assignees and Powell, the Court of Kentucky would have had no jurisdiction. This controversy, however, is not with Powell; it is with Massie, who is the purchaser of Powell's rights. The whole property being thus in the hands of Massie, and the Court of Kentucky being in possession of the cause, and having clear jurisdiction of a part of it which decides the principle on which the whole depends, that court did right in deciding the whole cause, and decreeing to the assignees of Oneale the whole land originally included in the entry made for him.

Considerable doubts were entertained respecting the right of Watts to more than the unsurveyed part of the entry. But a majority of the court is of opinion that he stands precisely in the place of Oneale.

As Massie does not show that he had conveyed any of that part of Powell's survey which is included within Oneale's entry previous to the institution of this suit, or even now, the allegation that he has conveyed a part of Powell's survey could not furnish sufficient matter for preventing the decree which was rendered.

The decree of the Circuit Court is affirmed with costs.

Approved—6 Wheat. 557, 560; 1 Sum. 504.
Cited—6 Pet. 296; 5 Pet. 79; 20 How. 565; 15 How. 243; 9 Wall. 121; 5 Otto, 723; 9 Otto, 302; 1 Bald. 416; 5 Mason, 42; 1 Gall. 18; 2 Wood. & M. 114.

171*] *THE UNITED STATES v. HALL AND WORTH.

If a vessel be driven by stress of weather to the West Indies, and the cargo there detained by the government of the place, this is such a casualty as comes within the exception of "dangers of the seas" in the condition of an embargo bond.

ERROR to the Circuit Court for the District of Pennsylvania, in an action of debt upon an embargo bond, dated December 29, 1807, the condition of which was, to reland certain goods in some port of the United States, "the dangers of the seas only excepted." The vessel on board of which the goods were laden, cleared out and sailed from Philadelphia, for East Portland, in the District of Maine, but, having encountered severe and tempestuous weather, her crew disabled in a great degree, she was obliged, in order to escape from the danger of Nantucket shoals, to change her course, and to endeavor to gain the port of Charleston. The weather and the winds, however, were so severe and adverse that she could not make Charleston, nor any other port of the United States, and was obliged to bear away for the West Indies to obtain relief. She arrived at Porto Rico in distress. The governor ordered the cargo to be landed and sold, with which order the captain was obliged to comply, and did land and sell the same. She could not leave the island without considerable repairs, which were accordingly made.

The court below instructed the jury that these facts, if believed by them, were, upon the whole case, sufficient to bar the United States of their action. The verdict and judgment were accordingly for the defendants, and the United States sued out a writ of error.

The bond was taken in pursuance of the directions of the act of 22d of December, 1807, usually called the embargo act (vol. 9, p. 7), and before any of the supplemental acts on that subject were passed.

The third section of the act of March 12, 1808, (vol. 9, p. 71), provided that in every case where a bond had been given under the act of 22d of December, 1807, conditioned to reland the goods, &c., the parties *should, [*172 within four months after the date of the same, produce to the collector a certificate of the relanding, &c., on failure whereof the bond should be put in suit, and judgment should be given against the defendants, "unless proof shall be produced of such relanding, or of loss by sea, or other unavoidable accident."

The seventh section of the act of January 9, 1809, (vol. 9, p. 190), usually called the enforcing act, provides that in all cases where, under the act of 22d of December, 1807, a bond has been given to reland, &c., the parties shall, within two months after the date of the same, produce to the collector a certificate of the relanding of the goods from the collector of the proper port; on failure whereof the bond shall be put in suit, and judgment shall be given against the defendants, "unless proof shall be given of such relanding, or of loss of the vessel at sea. But neither capture, distress, or any other accident whatever, shall be pleaded or given in evidence in any such suit, unless such capture shall be expressly proved to have been hostile; and such distress or accident occasioned by no negligence or deviation, nor unless such vessel shall have been, from the commencement of the voyage, wholly navigated by a master, mate or mates, mariners and crew, all of whom shall be citizens of the United States," &c., &c.

Rodney, Attorney General, and Jones for the United States. In order to excuse the party he must show that the goods have been actually lost by the dangers of the seas. If the vessel were irresistably driven by a tempest to Porto Rico, yet the goods arrived there in safety, and were not lost. The party had the full benefit of them, and probably at a higher price than if he had landed them in the United States. If the law of the 12th of March affects the case, yet it must be a loss by sea, or a loss by other unavoidable accident.

When the legislature particularly except certain cases, no other exceptions can be presumed. No loss can be said to be by the dangers of the seas, unless the sea be the proximate cause of the loss. (*Greene *et al.* v. *Ensley*, Peake's [*173 N. P., 61, 212; 4 T. R., 783; Bumb., 37.)

The vested rights of parties may be varied by posterior laws. The prohibition in the constitution respecting *ex post facto* laws, applies only to criminal cases.

Hopkinson, contra.

1. This was a loss by the dangers of the seas; and,

2. We are entitled to the benefit of the act of 12th of March, 1808, by which unavoidable accident is an excuse.

1. The first embargo law means such a kind of a loss as prevents the relanding of the goods in the United States. It does not mean where the loss is occasioned by the immediate dangers of the element, but any loss to which vessels are exposed in consequence of the dangers of the seas.

Thus captured by pirates is a loss by one of the dangers of the seas. The expression has the same meaning in the act as it has in bills of lading. If this action had been upon the bill of lading instead of the bond, such an accident would have been a sufficient excuse to the master for not delivering the goods. So in a policy of insurance. (Abbott, 155, Amer. edit.; 2 Roll. Abr., 248, pl. 10; Marshall, 418, 1st edit.; Abbott, 168; *Carricks* v. *Cox*, Binney's Rep, Sup. Court Pennsylvania; Marshall, 488, 2d edit.)

The vessel was by the weather forced into Porto Rico. She could not return without repairs. She could not obtain repairs without leave of the governor. That leave could not be obtained but by obedience to his orders. His orders prevented the relanding of the goods according to the condition of the bond.

The case cited from *Peake* only shows that the loss was within the description of loss by capture, not that it was not a loss by the dan-
174*] gers of the seas. The case *from *Bunbury* was a mere private trespass; so was that cited from 4 T. R. 783. It was not an act of the government. The insured had a private remedy against the trespassers.

2. We have a right to the benefit of the act of 12th of March, and are excused if prevented from relanding by any unavoidable accident.

There is a difference, as to *ex post facto* laws, between those which mitigate, and those which increase, the penalty.

The act expressly refers to bonds taken under the prior law. It does not mean loss by unavoidable accident, but prevention by such accident. The punctuation of the sentence, as printed in the statute book, favors this construction; but if it be doubtful, the court will lean against the penalty.

But the property was lost to the owner, within the meaning of the statute. He had no power over the thing itself; he could not bring it away. It is immaterial whether he obtained an equivalent or not; the letter of the condition of the bond could only be satisfied by relanding the thing itself. A compliance with the condition was to him as impossible as if the goods had perished in the sea.

3. The act of January 9, 1809, cannot apply to this case so as to make that penal which before was justifiable.

MARSHALL, *Ch. J.*, stopped the counsel, and observed that the court would never consider the penal act as applying to previous facts, unless such construction be absolutely unavoidable.

March 3. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was instituted on a bond taken in
175*] pursuance *of the original embargo act, with a condition that the cargo of the schooner Mary, a sea letter vessel, should be relanded in the port of East Portland, or some other port of the United States "the dangers of the seas only excepted."

Her cargo was not relanded within the United States, but was carried to Porto Rico and sold. The defendants allege that they were driven by stress of weather into Porto Rico, where the cargo was landed by order of the government; and they insist that the case is within the exception contained in the condition of the bond. The Circuit Court instructed the jury that, if they believed the testimony, it was sufficient in law to bar the action. To this opinion the counsel for the United States excepted; and its propriety is now to be considered.

The improbability of the allegations made by the defendants is no longer the subject of inquiry. The jury have verified them, and the court must receive them as true. The testimony is, that the Mary was driven by tempestuous weather into a foreign port. That, while prosecuting her voyage, she encountered weather which so disabled both the crew and vessel, and put her in such a situation that, to escape Nantucket shoals, "she was obliged to change her course and endeavor to gain a southern port." She changed her course and bore for Charleston. But such was the condition of the crew and of the vessel, and so severe and so adverse were the winds, that she "could not make Charleston, nor any other port of the United States, and was obliged to bear away for the West Indies, to obtain relief."

The vessel, then, was driven into Porto Rico by the cause which forms the exception in the condition of the bond, and if the cargo had been lost at the mouth of the harbor, instead of entering the port, all would admit that the penalty of the bond had not been incurred. But it is contended that the dangers of the seas terminated on entering the port, and that no sufficient cause is shown for not bringing back the cargo to the United States.

*The case states that the governor of [***176**
Porto Rico issued an order that the cargo should be landed and sold, "with which order the captain was obliged to comply."

As this case is stated, the Mary was driven into Porto Rico, and the sale of her cargo, while there, was inevitable. The dangers of the sea placed her in a situation which put it out of the power of the owners to reland her cargo within the United States. The obligors, then, were prevented, by the dangers of the seas, from complying with the condition of the bond; for an effect, which proceeds inevitably, and of absolute necessity from a specified cause, must be ascribed to that cause.

It is the unanimous opinion of this court that there is no error in the proceedings of the Circuit Court, and that the judgment be affirmed.

Aff'g—S. C. 2 Wash. C. C. 366.
Denied—4 Cranch C. C. 334.
Approved—6 Cranch 322.
Cited—5 Pet. 109; 1 Brock 183.

CAMPBELL *v.* GORDON AND WIFE.

A certificate by a competent court, that an alien has taken the oath prescribed by the act respecting naturalization, raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution of the United States, &c. The oath, when

taken, confers the rights of a citizen. It is not necessary that there should be an order of court admitting him to become a citizen.

The children of persons duly naturalized before the 14th of April, 1802, being under age at the time of the naturalization of their parent, were, if dwelling in the United States, on the 14th of April, 1802, to be considered as citizens of the United States.

THIS was an appeal from a decree of the Circuit Court for the District of Virginia, dismissing the bill of the complainant.

The case was stated by WASHINGTON, *J.*, in delivering the opinion of this court, as follows:

"The object of the bill was to rescind a contract made between the appellant and Robert Gordon, the appellee, for the sale of a tract of land by the latter to the former, upon the ground of a defect of title. The facts in the case, which are not disputed, appear to be as follows: The land which forms the subject of dispute belonged to James Currie, a citizen of Virginia, who died seized thereof in fee, on the 23d of April, 1807, intestate, and without issue. James Currie had one brother of the whole blood, named William, who, prior to the 14th day of October, in the year 1795, was a subject of the King of Great Britain, but who emigrated **177*** *to the United States, and on the day last mentioned, at a District Court held at Suffolk, in Virginia, took the oath prescribed by the act of Congress, for entitling himself to the rights and privileges of a citizen. At the time when this oath was taken, William Currie had one daughter, Janetta, the wife of the appellee, who was born in Scotland. She came to the United States in October, 1797, whilst an infant, during the life of her father, and hath ever since continued to reside in the state of Virginia. William Currie died prior to the 23d of April, 1807."

C. Lee and *F. S. Key*, for the appellant, contended,

1. That William Currie was not duly naturalized.

2. That if he was, yet his daughter Janetta, being in Scotland at the time of her father's naturalization, was not thereby naturalized.

1. William Currie was not duly naturalized.

The certificate of his naturalization was as follows, viz.:

"At a District Court held at Suffolk, October the 14th, 1795, William Currie, late of Scotland, merchant, who hath migrated into this commonwealth, this day in open court, in order to entitle himself to the rights and privileges of a citizen, made oath that for two years last past he hath resided in and under the jurisdiction of the United States, and for one year within this commonwealth, and also that he will support the constitution of the United States, and absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, or other state whatsoever, particularly to the King of Great Britain.

"A copy,

"Teste,

"JOHN C. LITTLEPAGE."

178* *The original memorandum made upon the minutes of the court was as follows:

"At a District Court held at Suffolk, October the 14th, 1795, William Currie, native of Scotland, migrated into the commonwealth, took the oath," &c.

There was also a deposition of a deputy clerk, who states that he acted as deputy to Mr. Littlepage, at, before, and after the date of the entry respecting Mr. Currie's naturalization. That upon examining the order-books of the said court, he finds the entries made in all cases where persons were admitted to become citizens under the act of Congress, at and prior to October term, 1795, to be agreeably to the form used in the case of Mr. Currie. That however informal these entries may have been in not stating that it appeared to the court that the persons who took the oaths were of good moral character, and were admitted citizens; he is sensible every requisite of the law in this, as well as in all other similar instances, was complied with to the satisfaction of the court, and that the omission has been a clerical one.

He also finds, from the order-book, that at May term, 1796, the form of the entry was altered, so as to express the applicant to be of good moral character, &c.

The application was made under the 2d section of the act of January 29, 1795, (vol. 3, p. 163), which provides that any alien then residing within the limits, and under the jurisdiction of the United States, may be admitted to become a citizen, on his declaring, on oath or affirmation, "that he has resided two years at least within and under the jurisdiction of the same, and one year at least within the state or territory where such court is at the time held; that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, *whereof he was before a citizen or sub- [***179** ject; and moreover, on its appearing to the satisfaction of the court, that during the said term of two years he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same."

"All of which proceedings, required in this proviso to be performed, in the court, shall be recorded by the clerk thereof."

The first section of the act requires only the oath of the party himself to be recorded; but the 2d section requires all the proceedings to be recorded.

When a matter is directed by act of parliament to be recorded, it cannot be proved otherwise than by record. (Peake's N. P. Cas., p. 132.) The deposition of the deputy clerk is not competent evidence to prove what ought to have appeared upon the record.

It does not appear upon the record that the court was satisfied as to the moral character of Mr. Currie, or his attachment to the constitution of the United States, or that the court admitted him to become a citizen. They must either show an order of the court for his admission, or they must show that everything has been done to entitle him to become a citizen.

No decision goes farther than that the declaration of a competent court that everything has been done according to law, is sufficient, and dispenses with showing how it was done. But the court has not said so, nor does the record show it. Proof of good character, &c., is not a prerequisite to permission to take the oath; if it was, the admission to take the oath might be

considered as evidence that the court was satisfied as to the moral character, &c. His application to the court was not to take the oath, but to be admitted a citizen.

The "&c." in the minutes might have been extended by the clerk, according to his usual custom; but this court cannot undertake to ex-**180***] tend it, or to say *what it means. Certainly not without direct and positive proof of its meaning.

2. But if William Currie was duly admitted a citizen, yet his daughter Janetta, being then in Scotland, was not thereby naturalized.

The words of the 3d section of the act of 1795 are, "that the children of persons duly naturalized, dwelling within the United States, and being under the age of 21 years, at the time of such naturalization," "shall be considered as citizens of the United States."

Janetta, the daughter of William Currie, was not dwelling within the United States at the time of his naturalization.

The words, "at the time of such naturalization," apply as well to the residence of the child as to her age.

If the child be naturalized by the naturalization of the father, she must be naturalized *eo instanti*. It cannot be a naturalization, or not, according to a future event.

The case would rarely happen of a parent coming to this country, residing two years, becoming a citizen, and leaving his children in a foreign country. Congress meant to provide for the more common case of a man coming with his children. They intended that all that were with him, under age at the time of his naturalization should partake of the benefit of his act. But they could not mean that the naturalization of a father should naturalize all his progeny under age, wherever they resided. Reasons of policy would forbid it. Their education, manners, habits, prejudices, and prepossessions would all be foreign, and uncongenial with our manners, principles, and systems of government. A child might in this manner become a citizen without renouncing his title of nobility.

The act of 1795 is to have the same construc-**181***] tion *as the act of 1802, *vol. 6, p. 79, § 4; 2 Tuck. Bl., 249; 1 Tuck. Bl., part 2, Appendix, 101.*

Swann, contra.

The "&c." in the clerk's minutes means everything that was necessary to be done to entitle Mr. Currie to become a citizen. If the requisites of the statute were complied with, it required the order of the court to admit him to become a citizen. He became such by virtue of the act of Congress. The testimony as to moral character, and attachment to the constitution of the United States, may be taken out of court, or the court may be satisfied of their own knowledge. He was naturalized *de facto* when he complied with the requisites of the act, and the neglect or error of the clerk cannot deprive him of the privileges of a citizen.

It was immaterial where the child was, if she was under age at the time of her father's naturalization.

February 20. WASHINGTON, *J.*, after stating the case as before mentioned, delivered the opinion of the court as follows:

The title of the appellees to the land in question being disputed only upon the ground of the alienage of the female appellee, the court take it for granted that there is no other objection to its validity. It is contended, by the counsel for the appellant, that Janetta, who claims as heir to James Currie, is an alien, inasmuch as she has, by no act of her own, entitled herself to the rights and privileges of a citizen, and cannot claim those rights in virtue of her migration to the United States, and of any acts performed by her father. First, because her father was not duly naturalized; and, secondly, because if he were, she was not, at the time of her father's naturalization, dwelling within the United States.

*In support of the first objection it [***182** is contended that, although the oath prescribed by the second section of the act of Congress entitled "An act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject," passed the 29th of January, 1795, was administered to the said William Currie, by a court of competent jurisdiction, still it does not appear, by the certificate granted to him by the court, and appearing in the record, that he was, by the judgment of the court, admitted a citizen, or that the court was satisfied that, during the term of two years, mentioned in the same section, he had behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same.

It is true that this requisite to his admission is not stated in the certificate; but it is the opinion of this court, that the Court of Suffolk must have been satisfied as to the character of the applicant, or otherwise a certificate, that the oath prescribed by law had been taken, would not have been granted.

It is unnecessary to decide whether, in the order of time, this satisfaction, as to the character of the applicant, must be first given, or whether it may not be required after the oath is administered, and, if not then given, whether a certificate of naturalization may not be withheld. But if the oath be administered, and nothing appears to the contrary, it must be presumed that the court, before whom the oath was taken, was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. It is, therefore, the unanimous opinion of the court, that William Currie was duly naturalized.

The next question to be decided is, whether the naturalization of William Currie conferred upon his daughter the rights of a citizen, after her coming to, and residing within, the United States, she having been *a resident in a [***183** foreign country at the time when her father was naturalized.

Whatever difficulty might exist as to the construction of the third section of the act of the 29th of January, 1795, in relation to this point, it is conceived that the rights of citizenship were clearly conferred upon the female appellee by the fourth section of the act of the 14th of April, 1802.

This act declares that the children of persons duly naturalized under any of the laws of the

United States, being under the age of 21 years at the time of their parent's being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon. Her father was duly naturalized, at which time she was an infant; but she came to the United States before the year 1802, and was at the time when this law passed, dwelling within the United States.

It is, therefore, the unanimous opinion of the court that, at the time of the death of James Currie, Mrs. Gordon was entitled to all the right and privilege of a citizen; and therefore that there is no error in the decree of the Circuit Court for the District of Virginia, which is to be affirmed with costs.

Cited—1 Otto, 245.

M'KNIGHT

v.

CRAIG'S ADMINISTRATOR.

In Virginia, if the defendant die afer interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded.

In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an action of debt upon a judgment and *devastavit*, brought by M'Knight against Craig, as executor of Mitchell.

After an office judgment by defanlt against Craig, and a writ of inquiry awarded in November, 1807, at the rules, Craig died. At the July term, 1808, his death was suggested, and a *scire facias* awarded against I. G. Ladd, his **184***] administrator. At the July term, *1809, (being the fourth term after the office judgment), Ladd appeared by his attorney, and offered to plead a special plea of *plene administravit*, by himself, as administrator of Craig, to which the plaintiff objected, but the court overruled the objection, and admitted the plea to be filed.

The substance of the plea was, that Craig had made a deed of trust of certain real estate to secure Ladd for his indorsements for Craig at the bank, by which deed Craig covenanted to indemnify Ladd. That Ladd had indorsed the notes of Craig to the amount of 8,000 dollars, which were discounted at the bank, and continued the indorsements to the time of Craig's death. That the bank had recovered judgment against Ladd as indorser of some of those notes to the amount of 6,009 dollars, and that Ladd had paid other of the said notes to the amount of 3,174 dollars, to avoid being compelled by suit to pay the same. That the estate, mentioned in the deed of trust, having been sold, produced only 4,095 dollars, whereby the estate of Craig became indebted to Ladd in the sum of 5,138 dollars, and so much of the estate of Craig is liable to be retained by Ladd in satisfaction.

That Craig was bound to several other creditors by specialties in large sums, amounting to 10,000 dollars, and suits thereupon have been brought against Ladd, and are now pending; that he has in his hands personal estate of Craig to the amount of 960 dollars only, which is liable to be retained by him in satisfaction of the damage he has sustained by his indorsements for Craig, by virtue of the covenant for his indemnification, and to pay the specialty creditors aforesaid.

To this plea the plaintiff replied the office judgment and writ of inquiry awarded against Craig in his lifetime in this suit; the subsequent death of Craig, and the *scire facias* against Ladd, as his administrator, returnable to November term, 1808.

The defendant rejoined that Craig died on the —— day of ——, in the year 1807.

*To this rejoinder the plaintiff de- [***185** murred, and assigned as cause of demurrer that the rejoinder is no answer to the replication, and is a departure from the plea.

The court below being of opinion that the plea was good, and the replication bad, rendered judgment upon the demurrer for the defendant.

The plaintiff sued out his writ of error.

E. J. Lee, for the plaintiff in error, contended,

1. That the office judgment against Craig in his lifetime, is a debt superior in dignity to the debts stated in the plea; and,

2. That the defendant, coming in upon *scire facias*, can only plead such plea as his intestate could have pleaded.

1. The office judgment was regularly obtained agreeably to the act of assembly of Virginia (P. P. 80, § 36). And according to the forty-second section of the same act, it became final after the next succeeding court, it not having then been set aside. It being an action of debt, the judgment was not interlocutory, but final. (3 Bl. Com., 395; 1 Tidd, 508). Being a final judgment in the lifetime of Craig, it is entitled to a priority of payment before specialty debts.

2. But if it was only an interlocutory judgment, yet the defendant, upon the *scire facias*, could plead nothing but what the intestate could have pleaded.

The act of assembly of Virginia (P. P. 110, § 20), is copied almost *verbatim* from the English statute of 8 and 9, W. III., c. 11, and is in these words:

"And if the defendant die after such interlocutory judgment, and before final judgment, such action shall not abate, if the same were originally maintainable against the executors or administrators of such defendant, but the plaintiff shall and may have a *scire facias* *against his executors or administrators [***186** to show cause why damages in such action should not be assessed and recovered by the plaintiff, and if such executors or administrators shall appear at the return of such writ, and not show or allege any matters sufficient to arrest the final judgment, &c., a writ of inquiry of damages shall thereupon be awarded, which being executed, judgment final shall be given for the said plaintiff," &c.

After such interlocutory judgment the intestate could only allege matter in arrest of judgment, and his administrator can only do the same.

Upon this point the case of *Smith* v. *Harmon* (6 Mod., 142, and 1 Salk., 315), is decisive.

Swann, contra.

An office judgment in Virginia is a very different thing from an interlocutory judgment in England. It may be set aside, as a matter of right, by the defendant at the next succeeding court, and he may plead any matter whatever in the same manner as if no such judgment had been rendered. And by the long established practice of Virginia, he may set it aside at any subsequent term, by pleading an issuable plea to the merits. It is not true, therefore, that Craig could only have alleged matter in arrest of judgment. He might have pleaded anything that went to show that the plaintiff ought not to recover judgment against him.

Upon the death of the defendant, and the appearance of his administrator, it becomes a new suit, and the administrator ought to be permitted to plead anything that goes to show that the plaintiff ought not to recover judgment against him.

A debt founded upon a *devastavit* is not of so high dignity as a debt upon specialty. It is in nature of damages for *tort*. It is a claim depending upon proof of matter of fact *in pais*.

187*] *February 19. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect.

The act of assembly of Virginia is copied almost literally from the English statute of 8 and 9 W. III., c. 11. The case in 6 Mod. is a decision expressly upon that statute, and is precisely in point, that the defendant upon the *scire facias* can only plead what the intestate could have pleaded; and that it is not to be considered as a proceeding against the representative of the deceased, but a continuance of the original action.

The plea is such as could not have been pleaded in the original action, and is therefore bad.

The judgment must be reversed, and the cause remanded for the defendant to plead to the origiual action, if he should think proper.[1]

To a question by *E. J. Lee*, the Chief Justice answered, that if the plaintiff in error should obtain a judgment in the court below, it will of course be with costs. So in all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.

Cited—2 Cranch, C. C. 31; 2 Wood. and M. 422.

KENNEDY *v.* BRENT.

The marshal of the District of Columbia is bound to serve a subpœna in chancery as soon as he reasonably can; and the service of such subpœna, in case of a chancery attachment in Virginia, will make the garnishee liable if he pays away the money after notice of the subpœna.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an action on the case by Kennedy against Brent, marshal of the District of *Columbia, [*188 for the neglect of his deputy in not serving a subpœna in chancery, commonly called a chancery attachment, in due time, whereby the plaintiff lost his debt.

The declaration stated that one Johnston, who did not reside in the District of Columbia, was indebted to the plaintiff, a resident of Alexandria in that district, and that one Hampson was indebted to Johnston; that in order to subject the money in Hampson's hands to the payment of the debt due from Johnston, the plaintiff, on the 13th of December, 1804, filed his bill in chancery in the Circuit Court of the district for the county of Alexandria, and caused to be issued a subpœna in chancery against Johnston and Hampson to answer the bill, which subpœna was then and there delivered to the defendant's deputy to be executed: and was prosecuted with an intention that the debt due from Hampson to Johnstou would be subjected to the payment of the debt due from Johnston to the plaintiff. Nevertheless, the defendant, by his said deputy, not regarding his office of marshal in the true execution thereof, but contriving and fraudulently intending to hinder the plaintiff of his proper remedy for the recovery of his debt aforesaid, did not serve the said subpœna in chancery upon the said Hampson within a reasonable time after receiving the same to be executed as aforesaid, but neglected to serve the said process, without any reasonable cause for so doing, for a long time, to wit, for the space of four months and upwards, by means of which said neglect the said defendant altogether lost the effect of his said suit in chancery against the said Johnston and Hampson as aforesaid, wherefore the plaintiff saith he is injured, and hath sustained damage, &c.

The defendant pleaded not guilty, and a verdict, by consent, was rendered for the plaintiff, subject to the opinion of the court upon a case agreed, which stated that on the 13th of December, 1804, the plaintiff filed his bill in chancery against Johnston and Hampson in the common form of a bill for a chancery attachment in Virginia. And that the clerk of the court, at the instance of the plaintiff, issued a process commonly *called a chancery attach- [*189 ment, being a subpœna in the common form to answer a bill in chancery, upon which was the following indorsement, viz.: "Memorandum. The object of the bill this day filed in this case is to stay the moneys and effects of the defendaut Johnston in the hands of the defendant Hampson, to satisfy a debt due from the defendant Johnston to the complainant.

(Signed) "G. DENEALE."

That this process, shortly after it was issued, was put into the hands of W. Fox, one of the defendant's deputies, to be executed, and might have been served by him if he had endeavored to have served the same, but it so happened that he did not serve the same, and that it afterwards got into the hands of Lewis Summers, another of the defendant's deputies, who served the same on the 20th day of June, 1805, and made the following return thereupon: "I received this attachment shortly after it issued, and delivered it to W. Fox, D. M., to serve, who shortly after left the town of Alexandria,

1.—The court below considered this case as coming within the act of Congress (vol. 1 p. 71, § 31), passed 24th September, 1789, which authorizes the court "to render judgment for or against the executor or administrator, as the case may require." It does not appear whether that act was taken into consideration by this court.

leaving in the marshal's office two bundles of process, one marked 'process served,' and the other 'process not served.' In the first bundle was this subpœna in chancery. On or about May or June last I was informed it had not then been served. I then examined this process and found it without any indorsement, and took the earliest opportunity to inquire of Mr. Fox as to the service of the subpœna, who informed me he did not recollect having served it. I then, on the 20th of June, served the same on Bryan Hampson. The other defendant Johnston not found.

(Signed) "L. SUMMERS, D. M."

Whereupon it was agreed that the verdict should be subject to the opinion of the court upon the following questions:

"1. As the marshal by his deputy executed the process on the 20th of June, 1805, before **190***] the day appointed *for the return thereof, and returned the same on the return day thereof, whether he was in law bound to have served the same, if in his power so to do, at any time previous to the said 20th of June, 1805, unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same as marshal on the day on which the said process was issued.

"2. Whether the indorsement on the said process of subpœna would, after service thereof, create any legal impediment to the payment of the money over to the said Johnston by the said Bryan Hampson, and would, in case of such payment after service, make the said Bryan Hampson personally liable for the amount so paid over.

"If the court should be of opinion that the said marshal was not bound to have served the said process, if in his power to do so at any time previous to the 20th of June, 1805, (unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same as marshal on the day on which the said process issued,) then the judgment is to be rendered for the defendant.

"And if, under the circumstances mentioned in the second question, the court should be of opinion that the said Bryan Hampson would not be personally liable for the amount so paid over, and that his not being personally liable would be sufficient to discharge the marshal from any liability in this case, then judgment is to be rendered for the defendant.

"But if both those questions are decided for the plaintiff, then judgment upon the verdict is to be rendered for him."

The court below was of opinion that the statement of the case was not full enough to justify a verdict for the plaintiff, and directed judgment to be entered up for the defendant; whereupon the plaintiff brought his writ of error.

191*] *Swann*, for plaintiff in error.

The marshal is bound to serve all process put into his hands for service, as soon as possible, and if he does not, he is liable, in a special action on the case, to any party who suffers any injury by his neglect. (Bac. Abr., tit. Sheriff.)

The service of the subpœna in this case would have bound Kennedy, and if he should pay over the money after service of the subpœna, he would do it at his peril. If there should be a decree against him he could not avoid it by showing that he paid away the money after notice. The decree would relate back to the time of notice.

E. J. Lee, contra.

The marshal is not bound to serve process as soon as he can by any possibility serve it, which was the principle which the court below was called upon, by the case stated, to sanction.

It is sufficient in such a case as this, if he served it at any time before the return day. The indorsement is no part of the process. The marshal was not bound to serve that, or to give notice of it to the defendant. All that he was commanded to do was to summon the defendant to answer the bill according to the command of the subpœna. The indorsement was a mere private notice. It might have been served by any person, and would have been as obligatory upon Hampson as if served by the marshal. This was the opinion of Chancellor Wythe, in the case of *Davis* v. *Fulton*.

February 28. MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

The questions intended to be submitted to the court were, 1st. Whether the marshal was bound to serve this process as soon as he reasonably could; and, 2d. *Whether the [***192** service of such process would have made Hampson liable in case he had paid over the money after such service. On these points the court has no doubt. But the case is imperfectly stated. It does not appear that the plaintiff has sustained any loss by the neglect of the officer to serve the process, and for this reason

The judgment is affirmed.

Cited—16 Pet. 301; 5 Biss. 53; 1 Cliff. 433.

KORN AND WISEMILLER *v.* THE MUTUAL ASSURANCE SOCIETY AGAINST FIRE ON BUILDINGS OF THE STATE OF VIRGINIA.

The separation of Alexandria from Virginia did not affect existing contracts between individuals. The insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia. The obligation of the insured to contribute, does not cease in consequence of his forfeiture of his own insurance by his own neglect. All the members of the company are bound by the act of the majority. No member can devest himself of his obligations as such, but according to the rules of the society.

ERROR to the Circuit Court of the District of Columbia, sitting at Alexandria.

This was a motion, in the court below, in the name of the principal agent of the Mutual Assurance Society for judgment against Korn & Wisemiller for 116 dollars, "being the amount due from them for a half quota under a declaration for insurance made to the society with 6 per cent. interest thereon from the first day of June, 1805."

The court below gave judgment according to the motion, and the defendants brought their writ of error.

This society was incorporated by the legislature of Virginia, by an act passed on the 22d of December, 1794, entitled "An act for establishing a Mutual Assurance Society against fire on buildings in this state."

The principles of the society are declared to be, "That the citizens of this state may insure their buildings against the losses and damages occasioned accidentally by fire; and that the insured pay the losses and expenses, each his share according to the sum insured."

193*] *The act provides that the rules and regulations which should be concluded upon by a majority of the subscribers at the first meeting, should be binding on all those who should insure their property in that society; and that a majority of the society might at any time alter and amend the rules and regulations as they should judge necessary. That certain premiums should be agreed upon to be paid by the insured to constitute a fund to pay losses. And that if that fund should not be sufficient, a "repartition" among the insured should be made, and each should pay on demand of the cashier his share according to the sum insured and the rate of hazard. It also provides that the property insured should be bound for the payment, and for that purpose might be sold. That such quotas when called for should be advertised, and when any person should neglect to pay his quota, his insurance should cease until it should be paid. If the property should be sold, the purchaser was to become a subscriber in lieu of the vendor. The subscribers might be compelled to pay the premiums, on request of the cashier, with 6 per cent. interest to the day of payment.

By a subsequent act, passed in December, 1795, it was enacted, "That the said subscribers, a majority of them in person or by deputation being present, or a majority of the sum subscribed, when any meeting shall be held, being there represented, shall have power and authority to proceed and act in all matters and things in the first recited act mentioned, in as full, absolute, and unlimited a manner as they might or could do if all and every of the said subscribers were actually present and attending at any such meeting."

By an act passed the 12th of January, 1799, it is enacted. "That the said mutual insurance society shall have full power to recover the whole, or any part of such premiums or quotas as are, or may hereafter become, due from any delinquent subscriber or member, under his subscription or declaration for insurance made to the said society, on motion of the cashier of the society before the court of the county, or the court of the district wherein such delin-

194*] quent may reside, ten *days' notice of such motion being previously given; and such court shall have full jurisdiction to hear and determine such motion, and to cause their judgment to be enforced with costs by any legal execution; saving to any person, against whom a motion shall be made, the right of a trial by jury, if he shall desire it."

By an act passed the 27th of January, 1803, it is enacted, "That the said society may insure buildings in the county of Alexandria, provided Congress shall pass a law subjecting those who declare for insurance in that society to the provisions and regulations of the laws of Virginia, which are already, or may hereafter be, passed concerning the said society. The act to commence and be in force as soon as Congress shall pass a law subjecting the citizens of the county of Alexandria who shall hereafter subscribe for insurance in the said society, to the same mode of recovery in the court of the county of Alexandria as is now allowed and granted by the laws of this commonwealth against defaulting subscribers residing within this state."

On the 3d of March, 1803, Congress passed such an act as was contemplated by the legislature of Virginia.

On the 29th of January, 1805, Virginia passed an act, the preamble to which recites, that it had been represented on the part of the society that such a change in their constitution as would separate the interests of the inhabitants of the towns from the interests of the inhabitants of the country, is essential to the "equalization" of the risks, and that the same had been agreed upon at a general annual meeting of the society. It therefore enacts, that the funds should be divided between the towns and the country, in proportion to the capital subscribed by the towns and country respectively, and that the town funds should be only liable for town losses, and country funds for country losses. That during the year 1805, all the valuations of houses insured should be revised, and no loss paid but according to such revaluation subject to a deduction of one-fifth thereof; "and where such revaluation shall exceed the former valuation, an additional premium shall be paid."

*That "it shall be lawful for any [***195** member of this society to withdraw from the same, on giving six weeks' previous notice, and upon paying all arrearages due at the time of withdrawing."

"That all debts due, or to become due, to the society may be sued for, prosecuted, and recovered in the name of the society in the same manner, in the same courts, and upon the same principles as they may now be sued for, &c., except that the name of the cashier need not be used. That the agents, &c., shall perform the duties required from agents by the 19th article of the rules and regulations now in force."

By the 19th article of the rules and regulations of the society adopted and in force prior to the 29th of January, 1805, the duties of an agent were "to act for the society agreeably to the constitution, to apply to the house owners of their respective counties, explain the plan to them, make out the declarations of insurance, procure the certificate of the majority of three respectable house owners (of whom the county agent may be one) of the valuation of the buildings, transmit the declarations, property executed, to the principal agent, and correspond with him on what may be necessary to be done."

The plaintiffs in error made their declaration for insurance in the usual form under seal, and thereby promised that they would "abide by, observe and adhere to, the constitution, rules and regulations which were already established, or might thereafter be established, by a majority of the assured present in person, or by representatives, or by a majority of the property insured, represented either by the persons themselves or

their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be holden by the assnranee society, or which were, or thereafter might be, established by the president and directors of the society."

In consequence of this declaration, the plaintiffs in error paid the original premium of **196***] insurance and obtained *a policy. The society demanded a half quota; "that is to say, for the payment as it existed on the 25th of February, 1805, of a sum equal to one half of the original premium, which half quota was required to be paid on the 1st of April, 1805, and is the sum for which judgment is now claimed."

By the 14th article of the original rules and regulations of the society, it is provided, that, "In every period of seven years from the commencement of this institution, there shall be new declarations and valuations for insuranee upon buildings insured by this society, and whoever fails to renew his declarations and valuations for the space of three months from the expiration of each term of seven years, shall cease to enjoy the benefits of his assurance till such new declarations are made; should the valnation be less than before, the assured shall have no right to demand of the society the difference of the premiums, but it shall remain for the benefit of the society, and in case of any loss the insured are always to be paid according to the last valnatiou."

Korn & Wisemiller did not, within three months after the expiration of the first term of seven years, renew their declaration and valuation, and thereby ceased to enjoy the benefit of their insurance.

The town and county of Alexandria, in which these buildings were situated, was, until the 27th of February, 1801, a part of the state of Virginia, since which day they have constituted a part of the District of Columbia. The plaintiffs have always been inhabitants of the town of Alexandria ever since the year 1789.

On the 25th of December, 1795, the society commenced the operations of the institution.

In pursuance of the act of Virginia of the 29th of January, 1805, a separation of the interests of the inhabitants of the towns from the interests of the inhabitants of the country, has been made in the manner expressed in the 1st, **197***] 2d, 3d, 4th, 5th and 6th sections. *The new constitution in that act contained went into operation on the 30th of Jannary, 1805.

The plaiutiffs iu error made a declaration of revaluation of the property insured by them, which declaration was under their seals, and was produced and made in consequence of the representations of the agent of the society, who stated that the plaintiffs in error were bound by their former declaration, and by the rules and regulations of the society, so to do.

C. Lee, for the plaintiffs in error, contended,

1. That they were not members of the company on the 25th of February, 1805, when the demand was made.

By the cession of the District of Columbia to the United States, the town of Alexandria ceased to be in Virginia, so that the plaintiffs in error were not Virginians, nor was their property in Virginia, and one of the fundamental articles of the charter would thus be violated if the property should continue to be insnred.

By accepting the new charter the old was dissolved, and no person could be a member of the new company unless by a new declaration, and by accepting a new policy.

2. That the revaluation, and new declaration did not bind the plaintiffs in error, because it was made under a misrepresentation made by the agent of the society; and it is immaterial whether it were a misrepresentation as to the fact or as to the law.

By the charter the assured only were to be considered as members of the company. When a person ceased to be assured he ceased to be a member, and was no longer liable to new calls. If the property of Korn & Wisemiller had been destroyed by fire after the 27th of February, 1801 (the day of the separation of Alexandria from Virginia), the society would not have been liable; Korn & Wisemiller, therefore, cannot be liable for a share of the losses which have happened *since that time. It [***198** was a fundamental principle of the charter, that the insurance should be mutual.

The act of Congress of the 27th of February, 1801, which adopts the laws of Virginia as the laws of that part of the District of Colnmbia, does not aid the society, for the law of Virginia authorized insurance to be made upon houses in Virginia only. Any person might withdraw from the company by refusing to pay a quota, or by refusing to accept a policy.

Swann, contra.

The original charter gave the majority of the members a right to bind the residue, as well by alterations in the charter itself, as by rules, by-laws and regulations; a majority could accept a new charter, and thereby bind all the members.

The cession of the District of Columbia did not destroy private rights; it only changed the political relation of the inhabitants.

No person could withdraw from the company otherwise than by the mode pointed out in the act of Virginia, after giving the notice prescribed. The snspension of the insurance of a person refusing or neglecting to pay his quota, is a mere penalty, he does not cease to be a member, he still remains liable for his share of the losses, notwithstanding the suspension of his own insurance.

If there was a misrepresentation by the agent of the society, it was a misrepresentation of a principle of law which the plaintiffs in error were bound to know as well as the agent. They were members of the company, and ought to have known all the obligations they contracted as such. (Fonb. Eq., 108; Doct. & Stud., 1, 46, 309; Woodd., 608; Buller, 31.)

JOHNSON, *J.*, delivered the opinion of the court as follows:

This cause comes up from the Circuit Court of Alexandria, *in which a summary [***199** judgment has been given for the recovery of a contributiou demanded of the members of the Mutual Assurance Society conformably to its by-laws.

The plaintiffs here contest their liability upon several grounds.

1. Because, by the separation of Alexandria from the state of Virginia, they virtually ceased to be members of the institution.

2. That, by having omitted to revalue within seven years, they were no longer insured, and, of consequence, not liable to contribute.

3. That, by the alteration of the charter in 1805, their security and liability became so materially changed as to discharge them from their contract.

4. That their revaluation in 1805 ought not to be obligatory upon them, because they were deluded into it by false or incorrect suggestions.

5. That they are not liable, under the description of persons who had insured prior to 1804, as they ought to be considered only as having insured at the time of their revaluation.

On the first of these points the court are of opinion, that the separation of Alexandria from the state of Virginia could have no effect upon existing contracts of individuals. Such divisions of territory are entirely political; a separation of jurisdiction takes place, but private interests and private contracts remain unaffected, and every individual relation continues the same, except that of being associated under the same government. The circumstance that the law of Virginia has limited the company to the bounds of the state, in performing its functions, could only prevent them from making new contracts subsequent to the separation, and until they had received additional powers, **200***] *but could not release them from their liability to individuals with whom they had previously contracted. Nor can the circumstance of the members of the legislature being authorized to represent their respective counties, affect the case; for, although the Alexandria property could no longer be represented in that mode, there was nothing to prevent their appearing in person, or by proxy, at the meetings of the company.

The court are further of opinion, that all the other grounds assumed by the plaintiffs are equally untenable. Although, at the first view, it would appear reasonable that he who is not insured is not bound to contribute, yet there may exist strong reasons why, under the peculiar organization of this company, a different rule should be adopted; and certain it is that the individual may, by his own act, subject himself to such a state of things. The liability of the members of this institution is of a twofold nature. It results both from an obligation to conform to the laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive. "We will abide by, observe and adhere to, the constitution, rules and regulations which are already established, or may hereafter be established, by a majority of the insured present in person, or by representatives, or by the majority of the property insured, represented either by the persons themselves or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society, or which are, or may hereafter be, established by the president and directors of the society." It would be difficult to find words of more extensive signification than these, or better calculated to aid, explain, and enforce the general principle, that the majority of a corporate body must have power to bind its individuals. It is true that the words of this declaration, as well as the general power of a corporate body, must be restricted by the nature and object of its institution; but apply this rule to the case before us, and it cannot avail the plaintiffs, for both the rule which suspends the security *and the alteration [***201** made in its constitution, under a vote of the majorty, are strictly conformable to the general objects for which the company was instituted.

We are of opinion that while Korn & Wiseminer continued members of the society, they remain subject to the general liability which that state imposes; and that, after becoming members, their ceasing to be so must be determined by the rules of the society, which rules, as far as we are at present advised, admit of only two cases; one is, where the house insured is consumed by fire, and the other, upon giving the notice, and conforming to the other regulations imposed by the by-laws.

It is observable that the rule which imposes the necessity of a septennial valuation of the property insured, does not contemplate a total rescission or annihilation of the contract; on the contrary, it is express in declaring that, upon a revaluation being made, the party shall continue insured by virtue of his former policy. We, therefore, consider this suspension of his security merely as a penalty imposed upon the member for neglecting to conform to a rule of the society. And it is certainly much more reasonable that he should be subject to a loss or inconvenience for his own neglect than that he should be released from his liability to the society, in consequence of it.

As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds; and whether just or unjust, reasonable or unreasonable, beneficial or otherwise, to all concerned, was certainly a mere matter of speculation, proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured. Certainly the general submission which they have signed will cover their liability to submit to this alteration.

*The view which we have taken [***202** of this subject affords an answer to the fifth ground, and, in a great measure, to the fourth.

We consider the insured, upon every revaluation, as in under his former right of membership, and, of consequence, that the plaintiffs come under the description of persons who had insured before 1804; and, for the same reason, the representation of Scott (could any effect at all be given to the circumstances to which he testifies) was true, as to the membership of the plaintiffs, and as to their liability in that capacity. They must have known it was a question of law on which Scott possessed no power to commit the society, and on which the plaintiffs themselves ought to have been as well informed as any other individual.

Judgment affirmed.

Cited—1 Wheat. 282 (n).

ATKINSON
v.
THE MUTUAL ASSURANCE SOCIETY AGAINST FIRE, ON BUILDINGS OF THE STATE OF VIRGINIA.

The additional premium upon a revaluation under the rules of the society, is only upon the excess.

THIS case differed from the case of *Korn & Wisemiller* v. *The Mutual Assurance Society;* that being for a half quota, and this for the additional premium upon a revaluation, under the 7th section of the act of 1805. (See Virginia Laws, v. 2, App., 81.)

The question (which was submitted without argument) was, whether the additional premium should be charged on the whole sum at which the buildings were revalued, or only on the excess between the old and new valuation.

JOHNSON, *J.* The court is of opinion that the rule on the subject of premium imposes the additional premium only on the excess of the revaluation beyond the former valuation.

Judgment reversed.

Cited—7 Cranch, 389.

203*] *THE UNITED STATES
v.
SHIP HELEN.

A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute.

THIS was an appeal from the sentence of the District Court of the United States for the District of New Orleans, which dismissed the libel.

The ship Helen, a vessel of the United States, during the existence of the act of Congress of the 28th of February, 1806, "to suspend the commercial intercourse between the United States and certain ports of the island of St. Domingo, had traded with one of the prohibited ports, contrary to that act. The act was suffered to expire on the 25th of April, 1808. Afterwards, to wit, on the 20th of September, 1808, she was seized, on account of that violation of the act, by the collector of the port of New Orleans; but the libel was dismissed by the judge, on the ground that the law had expired.

The United States appealed.

The case was now submitted without argument; and upon the authority of the case of ————, at last term,

The sentence was affirmed.

Cited—3 How. 552.

STEWART *v.* ANDERSON.

In an action in Virginia by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor which he held at the time of receiving notice of the assignment of his own note, although the note thus set off was not due at the time of the notice, but became due before the note upon which the suit was brought.

ERROR to the Circuit Court for the District of Columbia.

Stewart, the indorsee of a promissory note, brought his action of debt, under the statute of Virginia, against Anderson, the maker. The note was made payable to W. Hodgson, and by him assigned to Stewart. It *was dated [*204 the 25th of April, 1807, and payable 180 days after date, for 330 dollars and 56 cents.

The defendant pleaded,

1. *Nil debet;* and,

2. That at the time the note became due, and before the defendant had notice of the assignment thereof to the plaintiff by W. Hodgson, the latter became, and now is, indebted to the defendant in the sum of 566 dollars and 67 cents, by note dated the 29th of June, 1807, and payable 60 days after its date. That the defendant has been, and still is, ready and doth offer to set off against the money due from him by the note mentioned in the declaration, so much of the 566 dollars and 67 cents, as will be and is sufficient to discharge all that is due and owing from him for and on account of the note in the declaration mentioned.

Upon the trial in the court below the jury found a special verdict, which states, that Hodgson transferred to the plaintiff the note in the declaration mentioned; and afterwards, on the 14th of August, 1807, for the first time informed the defendant that the note was transferred, but did not say to whom. At the time of that information, the defendant held a note of W. Hodgson, dated the 29th of June, 1807, for 566 dollars and 67 cents, which was given for a full and valuable consideration, and payable 60 days after date. When the defendant was informed of the transfer of the note he made no reply. The jury finally conclude by saying that they "find for the defendant, provided the court are of opinion that the verbal notice given by Hodgson to the defendant, on the 14th of August, of the transfer of the note in the declaration mentioned, was not sufficient to bar the defendant's right of offsetting his aforesaid note of 566 dollars and 67 cents, against the plaintiff's note in the declaration mentioned. But should the court be of opinion that the said notice was sufficient to entitle the plaintiff to the money in the declaration mentioned, as against the defendant, then they find for the plaintiff," &c.

*Upon this special verdict the judg- [*205 ment of the court below was for the defendant; and the plaintiff brought his writ of error.

Youngs, for the plaintiff in error, contended, that the note offered in discount was not a good set-off, because it was not payable at the time the defendant had notice of the assignment.

The act of assembly of Virginia (P. P. 36) provides, that "assignments of bonds, bills, and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant."

Under this act of assembly it must be a just

discount before notice; this could not be a just discount until it became payable. Money cannot be offset before it be due.

The act of assembly was not intended to embrace commercial cases. If it did, it would destroy the negotiability of notes, and all credit and confidence in mercantile transactions.

The court stopped *E. J. Lee*, contra.

MARSHALL, *Ch. J.* If Hodgson's note had not been payable till after Andersou's, it would have been a different case; but being payable before Anderson's, and holden by Anderson before notice, it is such an offset as he might avail himself of at the trial.

Judgment affirmed.

Citcd—5 Mason, 206, 215.

206*] *THE MARINE INSURANCE COMPANY OF ALEXANDRIA

v.

HODGSON.

The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error.

After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the Appellate Court has decided such pleas to be bad upon demurrer.

In an action of covenant on a policy under seal, all special matter of defense must be pleaded. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy.

In order to prove the condemnation of a vessel it is only necessary to produce the libel and sentence.

It is a useless practice to read the proceedings at length. The depositions stated in such proceedings are not evidence in an action upon the policy of insurance.

In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy.

ERROR to the Circuit Court of the District of Columbia.

The former judgment of the court below in this cause, in favor of the now plaintiffs in error, having been reversed in this court, and the cause sent back for the trial of the issues of fact,[1] the plaintiffs in error, before the cause could be regularly called for trial according to the rules and practice of the court, moved the court below for leave to amend the pleadings by adding to the former eight pleas, a ninth and a tenth plea, in the words followiug:

9th plea. And the said defendants, by their attorney aforesaid, by leave of the court, and by virtue of the statutes in such cases made and provided, for further plea in this behalf say, that the said plaintiff ought not to have aud maintain his action aforesaid against them, because they say, that the said Marine Insurance Company (by the act of assembly of Virginia incorporating said compauy, which act of assembly they now bring here into court) are authorized to make rules and regulations for the conducting the business of the said corporation, and that one of their said rules and regulations requires that every order for insurance shall be made in writing, and shall contain the uame of the vesscl and master, the place from whence and to which insurance is required to be made, with as full a deseription of the vessel and voyage as can be given thereof, and especially as to her age, tonnage and equipment, and that it was always and is the practice of the said insurance company to make no insurance upon the body of a ship, her tackle, apparel and furniture, beyond the reasonable value thereof according to the representation and description given thereof as to her age, tonnage and equipment, which rule and praetice dimiuishes the risks of insurance in regard *to losses contrived, designed, effected [*207 and concealed by the insured when they are greatly over insured; and that the said rule and practice was, at the time of making and concluding the contract aforesaid in the declaration mentioned, well known to each of the said parties making the said contract; and that to induce them, the said defendants, to sign, seal and deliver the aforesaid policy of insurance, thereby insuring to the value of eight thousaud dollars upon the body, tackle, apparel and other furniture of the brigantine Hope aforesaid, he, the said plaintiff, in effecting the said poliey on the 30th of September, in the year 1799, at the county aforesaid, stated and represented that the said brigantiue in the month of July, in the year last meutioued, was a stout, well built vessel of about 250 tous burden, in good order, aud well found in sails, rigging, &c., built in Massachusetts, and from six to seven years old, and requested an insurance upon the said brigautine, her tackle, apparel and furniture, rating her value at the sum of 10,000 dollars for the voyage in the declaration mentioned at the commeucement of the risks to be insured. And the plaintiff represented to the defendants on the same 30th day of September, in the year 1799, at the county aforesaid, that the said brigantine, her tackle, apparel and furniture, were of the value of 10,000 dollars, at the time the risks of the voyage to be insured by the contract aforesaid, would commenee; and the defendants aver, that in cousequenee of the said representation, and placing full faith and credit therein, they were induced to sign, seal and deliver, and did sign, seal and deliver the said policy of insurance on the said 30th day of September, in the year aforesaid, at the county aforesaid, to the plaintiff, thereby agreeing in the said policy to fix the value of the said brigantine, her tackle and apparel and other furniture, at the sum of 10,000 dollars, and thereby insuring to the amount of 8,000 dollars for the voyage aforesaid, upon the said brigantine, her tackle, apparel and furniture. And the said defendants further aver, that the said brigantine Hope was not, in the month of July, in the year aforesaid, or at any time, a well built vessel of the burden of about 250 tons, and was *not from six to seven years [*208 old in the said month of July, in the year aforesaid, but was much older than from six to seven years old in the said month of July, in the said year, that is to say, more than eight and a half years old, and had been ill built in the year 1790, in the province of Maine, in Massachusetts, and thereafter was raised upon and rebuilt; that the valuc of the said brigantine, her tackle, apparel and furuiture, was never at any

1—Sce *ante*, v. 5, p. 100.

time whatever equal to one-half the said sum of 8,000 dollars. And the defendants say that the differencc aforesaid between the true built, age, tonnage and value of the said ship, and the aforesaid represcnted built, age, tonnage and value thereof was material in regard to the risks of the voyage in the said policy of insurance mentioned, and this they are ready to verify; wherefore they pray judgment, &c.

10th plea. And the said defendants by their attorney aforesaid, by leave of the court and of the statutes in such cases made and provided, for further plea in this behalf say, that the said plaintiff ought not to have or maintain his action aforesaid against them, because they say that the said policy of insurance was had and obtained of them by means of the fraud of the said George F. Straas in the declaration mcntioned, with intent to deceive and defraud the said defendants of a large sum of money, that is to say, of the difference between the just and fair value of the said brigantine, her tackle, apparel and furniture, and the sum of 8,000 dollars intended to be insured by the said policy, which difference exceeded one-half the sum last mentioned, that is to say, exceeded 4,000 dollars, and this they are ready to verify; wherefore they pray judgment, &c.

But the court below refused to permit the pleadings to be so amended, in consequence of which the cause went to trial upon the three issues of fact which had already been joined, viz.:

1. That the defendants "have well and truly [*209 done *and performed all things they by the said policy of insurance were bound to perform."

2. That the brigantine Hope "was not taken and seized by certain British vessels and carried into Jamaica and there libeled, condemned and sold in manner and form as in the declaration is set forth;" and,

3. That the brigantine Hope was not, when she sailed from her last port in the island of St. Domingo, on the voyage insured, a good, sound, staunch, seaworthy ship, able to perform the voyage insured.

Upon the trial of these issues the defendants offered evidence of the facts stated in the ninth and tenth pleas, which the court rejected as inapplicable to either of the issues. To which refusal the defendants excepted.

The defendants also offered in mitigation of damages, evidence to prove that the vessel, at the time she sailed upon the voyage insured, was not worth one-half the sum insured, and that the high valuation in the policy was produced by an untrue and unfair representation, on the part of the insured, of the age, tonnage and built of the vessel, and that the misrepresentation in those respects was material to the contract of insurance, and thereupon prayed the court to instruct the jury that if they found the facts to be so, they ought not to take the valuation stated in the policy as the true value of the subject intended to be insured, but in assessing the damages of the plaintiff, they ought to take the just value of the said brig, &c., at the commencement of the risk insured, although all the issues of fact should be found for the plaintiff. Which instruction the court refused to give, having already instructed the jury, in case they should find the issues for the plaintiff, to reserve, for the decision of the court, the question as to the principle upon which the damages should be estimated and assessed. To which refusal the defendants also excepted.

The plaintiff, for the purpose of proving the libel *and condemnation in the declara- [*210 tion mentioned, produced and read to the jury, without objection at the time on the part of the defendants, a copy of the whole record and proceedings in the Vice-Admiralty Court at Jamaica, respecting which the counsel for the parties had entered into the following agreement, viz.: "The defendants waive all exceptions to the authentication of the record of the proceedings in admiralty concerning the condemnation of the brig Hope, but save every objection to the contents of the said record excepting the matter of authentication. The plaintiff admits, as evidence, the affidavit of Gibson & Evans."

After the reading of which, the defendants, in order to prove that the vessel was not, at the time of capture, in the due course of the voyage insured, and the condition she was then in, offered to read in evidence to the jury, from the said record of proceedings, a copy of the deposition of William Murray, taken *in preparatorio*, to be used in the said Court of Vice-Admiralty.

But the court instructed the jury that the said deposition of the said William Murray, so taken, is not competent evidence in this cause to prove the said facts. To which instruction the defendants excepted.

The plaintiff moved the court to direct the jury, that if, from the evidence, they find all the issues of fact for the plaintiff, then they should find their verdict in the following form, viz.: "We of the jury find all the issues of fact joined in this cause for the plaintiff, and do assess his damages by reason of the breach of covenant in the declaration mentioned, to the sum of ——. The amount of damages so assessed to be nevertheless subject to the opinion of the court upon the following point reserved, viz., if the value fixed in the policy, set out in the declaration be not conclusive upon the parties, and it be competent to the jury, under any of the issues of fact joined in this cause, to hear evidence concerning, and to inquire into the real value of the vessel in the said policy mentioned, so as to reduce the agreed value mentioned in the said policy, and *to estimate the plaintiff's damages ac- [*211 cording to such reduced value, as actually proved, then, and not otherwise, we assess the plaintiff's damages (in lieu of the sum above assessed) to the sum of ——. To which direction the defendants objected, and prayed the court if they gave the jury any instruction upon the subject, to direct them to find the smaller sum in damages, if the court should be of opinion that it was competent for the jury to hear evidence concerning the misrepresentation as to the age, built, and tonnage of the vessel.

But the court refused to give the instruction prayed by the defendants, having before refused to suffer the defendants to give evidence of misrepresentation by the plaintiff in obtaining the policy, under either of the issues of fact joined in this cause, to which refusal the defendants had taken a bill of exceptions. But the plaintiff having consented to permit the defendants to give evidence of the real value

of the vessel at the time the risks insured commenced, (saving the objection to the competency of any parol evidence upon any of the said issues of fact, concerning the real value of the said subject insured,) the court directed the jury to find their verdict as prayed by the plaintiff.

To which refusal and instruction the defendants excepted.

The jury found a verdict in the form directed by the court, and filled the first blank with the sum of 11,452 dollars and 34 cents, and the other with the sum of 6,441 dollars and 71 cents.

The court, after consideration, rendered judgment for the largest sum, being of opinion that the value stated in the policy was conclusive between the parties.

The defendants brought their writ of error.

C. Lee, for the plaintiffs in error.

1. The court below ought to have permitted **212***] the additional *pleas to be filed. When a cause is sent back from this court with a mandate "that such further and other proceedings be had in the said cause, as, according to right and justice and the laws of the United States, and agreeably to the judgment of the said Supreme Court, ought to be had," it is open to all amendments as if it were an original cause, and as if the former plea had been adjudged bad by the court below in the first instance.

Amendments are permitted, even after judgment upon demurrer, according to the discretion of the court. And this court will reverse the judgment of the court below, if it has not soundly exercised its discretion. (5 Term Rep., 112, *Wilkins* v. *Despard;* 7 Term Rep., 703, *The King* v. *The Grantford Corporation;* 1 Cranch, 117, *Resler* v. *Shehee;* 1 Wash., *Downman* v. *Downman;* 1 Burr., 317, 322; 1 Wash., 313; 4 Cranch, 433, *Pollard* v. *Dwight.*)

The 9th plea was different from any before offered. And it was not necessary that the plea of fraud should have been more specific. (3 Wentw., 414; 3 Dall., 321, *Wiscart* v. *Dauchy;* 1 Woodd., 207; 3 Co., 77, *Ferrer's* case.)

The court ought to have received evidence of fraud and misrepresentation upon the first issue, which was in the nature of a general issue. The plea might perhaps have been adjudged bad upon demurrer; but it is aided by the joinder of issue upon it, and everything which could show that the defendants were not bound by their covenant to do anything, was admissible upon this issue.

(System of Pleading, 321; 5 Com. Dig. tit. Pleader, E. pl. 37, C.; 5 Esp. Rep., 38.)

If the evidence was not directly admissible upon either of the issues, it ought still to have been received in mitigation of damages. The contract of insurance is only a contract for indemnity; and if, upon a total loss, the insured **213***] receive the full value of the subject *insured, it is all that he can in equity and in good faith require. (4 Burr., 1966, *Da Costa* v. *Perth;* Cowp., 583, *Grant* v. *Parkinson.*)

In this very case this court has intimated an opinion that the misrepresentation might be a subject of consideration in inquiring of damages.

Upon a total loss, the value stated in the policy is only *prima facie* evidence. (*Marshall,* 110, 111, 199, 612, 701; 2 Atk., 554. *Sadlers' Company* v. *Babcock.*)

The court ought to have admitted the deposition of Murray to be read from the record of the vice-admiralty. By the British treaty the whole proceedings are made evidence.

The court also erred in rendering judgment upon the verdict for the larger sum. It was competent for the jury to hear evidence of the real value of the vessel, and to assess damages accordingly.

Swann, contra.

The court below committed no error in rejecting the 9th and 10th pleas. They were offered after the cause had been remanded from this court. There will be no end to delay if the party be permitted to amend after judgment against him upon a writ of error.

As a matter of discretion also, the court did right in rejecting the 9th plea. They ought not to have indulged the defendants with filing a plea at that late stage of the cause, which tendered the same issue which they had refused to join when tendered by the plaintiff in his replication to the 6th plea. Besides, the matter of the plea was covered by the implied warranty of seaworthiness; for if the facts stated in the plea were at all material, they must have been so only in regard to the ability of the vessel to perform the voyage. The substance of this plea was therefore included in the issue of seaworthiness.

The admission or rejection of a plea after an issue *is joined, is not an error for [**214** which the judgment can be reversed. It is a mere matter of discretion; the party can have no legal ground to insist upon it. (7 Term Rep., 703.) The principle that this court will not reverse a judgment for a proceeding in the court below which was within its discretion, has been decided in regard to the continuance of causes, and the granting new trials.

If it be a case in which a writ of error lies, still no error was committed by the court in the exercise of its discretion in rejecting the 10th plea. It is not a direct allegation of fraud, nor does it aver that any damage was sustained by the defendants in consequence of the fraud. The plea is not sufficiently explicit in charging the fraud; it does not state in what particulars the fraud consisted. Neither of the pleas could be considered as a fair plea to the merits. They must have produced demurrers, and additional delay.

There was no error in rejecting the evidence of the facts stated in the 9th and 10th pleas, because there was no issue to which those facts could apply.

The plea that the defendants had performed all that they were bound to perform must be considered as an averment of a matter of fact, not of a matter of law. The only act which the defendants were bound to perform was to pay the money if a loss happened. The plea therefore amounts to an averment that they had paid the money.

There was no error in rejecting the copy of Murray's deposition, for it was not taken in the cause. The plaintiff had no opportunity to cross-examine him. It was entirely an *ex parte* proceeding.

There could be no error in the direction given by the court to the jury to find their

damages in the alternative, or conditional manner; it is often done when a question of law is to be saved. It is a kind of special verdict. The error, if any, must have been in rendering the judgment for the largest sum.

215*] *The correctness of this judgment depends upon the question whether it was competent for the jury, upon either of the issues, to hear parol evidence of the value.

The policy was sealed, and subject to all the incidents of a sealed instrument at common law. The value agreed upon by the parties, under seal, cannot be denied by parol evidence. (4 Bac., 106; Salk., 276; 2 Burr., 1171, *Lewis* v. *Rucker;* 4 Burr., 2228, *Lowe* v. *Peers.*)

But even if it were a policy without seal, the agreed value in the policy would be conclusive. (Park, 104, 267, 1167.)

The agreed value is conclusive unless it appears to be a cover for a wager. An inquiry of the actual value is never made upon a valued policy but with a view to ascertain whether it be a wager policy. There is not an instance in the English books of the agreed value ever being reduced to a smaller sum. Upon a total loss, the agreed value is to be recovered, or nothing. If this be not the case, and you can go into the question of the actual value, every policy is reduced to an open policy.

Suppose a man should make a bad bargain, and purchase a vessel for 10,000 dollars, not worth 5,000. He insures, and it is agreed that the vessel shall be valued at 10,000 dollars. A total loss happens; shall he be obliged to receive only the value of the vessel to be ascertained by a jury?

This is like every other case of liquidated damages; it is conclusive between the parties.

As to plea of fraud, it was too vague. The precedent cited from Wentworth is against them; the vessel in that case was stated to have been fraudulently consumed by fire. The case from Dallas is not relevant. The case of *Pollard and Dwight* is against them. The court there refused to direct the amendment to be made. The case from 1 Wash., 313, was upon a special demurrer, and it was most clear that **216*]** the *justice of the case required the amendment. It was a case clearly within the equity of the statute of jeofails. In the case from 7 Term Rep., 703, the court did give leave to amend under the statute of jeofails, but it was in the exercise of its discretion.

E. J. Lee, in reply.

Amendments may be made at any time, even after verdict, and for that purpose a new trial will be granted. (7 Term Rep., 132, *Tompkinson* v. *Blacksmith;* Str., 1151, 1162, Comb., 4; 3 Call, 522, *Jude* v. *Syme;* 2 Salk., 622.)

If the facts in the 9th plea would have vacated a policy not under seal, the court ought to have suffered them to be pleaded to a sealed instrument, especially after the 6th plea (which had been formerly adjudged good by the court below) had been rejected by this court. By that rejection the defendants were entirely shut out from the benefit of these facts upon the trial.

The misrepresentation was material to the risks of the voyage, and every such misrepresentation, whether fraudulently or innocently made, destroys the policy. (Marshall, 335.)

Fraud vitiates every contract, and may be examined into by a court of law. It has been decided that courts of equity have no jurisdiction of insurance cases. (3 Bro. Parl. Cas., 525, *De Ghetoff* v. *The London Assurance Company.*) The contract of insurance is founded upon the principles of equity, and governed in all its parts by plain justice and good faith.

In a court of law a defendant may show that the consideration of a bond is bad. (*Collins* v. *Blantern*, 2 Wils., 347; *Guichard* v. *Roberts*, 1 W. Bl., 445; 4 Dall., 269; Jenk., 254, pl. 45; 1 Burr., 396; 1 Term. Rep., 619, *Winch* v. *Keely.*)

In covenant the plaintiff can recover only such damages as he has actually sustained, and the defendant may *give in evidence [***217** anything which shows that no damage has been sustained by reason of the breach of any covenant which the defendants were bound to perform. Evidence of fraud and misrepresentation went to show that the defendants were not bound to perform any of the covenants, and therefore the plaintiff was not entitled to damages. (2 Selwyn, 464.)

March 17. LIVINGSTON, *J.*, delivered the opinion of the court as follows:

This is an action of covenant, on a policy of insurance, to which the defendants pleaded, 1. That they had performed all things which, by the policy, they were bound to perform; 2. That the vessel insured was not captured and condemned as in the declaration is mentioned; and, 3. That the vessel insured was not seaworthy; on which pleas issues were taken by the plaintiff.

There were, also, five special pleas, to which there were demurrers, all of which were allowed by the Circuit Court, except the one to the sixth plea, which, on a writ of error to this court, heretofore brought, was allowed here, and the cause then remanded to the Circuit Court, for further proceedings to be had therein. On the return of the cause to the Circuit Court, the defendants moved for leave to file two additional pleas; which motion was denied, and is now relied on as one of the errors for which the present judgment should be reversed.

This court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the superior court *can never become fully possess- [***218** ed, that there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial, or not to continue a cause, but in neither case can the party be relieved by a writ of error; nor is the court apprised that a refusal to amend or to add a plea was ever made the subject of complaint in this way. The court, therefore, does not feel itself obliged to give any opinion on the conduct of the inferior court, in refusing to receive these pleas. At the same time, it has no difficulty in saying that, even in that stage of

the proceedings, the Circuit Court might, if it had thought proper, have received these additional pleas, or admitted of any amendment in those already filed.

The court below having refused to receive these pleas, the trial proceeded on the three on which issues were joined; and the defendants offered, under them, or some of them, to prove that it was one of the rules of their office, that every order for insuranee shall contain as full a description as can be giveu of the age, tonnage, and equipment of the vessel; and that it was always their practice to make no insurance on a vessel beyond her reasonable value, according to the representation given of her age, tonnage, and equipment; and that such rule was known to the plaintiff; and that, to induce them to insure eight thousand dollars on the brig Hope, the plaintiff represented her as a stout, well built vessel of about 250 tons burden, and from six to seven years old, and that she was worth ten thousand dollars; in consequence of which they insured her for eight thousand dollars; that, on the contrary, she was not a well built vessel of 250 tons burden, and was not from six to seven years old, but was more than eight and a half years old, and had been ill built; and that this difference between her true and her represented built, age, and tonnage, was material to the risks of the voyage insured. This evidence, being objected to, was deemed inadmissible; and this court is now called on to say whether, in this opinion, there was any error.

219*] *However desirable it may be to admit in evidence, on the general issue in an action of covenant on a policy of insurance, everything which may avoid the coutract, or lessen the damages, as is done in actions on the case, this court does not know that it possesses the power of changing the law of pleading, or to admit of evidence inconsistent with the forms which it has prescribed. No rule on this subject is more inflexible than that, in actions on deeds, all special matter of defense must be pleaded. Of this rule it is very certain, from a mere inspection of the record, that the defendants caunot allege ignorance. If everything, then, which is relied on to avoid a contract under seal, must be pleaded, it will at once be conceded that none of the matter offered in evidence applied to either of the pleas. The defendants could not thus set up an excuse for not doing that which, by one of the pleas, they professed to have done; and, as to the other pleas, which denied the capture and seaworthiness of the vessel, it will not be pretended that any of this matter supported either of them. The same remarks apply to the second and third bills of exeeption. Neither fraud nor misrepresentation, as to the value of the vessel, or her age, or tonnage, could be received in evidence, under either of these issues, no more than infancy or coverture, on a plea of *non est factum;* for, most certainly, none of the matters here offered by the defendants, the rejection of which occasioned these exceptions, went, in any degree, to prove either of the pleas on which issue had been joined.

The fourth exception is to the refusal of the court to admit the deposition of William Murray, which appeared among the admiralty proceedings, and which was offered by the defendants to prove that the vessel was not in the due course of her voyage when she was captured, and the condition she was in, at the time of capture. As the defendants have not, in either of their pleas, relied on a deviation, it may be doubted whether any evidence of that fact were admissible; but, if it were proper, for the purpose of discrediting any testimony which had beeu offered by the plaintiff, to show where the Hope had been taken, it is not thought that *the Circuit Court erred in instructing [***220** the jury that the deposition of Murray was not competent evidence to prove that fact. If all the proceedings in the admiralty had been read by the plaintiff without any previous agreement, on the part of the defeudants, to save every objection to their conteuts, excepting the matter of authentication, the court will not say that the defendants might not have insisted on using any deposition, among the papers, which made in their favor; but, as the plaintiff could have read them for no other purpose than to prove the libel and condemation, and must have attempted to prove no other fact by them, for which purpose it is expressly stated that they were offered, and as the defendants had, by their agreement, explicitly reserved to themselves every objection to their contents, it does not appear reasonable to permit them, to select a deposition, as evidence for them, while the plaiutiff could not have made use of that, or any other, if ever so favorable to himself. The Circuit Court, therefore, did not err in the iustruction which it gave to the jury on this subject. This court cannot forbear remarking here, that it can never be necessary, in order to prove a condemnation, to produce anything more than the libel and sentence; although it is a frequeut but useless practice to read the proceedings at length.

The fifth exception is taken to a refusal of the Circuit Court to direct the jury to find damages for the value of the vessel, as agreed in the policy, and, conditionally, for her actual value, if, in the opinion of the court, it was competent for the jury, under any of the issues joined, to inquire into the real value of the vessel. As it had already been decided, and, as this court thinks, correctly, to receive no evidence of the real value of the vessel, there was no error in refusing to give this directiou; and, although the plaintiff, at length, consented to permit the defendants to give evidence of the real value of the vessel, saving objections to the competency of such evidence, upon any of the issues of fact, and the jury, thereupon, found conditional damages, this court is of opinion that, as evidence of the real value of the vessel, under any of these issues, was incompetent, and as objections to its competency *were [***221** saved to the plaintiff, the Circuit Court did right in giving judgment for the damages found by the jury, according to the value of the vessel, fixed in the policy; which judgment this court affirms with costs.

S. C. 7, Cranch, 332.

Cited—3 How. 161; 4 How. 154, 148; 6 How. 6; 8 How. 161; 20 How. 267; 17 How. 445; 3 Wall. 105; 8 Wall. 373; 10 Wall. 436; 17 Wall. 628; 3 Blatchf. 233; 1 Sum. 104, 471.

SLACUM *v.* POMERY.

In an action by the indorsee against the indorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was indorsed.

The indorsement is a new and substantive contract.

In an action of debt against the indorser of a bill of exchange, under the statute of Virginia, it is necessary that the declaration should aver notice of the protest for non-payment.

It is not too late to allege, as error, in the appellate court, a fault in the declaration which ought to have prevented the rendition of a judgment in the court below.

ERROR to the Circuit Court for the District of Columbia, sitting in Alexandria, in an action of debt (under the law of Virginia), brought by Pomery against Slacum, as indorser of a bill of exchange, dated the 6th of August, 1807, drawn in the island of Barbadoes by Charles Cadogan, a merchant residing there, at 60 days' sight, upon Barton, Irlam & Higginson, at Liverpool, in England, for 138*l.* 17*s.* 9*d.*, sterling, payable to Slacum or order, who indorsed it, at Alexandria, in the District of Columbia, to the plaintiff.

The declaration was "of a plea that he render unto him one hundred and thirty-eight pounds, seventeen shillings and ninepence sterling money of Great Britain, with interest at the rate of five per centum per annum, from the 23d day of December, eighteen hundred and seven, until paid, together with fifteen per cent. damages on the said one hundred and thirty-eight pounds, seventeen shillings and ninepence, and ten shillings and sixpence sterling, of the value of two dollars and thirty-three cents, current money of the United States, costs of protest, which to him he owes," &c.

It then stated the making and indorsing of the bill, the non-acceptance and non-payment, and the protest for non-payment, "by reason of which premises, and by force of the statute in that case made and provided, action hath accrued to the plaintiff to demand and have of the defendant the said sum of 138*l.* 17*s.* 9*d.* sterling, and interest at the rate of five per cent. per annum, from the 23d of December, 1807, until paid, *together with fifteen per [*222 cent. damages, and ten shillings and sixpence sterling, of the value," &c.

Upon the trial of the cause on the issue of *nil debet*, the defendant below took a bill of exceptions, stating that evidence was offered of the bill, the indorsement by the defendant to the plaintiff in Alexandria (both parties being inhabitants of that town), the protest for non-payment, and that, by the laws of Barbadoes, the damages, upon protested bills of exchange, were only ten per cent. upon the principal and interest due upon the bill. Whereupon the defendant prayed the court to instruct the jury that the plaintiff was not entitled to recover more than the damages allowed upon protested bills according to the law of Barbadoes, and that he was not entitled in this case to fifteen per cent. damages, which instruction the court refused to give.

The verdict and judgment being for the plaintiff, for the whole amount demanded in the declaration, the defendant brought his writ of error.

The act of assembly of Virginia (P. P., 113,) provides, "that where any bill of exchange is or shall be drawn for the payment of any sum of money, in which the value is or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the drawer or indorser shall be subject to fifteen per centum damages thereon, and the bill shall carry an interest of five per centum per annum, from the date of protest, until the money therein drawn for shall be fully satisfied and paid." "And that it shall be lawful for any person or persons having a right to demand any sum of money upon a protested bill of exchange to commence and prosecute an action of debt for principal, damages, interest and charges of protest, against the drawers or indorsers jointly, or against either of them separately; and judgment shall and may be given for such principal, damages and charges, and interest upon such principal, after the rate

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NOTE.—The general principle adopted by civilized nations is, that the nature, validity, effect and interpretation of contracts, including notes, are to be governed by the laws of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought.

Bk. of U. S. v. Donally, 8 Pet., 372, per Story, J.; Watson v. Orr, 3 Dev. (N. C.), 161; De la Vega v. Vianna, 1 Barn. & Ad., 284; Trimbie v. Vignier, 1 Bing. N. C., 151; Dunscomb v. Bunker, 2 Mete., 8; Cox v. U. S., 6 Pet., 172; U. S. v. Daniel, 12 Pet., 32; Camfranque v. Burnell, 1 Wash., C. C., 340; Courtois v. Carpentier, 1 Wash., C. C., 376; Webster v. Massey, 2 Wash., C. C., 157; Nicolls v. Rogers, 2 Paine, 437; Bainbridge v. Wileox, 1 Bald., 536; Story on Prom. Notes § 155; Pearsoll v. Dwight, 2 Mass., 88; Touro v. Cassin, 1 Nott. & McCord, 173; DeSobry v. DeLaister, 2 Harr. & J., 193; Dyer v. Hunt, 5 N. Hamp., 401; Andrews v. Pond, 13 Pet., 65; Dyke v. E. R. Co., 45 N. Y., 113.

Notes drawn and dated in Maryland, and delivered in New York in payment of goods purchased in the latter state, are payable in, and to be governed by, the laws of New York. Cook v. Moffat, 5 How., 295, 307; Re Conrad, 1 Penn. Leg. Gaz., 284; Hyde v. Goodnow, 3 Comst. (N. Y.), 266; Davis v. Coleman, 7 Ired., 424; Fant v. Miller, 17 Grat., 47.

A bill of exchange drawn in one state, and accepted in another state for the accommodation of the drawer, and negotiated in the latter state, is to be governed by the law of the latter state, and if void for usury by its laws, an action against the drawer cannot be sustained. Davis v. Clemson, 6 McLean, 622.

Bills drawn for discount are governed by the law of the state where they are discounted. Orr v. Lacy, 4 McLean, 243.

The acceptor residing in Louisiana, and the indorser in Mississippi, the contract of the latter is governed by the law of Mississippi. Mason v. Lake, 4 How., 262.

A note made, dated, and payable at some place in New York, is, on the question of usury, to be treated as a New York contract, and governed by the laws of New York, although negotiated in a foreign country, at a rate lawful there, but usurious in New York, and is invalid. Cloyes v. Hooker, 6 N. Y., S. C. R. (T. & C.), 448; S. C., 4 Hun., 231; Curtiss v. Leavitt, 9 N. Y., 227; Jewell v. Wright, 30 N. Y., 259; Cope v. Wheeler, 41 N. Y., 303; Dickinson v. Edwards, 13 Hun., N. Y., 405; *Contra*, Boweu v. Bradley, 9 Abb., N. S. (N. Y.), 395; Bank of Georgia v. Lewin, 45 Barb., 340; Balme v. Wambough, 38 Barb., 352; Tilden v. Blair, 21 Wall., 241; First N. Bk. v. Morris, 1 Hun., 680; S. C. 4 N. Y., S. C. R. (T. & C.), 182; Dickinson v. Edwards, 53 How. Pr. (N. Y.), 40.

The case of Dickinson v. Edwards, *supra*, was affirmed in the Court of Appeals of New York, in September, 1879, (77 *N.* Y., 573), where the doctrine in this note above stated is affirmed, after an exhaustive examination of the authorities on the subject, in which case Tilden v. Blair, 21 Wall., 241; Bk. of Georgia v. Lewin, 45 Barb., 340; Kentucky v. Bassford, 6 Hill, 526; Hyde v. Goodnow, 3

aforesaid to the time of such judgment, and for interest upon the said principal money
223*] recovered after the rate *of five per centum per annum, until the same shall be fully satisfied.

Swann, for the plaintiff in error, conteuded,

1. That the damages must be according to the law of the place where the bill was drawn.

2. That it was uot averred iu the declaratiou that the defendaut had notice of the protest for non-payment. And although this might have been taken advantage of iu the court below in arrest of judgment, yet it was also a fatal objection upon a writ of error. The record does not show that the plaiutiff was eutitled to his judgment. (Doug., 679.)

Youngs, contra.

This is not an action upon the custom of merchants, but upon the statute of Virginia.

MARSHALL, *Ch. J.* It has never been doubted in Virginia, that uotice is as necessary in an action upon the statute as upou the custom of merchants.

Youngs. There was no motion in arrest of judgment. This objection was not taken iu the court below.

MARSHALL, *Ch. J.* There can be no doubt that anything appearing upon the record, which would have been fatal upon a motion in arrest of judgmeut is equally fatal upon a writ of error.

Youngs. This court, in the case of *Mandeville* v. *Riddle* (1 Cranch, 290), decided, that an action by a holder of a promissory note against an indorser is only by reason of the value received, and yet in the case of *Wilson* v. *Codman* (3 Crauch, 193, 208), this court decided that the averment of value received was an immaterial averment, and need not be proved.

In our case if uotice were uecessary to enti-
224*] tle the *plaintiff to a verdict, it will be presumed, after verdict, that notice was proved.

The statute upon which this action is founded does not require notice. The declaration avers all that the statute requires to constitute a cause of actiou. The want of notice is only to be taken advantage of by the defendant in his defense at the trial. The time of bringing this action shows that reasouable notice was giveu. This court has decided that it is not neccssary to give notice of a protest for non-acceptance.

As to the question of damages. The law of the place where the contract was made must prevail. The contract of the defendant as indorser, was made in Alexandria. Every indorsement creates a uew contract, and is in the nature of a new bill.

March 5. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

Upon a critical examiuation of the act of assembly on which this action is founded, the court is of opinion that it is rightly brought. Although the drawer of the bill was not liable to the damages of Virginia, the indorser is subject to them, he having indorsed the bill in Alexandria. The words of the act are, that where a bill of exchange shall be protested, "the drawer or indorser shall be subject to 15 per cent. damages thereon." The third section gives an action of debt "against the drawers or indorsers jointly, or against either of them separately. The act of assembly appears to contemplate a distinct liability iu the indorser, founded on the contract created by his own indorsement, which is not affected by the extent of the liability of the drawer. This is the more reasonable, as a bill of exchange is taken as much on the credit of the indorser as of the drawer; and the indorsement is understood to be not simply the transfer of the paper, but a new and a substantive contract.

*There is, however, an objection [*225 taken to this declaration. It omits to allege notice of the protest; an omissiou which is deemed fatal.

It has been argued that the act of assembly, which gives the actiou of debt, not requiring notice to be laid in the declaration, that requisite, which is only essential in au action founded on the custom of merchants, is totally dispensed

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N. Y., 266; Merchts. Bk. v. Spaulding, 9 N. Y., 53; National Bank v. Morris, 1 Hun., 680; P. C. S. Bank v. Frost, 13 Nat. Bank. Reg., 356; Scudder v. U. N. Bank, 1 Otto, 406, are distinguished; and Bowen v. Bradley, 9 Abb., Pr., N. S. 395; and W. C. S. Bank v. Low, 6 Abb. N. C., N. Y., 76, are overruled, by the New York Court of Appeals.

Bills of exchange drawn at Boston by G to his own order, upon defendant, (a resident of N. Y.,) at, and accepted payable at 107 West St., New York, were negotiated in Boston at a rate usurious in New York, *held*, that they were governed by the New York law. Hildreth v. Shepard, 65 Barb., 173, (1873). In this case it is stated that the true rule seems to be that where a note is dated and made payable in one state, and taken out of that state into another for negotiation or sale, it is still to be considered as a contract made subject to the laws of the state where dated and made payable. But when the note is made in one state, negotiated and sold in that state at a rate of interest there allowed, the same is to be governed by the laws of that state, and not of the state where it is payable.

As to the maker of a note, his liabilities are controlled by the law of the place where the note is made; unless it be payable elsewhere, then by the law of the place where payable. Wilson v. Lazier, 11 Gratt., 482; Chartres v. Cairnes, 16 Mart. (La.), 1; Yeatman v. Cullen, 5 Blackf., 241; Stacy v. Baker, 1 Scammon, 417; Brabston v. Gibson, 9 How., 263; Harrison v. Edwards, 12 Vt., 648.

As to the acceptor of a bill, his contract is governed by the law of the place where the acceptance is made if the bill is payable there, or if no place of payment be named, but if payable elsewhere, then by the law of the place of payment. Bright v. Judson, 47 Barb., 29; Everett v. Vendryes, 19 N. Y., 436; Frazier v. Warfield, 9 Smedes & M., 220; Barney v. Newcomb, 9 Cush., 46.

As to the drawer of a bill, his contract is to be governed by the law of the place where the bill is drawn. Freese v. Brownell, 35 N. J. L., 286; Hunt v. Standart, 15 Ind., 33; Raymond v. Holmes, 11 Texas, 55; Kuenzi v. Elvers, 14 La. An., 391; Lennig v. Ralston, 23 Penn. St., 137; Price v. Page, 24 Mo., 67, 595, 596; Bk. U. S. v. U. S., 2 How., 711.

The liability of an indorser of a bill or note is governed by the law of the place where indorsement was made, though the bill or note be payable elsewhere.

Cook v. Litchfield, 5 Seld., 280; Aymar v. Sheldon, 12 Wend., 443; 5 Sand., 330; Williams v. Wade, 1 Metc. (Mass.), 82; Dow v. Rowell, 12 N. H., 49; Dundas v. Fowler, 3 McLean, 400; Nat. Bank v. Green, 33 Iowa, 140; Short v. Trabue, 4 Metc., Ky., 299; Yeatman v. Cullen, 5 Blackf., 240; Trabue v. Short, 18 La. An., 257; Duncan v. Sparrow, 3 Ky., 167; Lowry v. W. Bk., 7 Ala. N. S., 120; Holbrook v. Vibbard, 2 Scam., 465; Currier v. Lockwood, 40 Conn., 349. The place of the first negotiation, or transfer is regarded as the place of the contract. 5 Seld., 280; 12 Wend., 443. In case of a bill of exchange, payable in New York, but drawn and indorsed in a foreign country, the law of New York controls the interpretation and validity of the indorsement, as between indorsee and drawer. Everett v. Vendryes, 19 N. Y., 436.

with. But this court is not of that opinion. In giving the action of debt to the holder of a bill of exchange, and in giving it the dignity of a specialty, the legislature has not altered the character of the paper in other respects. It is still a pure commercial transaction governed by commercial law. Notice of the protest is still necessary, and the omission to aver it in the declaration is still fatal.

Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below.

The judgment is reversed, and the cause remanded with direction that the judgment be arrested.

After the opinion was delivered, Youngs prayed that the cause might be remanded with leave to amend.

MARSHALL, *Ch. J.* Here is a verdict which must be set aside before an amendment can be allowed.

It might be set aside by the court below, but this court can see no reason in the record for setting it aside.

Cited—4 How. 143; 5 How. 315; 20 How. 433; 1 Wall. 600; 3 Wall. 661; 10 Wall. 261; 12 Wall. 403; 16 Wall. 386; 1 Otto, 130; 4 Otto, 81; 1 Biss. 338; 1 McLean, 316; 5 McLean, 156.

226*] *VASSE *v.* SMITH.

Infancy is a bar to an action by an owner against his supercargo for breach of instructions; but not to an action of trover for the goods. Still, however, infancy may be given in evidence in an action of trover, upon the plea of not guilty: not as a bar, but to show the nature of the act which is supposed to be a conversion.

An infant is liable in trover, although the goods were delivered to him under a contract, and although they were not actually converted to his own use.

A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed.

ERROR to the Circuit Court for the District of Columbia.

The declaration had two counts; first, a special count, charging the defendant Smith, who was a supercargo, with breach of orders; second, trover.

The first count stated that Vasse, the plaintiff, was owner and possessed of 70 barrels of flour, and, at the instance and request of the defendant, put it on board a schooner at Alexandria to be shipped to Norfolk, under the care, management and direction of the defendant, to be by him sold for and on account of the plaintiff, at Norfolk, for cash, or on a credit at 60 days, in good drafts on Alexandria, and negotiable in the bank of Alexandria. That the defendant was retained and employed by the plaintiff for the purpose of selling the flour as aforesaid, for which service the plaintiff was to pay him a reasonable compensation. That the defendant received the flour at Alexandria, put it on board the schooner, and sailed, with the flour under his care and direction, to Norfolk; "yet the defendant, not regarding the duty of his said employment, so badly, carelessly, negligently, and improvidently behaved himself in said service and employment, and took such little care of the said flour by him so received as aforesaid, that he did not sell the same, or any part thereof, at Norfolk, for cash, or on a credit of 60 days for drafts on Alexandria, negotiable in the bank of Alexandria, but the said defendant, on the contrary thereof, by and through his own neglect and default, and through his wrongful conduct, carelessness and improvidence, suffered the same, and every part of the said 70 barrels of flour, in his possession as aforesaid, to be embezzled, or otherwise to be wholly lost, wasted, and destroyed."

*The second count was a common [*227 count in trover for the flour.

The defendant, besides the plea of not guilty, pleaded infancy to both counts; to which last plea the plaintiff demurred generally.

The court below rendered judgment for the defendant upon the demurrer to the plea of infancy to the first count; and for the plaintiff upon the demurrer to that plea to the second count. Upon the trial, in the court below, of the issue of not guilty, to the count for trover, three bills of exception were taken by the plaintiff.

The first bill of exceptions stated, that the defendant offered evidence to prove that the flour was consigned and delivered to the defendant by the plaintiff under the following letter of instructions.

"Mr. Samuel Smith—Sir—I have shipped on board the schooner Sisters, Captain ———, bound to Norfolk, 70 barrels of superfine flour, marked A. V. to you consigned. As soon as you arrive there I will be obliged to you to dispose of it as soon as you can to the best advantage for cash, or credit at 60 days in a good draft on this place, negotiable at the bank of Alexandria. I should prefer the first, if not much difference; however, do for the best of my interest. (Signed) *Amb. Vasse.*"

And that the defendant received the flour in consequence of that letter of instructions, and upon the terms therein mentioned. That the flour was not sold by the defendant at Norfolk, but was shipped from thence by him, without other authority than the said letter of instructions, to the West Indies, for and on account of one Joseph Smith, as stated in the bill of lading, which was for 398 barrels, 70 of which were stated in the margin to be marked A. V., 198 I. S., 100 D. I. S., and 30 P. T.

*That the defendant, when he received [*228 the flour, and long after he shipped it, was an infant under the age of twenty-one years. Whereupon the court, at the prayer of the defendant, instructed the jury that if they found the facts as stated, the defendant was not liable upon the count for trover.

The second exception was the admission of evidence of the defendant's infancy.

NOTE.—Infancy is not a defense in an action of trover, nor for any tort. Catts v. Phalen, 2 How., 376; Baxter v. Bush, 29 Vt., 465; Lewis v. Littlefield, 15 Me., 233; Matthews v. Cowan, 59 Ill., 341; Walker v. Davis, 1 Gray, 506; Towne v. Wiley, 23 Vt., 355; Homer v. Thwing, 3 Pick., 492; Ray v. Tubbs, 50 Vt., 688; Eaton v. Hill, 5 N. H., 235; Burnard v. Haggis, 14 C. B. (N. S.), 45; Campbell v. Stakes, 2 Wend., 137; Conway v. Reed, 66 Mo., 346.

"If an infant is old and cunning enough to contrive and carry out a fraud, he ought to make satisfaction of it." 2 Eq. Cas. Abr., 515.

The third exception stated that, "upon the facts aforesaid (the facts in the first bill of exceptions mentioned), the plaintiff prayed the court to instruct the jury that if they shall be of opinion that the defendant was under the age of twenty-one years, and between the age of nineteen and twenty years, and that the defendant of his own head shipped the flour to the West Indies, in a vessel which has been lost by the perils of the sea, and that the said shipment was made with other flour, on account of his father Joseph Smith, in such case the defendant has thereby committed a *tort* in regard to the plaintiff, for which he is liable in this action, notwithstanding his infancy aforesaid, which instruction the court refused to give.

The verdict and judgment being against the plaintiff, he brought his writ of error.

E. J. Lee and *C. Lee*, for the plaintiff in error.

1. The infancy of the defendant was no bar to the first count, because it was a count in *tort*, and not upon contract, and infants are liable for *torts* and injuries of a private nature. (3 East, 62, *Govett* v. *Radnidge and others;* 3 Bac. Abr., 132; Noy, 129; Roll. Abr., 530; *Fearnes* v. *Smith*, 3 Bac. Abr., 126.)

2. The shipping of the flour without authority was a conversion. (Peake's Ni. Pr. Cases, 49; *Youl* v. *Harbottle*, 4 T. R. 260; *Syeds* v. *Hay*, 1 Wils., 328; *Perkins* v. *Smith*, Bull. N. P. 35, 6 Mod., 212; 6 East, 539, *M'Combie* v. *Davis.*)

229*] *3. Infancy cannot be given in evidence upon the issue of not guilty.

It is admitted that if the possession had been obtained by a *tort*, the infant would be liable; but it is contended that the possession having been rightfully obtained, a subsequent misapplication of the property by an infant cannot be a conversion unless it be actually a conversion to his own use.

But there are no cases to justify such a doctrine, and it is contrary to the principles of analogous cases. In an action of trespass for mesne profits infancy is no bar, although he becomes a trespasser by implication of law. (Latch., 21; 1 Bac. Abr., 132; 1 Esp. Rep., 172.) So a *feme covert* is liable in an action of trover, because the conversion is a *tort*. (Yelv., 166.)

Although infancy may be given in evidence upon *non assumpsit*, yet it cannot upon any other general issue. (Gilb. L. E., 164, 216, 217; 2 Term Rep., 166.) Upon not guilty, the defendant cannot give in evidence a license, nor a right to a way, nor any other matter of justification. (Str., 1200; 1 Tidd., 591, 598, 600.)

Any act which, if done by a person of full age, would be a conversion, will be a conversion if done by an infant.

In the present case the bill of lading, which is a negotiable instrument, being in the name of Joseph Smith, the plaintiff had no power or control over it. It would unquestionably be a conversion if done by an adult. The only question is, whether the nature of the act is altered by being done by an infant. (1 Term Rep., 215, 745; 2 Term Rep., 63; 6 Term Rep., 131; 5 Term Rep., 583.)

Swann, contra.

An infant is liable for actual, not for constructive *torts* founded upon contract, or bailment, which is in the nature of a contract. In this case the action might as well have been brought upon the contract, as upon *the [***230** *tort.* If it had been brought upon the contract, infancy would have been a bar.

The case is clearly within the reason of the law of infancy, and it cannot be in the power of the plaintiff by his form of action to deprive the defendant of his defense. The case cited from *Peake's* Cases arose entirely *ex delicto.* There are cases in which infancy may be given in evidence upon not guilty. (5 Burr., 2826.)

March 5. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The first error alleged in this record, consists in sustaining the plea of infancy to the first count in the declaration.

This count states a contract between the plaintiff and defendant, by which the plaintiff committed seventy barrels of flour to the care of the defendant, to be carried to Norfolk, and there sold for money, or on sixty days' credit payable in drafts on Alexandria, negotiable in the bank. The plaintiff then alleges that the defendant did not perform his duty in selling conformably to his instructions, but, by his negligence, permitted the flour to be wasted so that it was lost to the plaintiff.

This case, as stated, is completely a case of contract, and exhibits no feature of such a *tort* as will charge an infant. There can be no doubt but that the court did right in sustaining the plea.

The second count is *in trover*, and charges a conversion of the flour.

That an infant is liable for a conversion is not contested. The Circuit Court was itself of that opinion, and therefore sustained the demurrer to this plea. But, in the progress of the cause, it appeared *that the goods [***231** were not taken wrongfully by the defendant, but were committed to his care by the plaintiff, and that the conversion, if made, was made while they were in his custody under a contract. The court then permitted infancy to be given in evidence on the plea of not guilty. To this opinion an exception was taken.

If infancy was a bar to a suit of trover brought in such a case, the court can perceive no reason why it may not be given in evidence on this plea. If it may be given in evidence on *non assumpsit*, because the infant cannot contract, with at least as equal reason may it be given in evidence in an action of trover in a case in which he cannot convert.

But this court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a *tort;* it is not an act of omission but of commission, and is within that class of offenses for which infancy cannot afford protection. Yet it may be given in evidence, for it may have some influence on the question, whether the act complained of be really a conversion or not.

The court, therefore, does not consider the admission of this testimony as error.

The defendant exhibited the letter of instructions under which he acted, which is in these words: "Sir," &c., but the plaintiff offered evidence that the flour was not sold in Norfolk,

but was shipped by the defendant to the West Indies, for and on account of a certain Joseph Smith, as by the bill of lading which was produced. The defendant then gave his infancy in evidence, and prayed the court to instruct the jury, that if they believed the testimony, he was not liable on the second count stated in the plaintiff's declaration, which instruction the court gave, and to this opinion an exception was taken.

This instruction of the court must have been founded on the opinion that infancy is a bar **232***] to an action of *trover for goods committed to the infant, under a contract, or that the fact proved did not amount to a conversion.

This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession. It remains to inquire whether this is so clearly shown not to be a conversion as to justify the court in saying to the jury, the defendant was not liable in this action.

The proof offered was, that the defendant shipped the goods on account of Joseph Smith. This fact, standing unconnected with any other, would unquestionably be testimony which, if not conclusive in favor of the plaintiff, was, at least, proper to be left to the jury. But it is urged that this statement refers to the bill of lading, from the notes in the margin of which it appears that, although the bill of lading, which was for a much larger quantity of flour, was made out in the name of Joseph Smith, yet, in point of fact, the shipment was made for various persons, and, among others, for the plaintiff.

The court perceive, in this bill of exceptions, no evidence explanatory of the terms under which this shipment was made, and the marks in the margin of the bill of lading do not, in themselves, prove that the shipment was not made for the person in whose name the bill was filled up.

It is possible that it may have been proved to the jury that this flour was really intended to be shipped on account of the plaintiff, and that the defendant did not mean to convert it to his own use. But the letter did not authorize him so to act. It was not, therefore, a complete discharge; and should it be admitted that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to the jury. The defendant would certainly be at liberty to prove that the shipment was in fact made for Vasse, and that he acquiesced in it so far as to consider the transaction not as a conversion; but without **233***] any of *these circumstances which, if given in evidence, ought to have been left to the jury, the court has declared the action not sustainable.

This court is of opinion that the Circuit Court has erred in directing the jury that, upon the evidence given, the defendant was not liable under the second count; for which their judgment is to be reversed, and the cause remanded for further proceedings.[1]

Cited—11 How. 158; 20 Wall. 162; 1 Woods, 50; 2 Wood. & M. 402.

1.—The Chief Justice noticed also the phraseology of the third bill of exceptions. It prays the opinion of the court upon certain facts, without stating that any evidence of those facts was given to the jury. It is doubtful whether those facts exist in the case, and whether the court would be bound to give an opinion upon them.

CUSTISS
v.
THE GEORGETOWN AND ALEXANDRIA TURNPIKE COMPANY.

An appeal lies in the Supreme Court from an order of the Circuit Court of the District of Columbia, quashing an inquisition in the nature of a writ *ad quod damnum*.

The Circuit Court for the District of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's causey to Alexandria."

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, which had quashed an inquisition taken by the marshal condemning land of Mr. Custiss for a turnpike road.

The inquisition was taken under the 7th section of the act of Congress of the 3d of March, 1809, "to authorize the making of a turnpike road from Mason's causey to Alexandria" (vol. 9. p. 276), which provides, that it shall be lawful for the president and directors of the turnpike company to agree with the owners of any ground to be occupied by the road and the necessary toll-houses and gates, for the right thereof; and, in case of disagreement, "on application to one of the judges of the Circuit Court, he shall issue a warrant directed to the marshal of the district to summon a jury of 24 inhabitants of the District of Columbia, of property and reputation, not related to the parties, nor in any manner interested, to meet on the land to be valued, at a day to be expressed in the warrant, not less than ten nor more than twenty thereafter; and the marshal, upon receiving the said warrant, shall forthwith summon *the [**234** said jury, and when met, provided there be not less than twelve, shall administer an oath or affirmation to every juryman that shall appear, that he shall faithfully, justly and impartially value the lands, and all damages the owner thereof shall sustain, by opening the road through such land, according to the best of his skill and judgment; and that the inquisition thereupon taken shall be signed by the marshal and the jurymen present, and returned by the marshal to the clerk of the county, to be by him recorded; and upon every such valuation the jury is hereby directed to describe and ascertain the bounds of the land by them valued, and their valuation shall be conclusive upon all persons; and shall be paid by the president and directors to the owner of the land, or his or her legal representatives; and on payment thereof, the said land shall be taken and occupied for a public road, and for the necessary toll-houses and gates forever."

On the application of the president and directors of the company, a warrant was granted, and an inquisition taken and returned to the clerk. Before it was recorded, the president and directors obtained from the Circuit Court of the District of Columbia, sitting at Alexandria, a rule upon Mr. Custiss to show cause why the inquisition should not be quashed. Mr. Custiss appeared and objected to the juris-

diction of the court, but the court overruled the objection, and, upon hearing, quashed the inquest.

From this order Mr. Custiss appealed to this court.

E. J. Lee, for the appellant.

The Circuit Court had no jurisdiction of the case upon motion. No such jurisdiction is given by the act of Congress. It directs the marshal to return the inquisition to the office of the clerk, to be by him recorded. The remedy, if any exists, is by a bill in equity. This was an application to the court as a court of law. Even the court itself, in recording deeds, acts in a ministerial capacity. (2 Hen. & Munf., 132, 135; 1 W. Bl., 605; *Rex.* v. *Justices of Derbyshire*, 6 Term, Rep., 88.)

235*] **F. S. Key* and *C. Lee*, contra.

The court must of necessity possess a power and control over its own record. Suppose the clerk should refuse to record the inquisition; or suppose he is about to record an irregular and informal inquisition, will not the court control him? Such a jurisdiction is exercised by the courts in England without the authority of any statute.

The case from Hening & Munford only decides that the court could not inquire into the right of the party to make the deed, or to inquire into the title or contending claims. But the court must see whether it be a deed or not; whether it be proved by the proper number of witnesses, and whether it be sealed.

The clerk of the court could not put anything upon record without the authority of the court.

This court cannot correct the error, if it be one. No writ of error will lie in such a case. This court can correct only error in law, and this, if it be an error, is an error in fact.

March 5. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

At the opening of this case, some doubt was entertained respecting the jurisdiction of the Supreme Court, but that doubt is removed by an inspection of the act by which the Circuit Court of the District of Columbia is constituted. The words of that act, descriptive of the appellate jurisdiction of this court, are more ample than those employed in the judicial act. They are, that "any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of 100 dollars, may be re-examined and reversed or affirmed in the Supreme Court."

The jurisdiction of this court being admitted, the proceedings of the Circuit Court, in order-

236*] ing the inquisition *taken between these parties to be quashed, comes on to be examined.

The first objection to this proceeding is, that the court of Alexandria could take no cognizance of the subject, by way of motion.

The validity of this objection depends entirely on the act of Congress under which this inquisition was taken. If it was to be recorded by order of the court, if the judgment of the court was, in any manner, to be exercised upon it, then, in all which has been done, the court has exercised its jurisdiction, and the inquiry will be whether there was sufficient cause for refusing to permit the inquisition to be recorded. If, on the other hand, the clerk was a mere ministerial officer directed, by law, to perform a ministerial act, without any superintending agency on the part of the court, then the court could not, upon motion, prohibit the clerk to perform his duty, and could not legitimately quash the inquisition.

The act of Congress directs "that the inquisition, when taken, shall be signed by the marshal and by the jurymen present, and returned by the marshal to the clerk of the county, to be by him recorded."

That the legislature may direct the clerk of a court to perform a specified service, without making his act the act of the court, will not be controverted: and, if this may be done, it is difficult to conceive words which convey this idea more clearly than those which are employed in this act.

The inquisition is not returnable to the court, but to the clerk. It is not to be recorded by order of the court, but is to be recorded by the clerk, on receiving it from the marshal. It does not derive its validity from being recorded, but remains afterwards liable to all the objections which might be taken to it, previous thereto. If, for example, an inquisition should be recorded which was found by eleven jurors, that inquisition would neither vest the land in the company, nor give a right to *the for- [***237**
mer proprietor to demand the money to which it was valued. The inquisition, then, is to be recorded solely for preservation, and the act of recording is a ministerial act which the law directs the clerk to perform, without submitting the paper to the judgment of the court. The law asks not the intervention of the court, and requires no exercise of judicial functions.

The difference between this act and those, the execution of which is superintended by the court, is apparent. In those cases the instrument is to be brought into court, and acted upon by the court: in this it is to be delivered to the clerk at any time, and acted on by him without the intervention of the court.

This court is unanimously of opinion that the Circuit Court for the county of Alexandria could not legally entertain the motion for quashing the inquisition found in this case, nor legally prevent their clerk from recording it. Their judgment, therefore, is reversed, and the motion to be dismissed.

Cited—12 Pet. 619; 19 Wall. 64.

LODGE'S LESSEE *v.* LEE.

A grant of an island, by name, in the Potomac River, superadding the courses and distances of the lines thereof, which on resurvey are now found to exclude part of the island, will pass the whole island.

EJECTMENT by Lodge against Lee, for part of an island in the Potomac River, called Eden, but now generally called Lee's island.

The plaintiff's lessor had taken up the land in the year 1804, as vacant, supposing that the defendant's claim must be bounded by the course and distance, allowing one degree of variation for every 20 years since the certificate of survey was made under which the defendant claims.

The defendant claimed under a patent from the lord proprietor of Maryland, dated in 1723, which granted to Thomas Lee "all that tract or upper island of land, called Eden, lying and **238***] being in Prince George *county, beginning at a bounded maple, near ten miles above the second falls, and opposite to a large run on the Virginia side called Hickory Run, and standing upon a point at the foot of the said island, and running thence north sixty degrees, west sixty perches," (&c., &c., giving the course and distance of every line to the beginning tree,) "containing and laid out for 320 acres of land, more or less."

The court below instructed the jury that the grant to Thomas Lee passed the whole of the island called Eden, and that the lessor of the plaintiff is not entitled to recover. Verdict and judgment for plaintiff; which opinion and judgment were, by this court, without argument, affirmed.

Cited—6 Pet. 739.

FINLEY *v.* LYNN.

A bond, executed in pursuance of articles of agreement, may, in equity, be restrained by those articles.

A complainant in equity may have relief even against the admissions in his bill.

ERROR to the Circuit Court for the District of Columbia, in a suit in chancery, brought by Finley against Lynn.

The bill stated that on the 27th of February, 1804, the plaintiff and defendant entered into articles of copartnership, by which the stock to be furnished by the plaintiff was to consist of one-half of the ship United States and 5,000 dollars; and by the defendant, his gold and silver manufactory, two lots in the city of Washington, all his stock of merchandise, and the rents of two houses. That a part of the merchandise agreed to be furnished consisted of plate, jewelry, &c., purchased by the defendant of Messrs. Lemuel Wells & Co., to the amount, as was then supposed, of 2,300 dollars; and, in consideration of its being brought into the joint stock, the plaintiff agreed to pay one-half of the debt due to Wells & Co. therefor.

That the business of the concern was conducted in two separate stores, viz., a hardware **239***] store principally *under the management of the plaintiff; and a jewelry store under the management of the defendant, containing the stock of jewelry, &c., brought into the joint concern by the defendant, and that which was purchased of Wells & Co. The business of the copartnership was carried on until the 1st of March, 1805, when a dissolution took place. During that period goods were bought and carried into the jewelry store, and at the time of the dissolution "the jewelry store was indebted to said concern" in the sum of 2,825 dollars and 27 cents, besides which the concern had paid Wells & Co. in part of their debt, the sum of 263 dollars and 56 cents. That the dissolution was upon the following terms, viz., that the defendant should withdraw all the property put into the joint stock by him; and should have the goods in the jewelry store, and all the debts due to that store, as a compensation and in lieu of the profits arising upon the whole business. And the plaintiff was to take on his account the goods in the hardware store, and the goods which were ordered for the spring; and was to indemnify the defendant from all claims or demands upon the concern, or which might arise from goods then ordered, and not at that time received; which articles of dissolution were under seal. That when the plaintiff signed the articles of dissolution he did not intend to commit himself to the payment of the debt due to Wells & Co. For although, by the articles of copartnership, he had agreed to pay half the debt, yet as the goods were given up to the defendant upon the dissolution, he considered himself absolved from that obligation. And the plaintiff contends that the defendant ought to have been satisfied when the plaintiff "returned to him the whole jewelry store, with the accession of nearly 3,000 dollars' worth of merchandise, and gave up to him the profits of the said store, which he believes to be equal to 2,500 dollars more."

That upon the dissolution the plaintiff agreed to give the defendant security for his performance of the terms of the dissolution, and the defendant had a bond prepared, which was signed by the plaintiff and his sureties; that the plaintiff did not see the bond until he was called *on to sign it, and that he is satisfied he [***240** never read it, taking it for granted that it was a bond to compel him to perform what he was bound to perform by the terms of the dissolution; and that his sureties executed it under the same circumstances and impression. That the defendant did not claim payment of the debt due to Wells & Co. for a year after the bond was executed, although Wells & Co. before the dissolution had brought suit against the defendant therefor; that the defendant had rendered the plaintiff some accounts in which that debt was not mentioned. That the defendant afterwards brought suit upon the plaintiff's bond, and gave notice that he should claim the whole amount of the debt due to Wells & Co. That the plaintiff's counsel was of opinion that the bond was so worded as to bind the plaintiff to the payment of that debt, whereupon the plaintiff confessed a judgment at law, saving his right to relief in equity. That the bond was executed under a mistaken impression of its contents; and that the defendant will take out execution upon the judgment at law. The bill then prays an injunction to stay execution until the matter in dispute can be heard and decided in equity, and the accounts between the plaintiff and defendant examined and settled, and for general relief.

The injunction was granted by one of the judges out of court.

In the articles of copartnership, after stating what stock the plaintiff should bring into the joint concern, the debt to Wells & Co. is mentioned in the following manner, viz.: "And on the part of Adam Lynn, his gold and silver manufactory, two lots in the city of Washington, all his stock of merchandise (the said O. P. Finley and Adam Lynn, jointly and severally, by these presents, binding themselves, their

heirs, executors, administrators and assigns, to pay to Lemuel Wells & Co. of New York, two thousand three hundred dollars, money due to them on account of said merchandise), the rents of one house," &c.

The account against the jewelry store was an **241***] account *opened in the books of the company, charging that store with goods purchased and put into it for sale on the joint account; and giving it credit by cash and by goods sold to sundry persons; showing a balance of goods remaining in that store of 2,825 dollars and 27 1-2 cents, over and above the goods which were in it at the commencement of the copartnership.

The articles of dissolution were truly recited in the bill.

The condition of the bond of indemnity was as follows: "Whereas the said O. P. Finley and Adam Lynn, late joint merchants and copartners under the firm of Finley & Lynn, have by mutual consent dissolved the said copartnership on the first day of the present month, on which dissolution it was, among other things, agreed between the said Oliver P. Finley and the said Adam Lynn, that the said Oliver P. Finley should satisfy and pay all debts and contracts due from or entered into by the said copartnership, or either of the said copartners, for or on account of, or for the benefit of the said copartnership, including certain debts due from the said Adam Lynn, for goods by him ordered, which have been received by the said copartnership; and also all debts which may arise from merchandise hereafter shipped to the said concern in consequence of any orders heretofore made; now the condition of the above obligation is such, that if the said Oliver P. Finley shall well and truly satisfy and discharge all the debts and contracts herein before described, so as to indemnify and save harmless the said Adam Lynn from the payment of the same, and from any suit or prosecution in law or equity, for or on account of the said debts and contracts, then this obligation to be void."

There was also raised in the books of the concern an account against "merchandise," the balance to the debit of which was 4,028 dollars and 89 cents. And a statement of hardware imported on the joint account before March, 1805, amounting to 7,653 dollars and 8 **242***] *cents. And of debts of the concern paid by Finley amounting to about 6,000 dollars.

The defendant's answer admits the original articles of copartnership, and of dissolution, and the bond as referred to in the bill. It denies that the plaintiff advanced the 5,000 dollars in cash; and avers that the profits of the ship United States never came to the use of the concern, but were retained by Rickets & Newton, to whom the plaintiff had transferred his half of that ship. It avers that by the articles of copartnership, each party was to bring into the joint stock 11,000 dollars. That the defendant brought in 2,429 dollars more than his proportion, which was the reason of making the debt to Wells & Co. a partnership debt; after which there was still an excess of capital, amounting to 129 dollars furnished by the defendant, for which he had credit upon the first opening of the partnership books.

The entry of stock on the 1st of March, 1804, was as follows:

	l.	s.	d.	l.	s.	d.
Cash in England,	1,500	0	0			
One-half ship U. States,	1,800	0	0			
Real estate,	1,290	0	0			
Manufactory,	1,200	0	0			
Merchandise,	1,538	14	0			
				7,328	14	0
Due from stock to L. Wells & Co., of New York,				690	0	0
To Adam Lynn,				38	14	0

It avers that the debt to Wells & Co. was, from this period, always considered by both parties as a copartnership debt, and that it was by the advice of the plaintiff that the defendant suffered himself to be sued for that debt.

It admits that some goods were brought from the hardware store to the jewelry store, but avers goods to a large amount were also taken from the latter to *the former store, of [***243** which no account was kept. It denies that the account exhibited by the plaintiff against the jewelry store is correct; and avers that if a true account had been kept, the balance would have been in favor of that store. It avers that it was the intention of the defendant, and he believes of the plaintiff also, in the articles of dissolution, to include the debt due to Wells & Co. under the description of "all claims and demands on the concern." That it was adopted as a social debt by the articles of copartnership, and was placed to the credit of Wells & Co. on the books of the concern, and a partial payment made out of the joint funds. That if this credit had not been so given, the defendant would have been a creditor of the concern to the amount of 2,429 dollars instead of 129. That the plaintiff had paid many of the debts due from the jewelry store which were situated exactly like that of Wells & Co.

The answer expressly avers that the plaintiff did read, examine, and, as the defendant believes, perfectly understand the bond of indemnity before he executed it. That it was left with him some hours before he signed it. And it avers also, positively, that the plaintiff's sureties read it and made remarks to the defendant in the presence of the plaintiff upon the manner in which it was drawn.

It states that the defendant offered the plaintiff two propositions as the basis of the dissolution. One was, that a dividend should be made of the debts, the profits, and the stock; and if any difference should arise, on settlement, it should be submitted to three merchants. The other was, that the defendant should have the merchandise in the jewelry store, and the debts due to that store, as a compensation in lieu of the profits of the whole business; that the plaintiff should hold the merchandise in the hardware store, and the debts due to it, and the profits of the trade, and should pay all debts and contracts as stated in the bond; the latter of which propositions was accepted by the plaintiff.

*The answer denies that the defend- [***244** ant received back the jewelry store with the accession of 3,000 dollars' worth of merchandise, or that the profits were equal to 2,500 dollars. It avers that the defendant believes they did not exceed 1,250 dollars, and were less than those of the hardware store. That the profits of the ship United States were at least 4,000 dollars. These the defendant relinquished to obtain

indemnity against the debts of the concern. That the plaintiff refused to take an inventory at the time of dissolution, so that an accurate account cannot be taken. That the reason why he did not sooner claim from the plaintiff the amount due to Wells & Co. was, that he was under an erroneous opinion that he could have no recourse to the plaintiff until he should first have paid and discharged that debt.

The answer denies any agreement between the plaintiff and defendant to acquit each other of their private debts.

The only testimony in the cause related to the profits of the ship United States; and the accounts exhibited being true copies from the books.

The court below, conceiving that the whole equity of the bill was completely denied by the answer, and not supported by the evidence in the cause, dissolved the injunction, and, upon final hearing, dismissed the bill; whereupon the plaintiff brought his writ of error.

Swann and *Youngs*, for the plaintiff in error, contended,

1. That Finley was not bound to pay the debt due to Wells & Co.; and,

2. That Finley was entitled to the amount standing on the books of the concern to the debit of the jewelry store, it being (as they contended) a debt due to the hardware store, and that, by the true construction of the articles of dissolution, Finley was entitled to the debts due to that store.

245] *1. In support of the first point it was said that by the articles of dissolution Finley was bound to indemnify Lynn from "claims and demands upon the concern" only. That the claim of Wells & Co. was against Lynn only for goods originally sold to him upon his sole credit, and that although the goods afterwards came to the use of the concern, and although Finley and Lynn might agree between themselves to consider it as a joint debt, yet that would give Wells & Co. no claim upon the concern. That the bond was given merely to carry into effect the articles of dissolution, and will not in equity be extended beyond the expressions of those articles. The bond does not alter the equitable obligations of the parties. (1 Fonb., 106, 188, 192; 2 Atk., 203; 2 P. Wms., 349; 1 P. Wms., 123.)

2. Although the article of dissolution do not expressly give Finley the debts due to the hardware store, yet it is to be implied from the principle of reciprocity which seems intended between the parties, and from the circumstance that he was bound to pay all the debts of the concern. (1 Fonb., 427.) Although the account makes the jewelry store debtor to Finley and Lynn, yet it means Finley and Lynn's hardware store, because that store was carried on in the name of Finley & Lynn, the jewelry store in the name of Lynn only.

Although the plaintiff has not in his bill claimed this balance, yet that is no objection to his recovery. He has prayed for general relief, and the court will give him everything which in equity he ought to have. (3 Atk., 523.)

Although the defendant denies that balance to be due, because he says goods, of which no account was taken, had been carried from the jewelry to the hardware store, yet he admits that the goods charged in the account were furnished and sent to the jewelry store, and his answer is no evidence that goods were carried from the jewelry to the hardware store. It is not an averment responsive to the bill, and must be proved by other evidence than the defendant's answer.

*One witness will authorize a decree [***246** against an answer. (1 Atk., 19.) And here was a witness who testified that both the parties admitted the entries in that account to be correct.

E. J. Lee and *Jones*, contra.

The whole equity of the bill consists in the allegation that the bond does not agree with the articles of dissolution, and was obtained by surprise. It contains no other ground of complaint. The answer completely denies this equity, and there is no proof to support it.

The bond is warranted by the articles of dissolution and the articles of copartnership. The ground of surprise and mistake is denied absolutely by the answer. It is a rule in equity that the ground of mistake or surprise must be clearly proved before a court of equity will interfere. (1 Vezey, 317.) In this case there is a total failure of proof altogether. Nothing can be clearer than the liability of the plaintiff to pay the debt of Wells & Co. The articles of copartnership are express and pointed to that effect. The articles of dissolution, taken in connection with the articles of copartnership, are equally explicit, and the bond is unequivocal.

With regard to the account raised against the jewelry store, it is no more than a memorandum of the amount of goods placed there for sale. The account is with the concern. The plaintiff in his bill expressly states it to be so. It is no more than if the company had chosen to keep a separate account of the profits arising from any particular article of merchandise. It is very common for merchants to open an account against flour, or rum, or tobacco, or wine, or any other article in which they have large dealings, yet no one ever thought that such an account created a debt. If this account against the jewelry store created a debt, it was Finley & Lynn's debt to Finley & Lynn. The jewelry store was Finley & Lynn's store. An account against the store was, therefore, an account *against Finley & Lynn. [***247** It was merely the right hand made debtor to the left.

Besides, it was clearly the intention of the parties that something should be given to Lynn in lieu of his share of the profits of the trade: If you give him the goods in the jewelry store, and still make him debtor for the goods, you give him nothing. He might as well have bought the goods elsewhere. The plaintiff in his bill makes a merit of having given up to the defendant the whole jewelry store, with the accession of nearly 3,000 dollars' worth of merchandise, and the whole profits of that store to the amount of 2,500 dollars. This could not possibly have been the case if the defendant was to be made debtor for those goods. Although a person is not bound in equity by the admission of a principle of law, yet he is by the admission of a fact; and here is a clear admission of a fact as to the understanding and the intention of the parties at the time of the dissolution.

March 7. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.[1]

The plaintiff and defendant had been copartners in trade, and had carried on their business in two stores; the one a jewelry store in the name of Lynn, to be conducted exclusively by him; the other a hardware store in the name of Finley & Lynn, to be under the joint management of the partners.

Previous to the commencement of their partnership, Lynn had contracted a debt to Lemuel Wells & Co., of New York, for goods ordered for a jewelry store carried on by himself, which goods it was mutually agreed to transfer to the new concern, and the debt to Lemuel Wells & Co., should become a debt chargeable on the social fund.

In February, 1805, it was agreed to dissolve the copartnership; and articles were entered into **248***] to take *effect on the first day of March. The terms were, "that Adam Lynn shall withdraw all the property put into the joint stock by him, and that he shall have the goods in the jewelry store, and all the debts due to that store, as a compensation in lieu of the profits arising from the whole business; and the said Finley agrees to take, on his own account, the goods in the hardware store, and the goods which are ordered in the spring, and to indemnify the said Adam Lynn from all claims or demands upon the said concern, or which may arise for goods now ordered, and not yet arrived."

On the second of March, a bond of indemnity was executed, the condition of which, after stating the dissolution, proceeds thus: "On which dissolution it was, among other things, agreed that the said Oliver P. Finley should satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, or either of the said copartners, for or on account of or for the benefit of the said copartnership, including certain debts due from the said Adam Lynn for goods by him ordered, which have been received by the said copartnership, and also all debts which may arise from merchandise hereafter shipped to the said concern, in consequence of any orders heretofore made.

"Now, the condition of the above obligation is such, that if the said Oliver P. Finley shall well and truly satisfy and discharge all the debts and contracts herein before described, so as to indemnify and save harmless the said Adam Lynn from the payment of the same, and from any suit or prosecution in law or equity for or on account of the said debts and contracts, then this obligation to be void."

Some time previous to the dissolution, an action had been brought by Lemuel Wells & Co. against Adam Lynn for the recovery of their debt which was then depending.

In December, 1806, Adam Lynn, for the first time, claimed, under the bond of indemnity, **249***] the amount of *the debt to Lemuel Wells & Co., and, payment being refused, instituted a suit on the bond. Supposing that no defense could be made at law, judgment was confessed, with a reservation of all equitable objections to the payment. A bill was then filed suggesting that the bond was executed by mistake, and in the confidence that it was in exact conformity with the articles, and praying that it might be restrained by the articles. Several extrinsic circumstances are also detailed and relied upon as demonstrating that Lynn himself did not suppose, until so informed by counsel, that the bond comprehended this debt.

An injunction was granted, which, on the coming in of the answer, was dissolved, and, on a final hearing, the bill was dismissed.

The answer denies all the allegations of the bill which go to the mistake under which the bond was executed; insists that it conforms to the true meaning of the articles and intent of the parties; and endeavors to explain those extrinsic circumstances on which the plaintiff relied.

That a bond, executed in pursuance of articles, may be restrained by those articles, if the departure from them be clearly shown, is not to be controverted. But in this case, the majority of the court is of opinion that no such departure is manifested with sufficient clearness to justify the interposition of a court of equity.

By the articles of copartnership, the debt to Lemuel Wells & Co. was assumed by the firm of Finley & Lynn, and was payable out of the partnership fund. It is true that, at law, it did not constitute a demand against the partnership, but the court is much inclined to the opinion, that, had Lynn become insolvent, a suit in equity might have been sustained, on this claim, against Finley & Lynn.

If it might in equity, though not in law, be a "claim *or demand upon the con- [***250** cern," there does not appear to be such a repugnancy between the bond and the articles as to induce the court to say that the bond, which, so far as is shown in this cause, was executed without imposition, and with a knowledge of its contents, binds the obligors further than they intended to be bound. The extrinsic circumstances relied on are certainly entitled to much consideration; but they are not thought sufficiently decisive and unequivocal in their character to justify a court of equity in restraining legal rights acquired under a solemn contract.

Though this is the principal object of the bill, it may be understood to contemplate something further. It prays for a settlement of all accounts, and for general relief.

So far as the accounts between the parties are closed by the articles of dissolution, no reason can be assigned for opening them. But if rights, growing out of those articles, require a settlement, the plaintiff is entitled to an account.

By a majority of the court it is conceived that if any profits had arisen on the jewelry store, independent of the goods on hand and of the debts due to the store, the plaintiff is entitled to them. It is not probable that there are such profits; but it is very possible that there may be. Large sums of money may have been received, and might either be on hand when the dissolution took place, or have been diverted to various uses. If such be the fact, the majority of the court is of opinion that any fair construction of the articles gives those profits to the plaintiff. The contract is, that Adam Lynn shall have "the goods in the jewelry store, and all the debts due to that store, as a compensa-

1.—Judge Johnson was absent.

tion in lieu of the profits arising from the whole business." Now the profits of the jewelry store, if any, not existing in debts or goods, were certainly a part of the "profits of the whole business," and are, consequently, yielded to the plaintiff.

That this was the deliberate intention of the **251***]defendant, *is avowed in his answer. A proposition for a dissolution was, he says, made by him in writing and accepted by the plaintiff. That proposition is, "that the defendant should have the merchandise in the jewelry store, and the debts due to that store, as a compensation in lieu of the profits of the whole business; that the complainant should hold the merchandise in the hardware store, and the debts due to it, and the profits of the trade."

Now, the profits of the jewelry store are certainly a part of the "profits of the trade."

The plaintiff also claims a debt said to be due from the jewelry store to the hardware store.

As all the debts due to the hardware store are obviously assigned to Finley, this debt becomes his property, unless his claim to it is relinquished by the undertaking to pay all debts due from the concern.

The words of this undertaking are to be looked for in the condition of his bond. He is to "satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, or either of the said copartners, for or on account of or for the benefit of the said copartnership."

The terms of this stipulation appear to the court to be applicable to claims upon the copartnership, and not to claims of a part of the company on the other part. He is to satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, not to release the claim of one store upon the other. This is a claim which did not exist upon the copartnership, and which grows out of the articles of dissolution. Those articles assign to the plaintiff all the profits of the hardware store, as well as the debts due to it. They separate what was before united. They draw the distinction between the hardware and the jewelry store, and make the debt due to the hardware store a part of the profits of that store.

252*] *The residue of the condition does not affect the question, and need not be recited.

It is, then, the opinion of a majority of the court that, if there was really a debt due from the jewelry store to the hardware store, Finley is entitled to that debt.

This is a proper subject for an account.

The plaintiff has probably not applied for this account in the court below, and it does not appear to be a principal object of his bill. This court, therefore, doubted whether it would be most proper to affirm the decree dismissing the bill with the addition that it should be without prejudice to any future claim for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter was deemed the more equitable course. The decree, therefore, is to be reversed, and the cause remanded, with directions to take an account between the two stores, and an account of the profits of the jewelry store, if the same shall be required by the plaintiff.

TODD, *J.*, concurred in the opinion of the court that the debt of Wells & Co. was a debt to be paid by Finley, but he differed upon the other part of the case, being of opinion that the complainant was not entitled to a relief which by his bill he had made a merit of waiving.

Decree reversed, and the cause remanded, with directions to reinstate the injunction, and take an account, &c.

Cited—19 How. 173; 11 Wall. 227; 8 Otto, 83; 4 Cliff., 198.

DE BUTTS *v.* BACON AND OTHERS. (*a*)

If an agent, who has, by permission of his principal, sold 8 per cent. stock, applies the money to his own use, and being pressed for payment gives a mortgage to secure the repayment of the amount of the stock with 8 per cent. interest thereon, it is usury.

ERROR to the Circuit Court for the District of Columbia, in a suit in chancery, brought by Samuel De *Butts against James [***253** Bacon and others, the object of which was to foreclose a mortgage made by Bacon to De Butts. The condition of the mortgage was, that if the defendant, Bacon, should pay to the complainant the interest of eight per cent. upon one thousand dollars of eight per cent. stock of the United States, loaned by the complainant to the defendant, and should further pay to the complainant "the said sum of one thousand dollars, &c., the deed should be void.

The defendant, Bacon, pleaded the statute of usury, alleging that it was a loan of money and not of stock.

The facts of the case appeared to be, that the complainant, Samuel De Butts, intending to speculate in a voyage with Captain Elias De Butts, authorized the latter to sell one thousand dollars of eight per cent. stock of the United States, which he did through the agency of the defendant, Bacon, who received the money. The plan of the voyage not having been prosecuted, the complainant wished to get his stock back again, but could not get either the stock or the money from Bacon. It was, however, finally agreed, that Bacon should be considered as answerable for the stock, and should give a mortgage to secure the repayment of the stock, and eight per cent. interest.

The court below decided the contract to be usurious, and decreed the mortgage to be void. Which decree, this court, after argument, by *Swann*, for the appellant, and *Youngs*, for the appellees,

Affirmed.

SHEEHY *v.* MANDEVILLE AND JAMESSON. (*b*)

A promissory note given and received for and in discharge of an open account is a bar to an action upon the open account, although the note be not paid.

A several suit and judgment against one of two

(*a*) NOTE.—See Levy v. Gadsby, 3 Cranch, 180, and note in this edition.

(*b*) NOTE.—See Harris v. Johnston, 3 Cranch, 311, and note in this edition.

joint makers of a prommissory note, is no bar to a joint action against both upon the same note.

The whole of a joint note is not merged in a judgment against one of the makers on his individual *assumpsit;* but the other may be charged in a subsequent joint action if he pleads severally.

This court will not direct the court below to allow the proceedings to be amended.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in an **254***] action of *assumpsit* *brought by Sheehy against Joseph Mandeville and R. B. Jamesson.

The declaration consisted of three counts.

The first count was upon a promissory note as follows, viz.: "James Sheehy complains of Joseph Mandeville and Robert Brown Jamesson, lately tradiug under the firm of Robert Brown Jamesson, of a plea of trespass on the ease, for that whereas, on the seveuteenth day of July, in the year of our Lord one thousand eight hundred and four, the said defendant Joseph Mandeville, seeretly trading with the defendant Robert B. Jamesson, by way of buying and selling merchandise, at Alexandria, in the county aforesaid, under the name, title, style, and firm of Robert Brown Jamesson; and whereas the said defendants under the said name, firm and style, on the said seventeenth day of July, in the year one thousand eight hundred and four, at, &e., made their certain note in writing, ealled a promissory note, subseribed by them by and under the name, style, title and firm of Robert B. Jamesson, bearing date the same day and year, aud then and there delivered the said note to the plaintiff, and by the said note did, under their firm aforesaid, promise to pay to the said plaintiff, or to his order, six hundred and four dollars and ninety-one eents, for value received, negotiable at the bank of Alexandria, by reason whereof, and by force of the law in sueh cases made and provided, the said defendants beeame liable to pay to the plaintiff the said sum of money eontained in the said note, aecording to the tenor aud effect of the said note; and being so liable, they, the said defendants, under the name and firm aforesaid, afterwards, to wit, the same day and year aforesaid, at Alexandria aforesaid, undertook," &c.

The second count was *indebitatus assumpsit* for goods sold and delivered to the defendants, under the name and firm of Robert B. Jamesson.

The third couut was a *quantum valebant* for the same goods.

255*] *The defendants were duly arrested, but Jamesson was discharged by a judge upon entering a eommon appearance, he having been before discharged under the act of Congress for the relief of insolvent debtors within the Distriet of Columbia; and no further proeeedings seem to have been had against him.

The defendant Mandeville appeared and filed two pleas.

1st plea. "And the said defendant, by George Youngs, his attorney, comes aud defends the wrong and injury, when, &c., protesting that the said goods, wares and merchandise, in the declaration mentioned, were not sold and delivered to the said Robert B. Jamesson aud this defendant jointly; for plea saith, that the said James ought not to have and maintain his actiou aforesaid against him, because he says, that heretofore, to wit, on the seventeenth day of July, 1804, at Alexandria, the said Robert B. Jamesson, in the declaration named, made his promissory note, payable to the said James Sheehy or order, sixty days after date, for 604 dollars and 91 cents, negotiable at the bank of Alexandria, which said note, so as aforesaid made by the said Jamesson, was given by the said Jamesson, to the said James Sheehy, and by him received, for and in discharge of an aecount or bill of the said James Sheehy against the said R. B. Jamesson, for sundry goods, wares and merehandise, at the speeial instance and request of the said R. B. Jamessou, sold and delivered by the said James to the said Robert B. Jamessou. And the said defendant Joseph avers that the said goods, wares and merehandise, mentioued in the plaintiff's deelaration, are the same goods, wares and merchandise, so as aforesaid sold and delivered to the said Robert B. Jamesson by the said James Sheehy, aud the same for which the said R. B. Jamesson gave his aforesaid negotiable note, and none other; and afterwards, to wit, on the 8th day of June, 1805, the said James Sheehy sued out of the elerk's offiee of the Circuit Court of the District of Columbia for the county of Alexandria, his writ in an aetiou of debt upou the aforesaid note against the said Robert B. Jamesson, and such proeeedings *were [**256** had therein, that at the July term of the said court, in the year 1806, a judgment was rendered in favor of the said James Sheehy, against the said R. B. Jamesson, for the debt and damages mentioned in the deelaration filed in that action, to be diseharged by the payment of the said six hundred and four dollars and ninety-one eents, with interest from the 15th of September, 1804, till paid, which will at large appear by the reeords of the said court uow here remaining in the said Cireuit Court of the Distriet of Columbia, for the county of Alexandria, which judgment still remains unreversed and in full foree; all of whieh the said defendant is ready to verify; wherefore he prays judgment whether the said plaintiff his aetiou aforesaid ought to have and maintain against him upon the seeond and third counts in the said declaration," &e.

2d plea. "And the said defendant, by leave of the eourt," &e., "for further plea saith, that the plaintiff his aetion aforesaid against him ought not to have and maintain, on the first eount in his said deelaration, because he saith, that heretofore, to wit, on the 8th day of June, 1805, the said James Sheehy sued out of the elerk's office of the Circuit Court of the Distriet of Columbia, for the eounty of Alexandria, his writ in an action of debt against the said Robert B. Jamesson, and afterwards, in July, filed his deelaration therein upon a note of the said Robert B. Jamesson to the said James Sheehy, dated the 17th day of July, 1804, payable sixty days after date, for 604 dollars and 91 cents, for value reeeived, negotiable at the bank of Alexandria; and afterwards sueh proceedings were had iu the said suit, that at July term of the said court, in the year 1806, judgment was rendered therein in favor of the said James Sheehy against the said Robert B. Jamesson, for the debt and damages in the said declaration mentioned to be discharged by the payment of 604 dollars and 91 cents, with interest from the 15th of September, 1804, until paid, and also costs of suit; all

which the said defendant is ready to verify by the record and proceedings of the said court," &c., "which said judgment still remains unreversed and in full force, also to be verified by **257***] the record, &c. And the *said defendant avers that the promissory note in the first count in the plaintiff's declaration mentioned and described, is the same note upon which the aforesaid judgment was rendered and obtained, against the said Robert B. Jamesson, as aforesaid, and not other or different, and this the said defendant is ready to verify; whereupon the defendant prays judgment if the said plaintiff ought to have and maintain his action aforesaid against him upon the first count in the said declaration," &c.

To the first plea the plaintiff demurred, and assigned as causes of demurrer,

1. That the plea does not traverse the *assumpsit* laid in the declaration.

2. It does not expressly confess or deny that the goods were sold and delivered to the said Joseph Mandeville and Robert B. Jamesson; nor that the note in the declaration mentioned was given by the said house and firm of Robert B. Jamesson.

3. An unsatisfied judgment against Robert B. Jamesson is no bar to an action upon the same cause of action against the other defendant, against whom no judgment has been rendered.

4. It does not aver that the judgment against Jamesson has been satisfied.

5. It does not deny or admit that the defendant, Mandeville, assumed to pay for the goods.

6. The plea is no answer to the declaration.

To the second plea the plaintiff also demurred, and assigned the same causes of demurrer.

The judgment of the court below, upon these demurrers, was in favor of the defendant Mandeville; and the plaintiff brought his writ of error.

258*] *E. J. Lee*, for the plaintiff in error.

A debt due from joint partners is joint and several. Each is liable for the whole. (*Rice* v. *Shute*, 5 Burr., 2613; Watson's Law of Partnership, 238; 3 N. Y. Term Rep., 5; 14 Vin. Abr., 607, pl. 3; 6 Co., 40, b, *Mildmay's* case; 6 Co., 46, a, *Higgins's* case; Yelv., 67; 2 Atk., 510, *Darwent* v. *Walton;* 3 N. Y. Term Rep., 4; 5 East, 147; Cro. Jac., 74.) A judgment against one partner alone does not bind the other. It is therefore no bar to a suit against this other partner. The obligation of the note of Mandeville & Jamesson is not merged in the judgment against Jamesson. Mandeville cannot say he has been twice vexed for the same cause of action.

A secret partner is liable when discovered. (Watson, 42; Doug., 371.) If the creditor has obtained judgment against the open partner before the discovery of the secret partner, the latter may be sued upon the original cause of action. As to him it is not merged in the judgment. An unsatisfied execution is no bar to a second remedy against another person liable for the same debt. (5 Co., 86, b; Cro. Jac., 73; 1 Mod., 207.)

A promissory note, given for goods, is no bar to an action for the price of the goods founded on the sale. In the present case it is not pleaded as an accord and satisfaction, and it is in that form only that the defendant can avail himself of it. It is not satisfaction unless it be paid. (1 Esp., 148; 9 Co., 79, b; 1 Selw., 107; 1 Str., 426; 1 Burr., 9; 2 Term Rep., 24; 1 Selw., 108, 109.)

Although the plea states that the note was received in discharge of the account for goods sold, yet it was not a discharge without payment. (Cro. Car., 85, 86, *Brainthwait* v. *Cornwallis;* 6 Co., 44, b, 45, b; Cro. Eliz., 240, *Ashbrook* v. *Snape;* 3 East, 250, *Drake* v. *Mitchel;* 3 Call, 234, *M'Guire* v. *Gadsby;* 1 Cranch, 181; 1 Esp. Rep., 3, 5, *Stedman* v. *Gooch;* 6 Term Rep., 52, *Puckford* v. *Maxwell.*)

*The judgment (against Jamesson) [***259** upon the note is no discharge of Mandeville. The cause of action against Jamesson only is merged in the judgment; not the joint cause of action against Mandeville & Jamesson. The reason why the cause of action merges in the judgment is, that the party has obtained a remedy of a higher nature against his debtor. But a judgment against Jamesson gives no remedy against Mandeville. The plaintiff could not lose his remedy upon the note against Mandeville until he had obtained another remedy of a higher nature against him. This he has not obtained, and, therefore, has not lost his remedy upon the note.

In the former action the declaration does not state it to be a joint note. If it had, there might perhaps be some doubt. But it was sued as the separate note of Jamesson. If the note had been in terms joint and several, a judgment against one would not have been a bar to a subsequent action upon the note against the other.

Youngs and *C. Lee*, contra.

The contracts made by copartners are joint, and not several. It is true that the effect of a judgment is several, that is, the execution may be served on both, or either of the defendants; but that does not alter the nature of the contract.

In joint contracts, both are bound, or neither is bound. If one be discharged the other is discharged; a release to one is a release to both. If the contract be destroyed, or vacated, as to one, it is as to the other also. When it has once passed into a judgment it is extinct; a plaintiff may if he pleases sue only one of the copartners, and if the defendant does not plead in abatement the action may be maintained; and if the plaintiff obtains a judgment against one he cannot have another action upon the same original cause of action against the other. This would enable the plaintiff to split and multiply actions at his pleasure. Upon a joint cause of action you cannot have several judgments *as you can in trespass, although [***260** the defendants should plead severally.

If a note be given for a preexistent debt, you cannot have an action on the original cause of action, unless you can prove the note to be lost. (1 Johns., 36; 4 Esp. Rep., 159; 1 Com. Dig., 143, 144; 4 Bac. Abr., 48, 49; 2 Salk., 609; 2 Atk., 510, 609.)

But the plea states that the note was given and received in discharge of the prior debt; and there can be no doubt that, by agreement of the parties, a debt may be discharged in that way.

The declaration does not state any reason for not having made Mandeville a defendant to the first suit. It ought at least to have stated that

the plaintiff did not know that Mandeville was a partner at the time of obtaining the judgment against Jamesson. If the plaintiff has any remedy, it must be in equity. If there can be a remedy at law, it must be upon a very special action on the case, setting forth all the circumstances.

If the plaintiff had at first an option to sue for goods sold and delivered, or upon the note, he has made his election to sue on the note, and having prosecuted that suit to judgment, he cannot afterwards sue for the goods sold and delivered. A man cannot have two judgments for the same cause of action. If the note did not destroy the right of action for goods sold, yet a judgment upon that note does.

A written instrument cannot be contradicted by parol evidence. The note purports to be the separate note of Jamesson. To show that it was a joint note is to contradict the tenor of the instrument.

If the defendants in a joint action of *assumpsit* sever in their pleas, this does not make it a separate action against each; and if the plaintiff does not show a joint cause of action against both, he cannot recover against either. There **261***] could be no doubt that it would *be a good plea for Jamesson to say that the plaintiff had already recovered a judgment against him upon the same cause of action, which judgment was still in force. And a plea that would discharge Jamesson would discharge Mandeville also, because the plaintiff having declared upon a joint cause of action must prove it as laid; and if he had no cause of action against Jamesson, as well as against Mandeville, he had no joint cause of action as laid in his declaration.

Jones, in reply.

A judgment against one severally, upon a joint cause of action is no bar to a subsequent action against the others, upon the same cause of action.

A note given by one, for the precedent debt due by two, is *nudum pactum*.

A note cannot be a satisfaction of a precedent debt, unless payment be actually made of the note. (2 Cro., 152; 5 Co., 119; *Whelpdale's* case; 14 Vin., 607; 6 Co., 40, b; Cro. Jac., 74; 12 Mod., 538; 5 Mod., 136; Cro. Car., 85, 86; 1 Esp. Rep., 3, 5; 3 East, 256.)

Judgment may be severed when the parties plead severally. (Co. Litt., 127, b; Lutw., 9; 5 Com. Dig., 8 tit. Pleader, B., 9, 10; 11 Co., 5, *Hayden's* case; 1 Wils., 89; 1 Burr., 357.)

Jamesson is no party to this suit. Although arrested, he has never appeared, and the suit as against him has been abandoned. The court can give judgment against Mandeville only.

The plea amounts to the general issue, and therefore is bad upon demurrer. (Cro. Eliz., 201; 5 Mod., 314.)

March 14. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

The plaintiff sold certain goods to Robert B. **262***] Jamesson, *a merchant of Alexandria, and took his note for the amount, which he put in suit, and prosecuted to a judgment. Afterwards, supposing the other defendant Mandeville to be a secret partner, he instituted a suit against Mandeville and Jamesson. The declaration contains three counts. The first is on the note, and charges it to have been made by the defendants under the name, firm and style of Robert B. Jamesson. The 2d and 3d counts are for goods, wares and merchandise sold and delivered to the defendants, trading under the firm of Robert B. Jamesson.

The defendant Mandeville pleads two pleas in bar. The first goes to the whole declaration, and the second applies only to the first count.

The first commences with a protestation that the goods, &c., in the declaration mentioned were not sold to the defendants jointly, and then pleads in bar the promissory note which is averred to have been given and received for, and in discharge of, an account for sundry goods, wares and merchandise sold and delivered to the said Jamesson, and that the goods in the declaration mentioned are the same which were sold and delivered to the said Jamesson, and for which the said note was given. The plea also avers, that a suit was instituted and judgment obtained on the note, and concludes in bar.

The second plea pleads the judgment in bar of the action.

To the first plea, the plaintiff demurs specially, and assigns for cause of demurrer,

1. That the defendant does not traverse the *assumpsit* laid in the declaration.

2. That he does not expressly confess or deny that the goods, &c., were sold and delivered to the defendants, trading under the firm of R. B. Jamesson, or that the note was given by the said firm.

*3. Because an unsatisfied judgment [***263** against Jamesson is no bar to an action against Mandeville.

4. It is not averred that the judgment has been satisfied.

5. The defendant does not deny or admit that he assumed to pay for the goods, &c., in the declaration mentioned.

6. Because the plea is no answer to the declaration, or any count thereof, and is informal.

The defendant joins in demurrer.

To the second plea the plaintiff also demurs specially, and assigns, for cause of demurrer, the same, in substance, which had been assigned to the first plea, and the defendant joins in the demurrer to this plea likewise.

The other defendant, Jamesson, has put in no plea, nor are there any proceedings against him subsequent to the declaration.

Although the first plea is not expressly limited to the 2d and 3d counts, yet it would seem, from its terms, to be intended to apply to them alone. It sets up a bar to an action on an *assumpsit* for goods, wares and merchandise sold and delivered, and no such *assumpsit* is laid in the first count.

If, however, it be considered as pleaded to the first count, it is clearly ill on demurrer. For it does not deny or avoid the joint *assumpsit* laid in that count.

It remains to inquire whether this plea contains a sufficient bar to the 2d and 3d counts.

The plea is, that the note was given and received for, and in discharge of, an account or bill for goods, wares and merchandise sold and delivered by the plaintiff to Robert B. Jamesson, which are the same goods, &c., that are mentioned in the plaintiff's declaration.

264*] *That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it.

This principle appears to be well settled. The note of one of the parties or of a third person may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm which might be a sufficient consideration for discharging the firm. Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods.

The special causes of demurrer which are assigned do not, in any manner, affect the case. Whether the promise was made by Mandeville, or not, ceases to be material, if a note has been received in discharge of that promise, and the payment of the note need not be averred, since its non-payment cannot revive the extinguished *assumpsit*.

The next subject of consideration is the second plea, which applies singly to the first count.

That count is on a note charged to have been made by Mandeville and Jamesson, trading under the firm of Robert B. Jamesson. This, not being denied, must be taken as true.

The plea is, that a judgment was rendered on this note against Robert B. Jamesson.

265*] *Were it admitted that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound; if a suit could be originally maintained against him; is the note, as to him, also merged in the judgment?

Had the action, in which judgment was obtained against Jamesson, been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract.

In point of real justice there can be no reason why an unsatisfied judgment against Jamesson should bar a claim upon Mandeville; and it appears to the court that this claim is not barred by any technical rule of law, since the proceedings in the first action were instituted upon the *assumpsit* of Jamesson individually.

It is not necessary to decide whether this action could have been maintained against Mandeville singly with an averment that the note was made by Mandeville and Jamesson. The declaration being against both partners, that question does not arise. The declaration is clearly good in itself, and the plaintiff may recover under it, unless he be barred by a sufficient plea.

Admitting, for the present, that a previous judgment *against Jamesson would be [***266** a sufficient bar, as to him, had Jamesson and Mandeville joined in the same plea, it would have presented an inquiry of some intricacy, how far the benefit of that bar could be extended to Maudeville.

But they have not joined in the same plea. They have severed; and as the whole note is not merged in a judgment obtained against Jamesson, on his individual *assumpsit*, the court is not of opinion that Mandeville has so pleaded this matter as to bar the action.

In this plea it was necessary to negative the averment of the declaration, that the note was made by Mandeville as well as Jamesson, or to show that the judgment was satisfied. The defendant has not done so. He has only stated affirmatively new matter in bar of the action, which new matter, as stated, does not furnish a sufficient bar. It is not certain that this plea would have been good on a general demurrer, but on a special demurrer it is clearly ill.

The judgment, therefore, is to be reversed, and, as no other plea is pleaded, judgment must be rendered, on the first count, in favor of the plaintiff.

The judgment of the court was as follows: This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof the court is of opinion, that there is error in the judgment of the Circuit Court in overruling the demurrer to the first plea, so far as the same is pleaded in bar of the first count in the declaration, and that there is error in overruling the demurrer to the second plea; wherefore it is considered by this court, that the judgment of the Circuit Court be reversed and annulled, and that the cause be remanded to the Circuit Court, with directions to sustain the demurrer to the first plea so far as the same is pleaded in bar of the first count, in the plaintiff's declaration, and also to sustain the demurrer to the second plea, and to render *judgment in favor of the [***267** plaintiff on his said first count, and to award a writ of inquiry of damages.[1]

Denied—6 Wall. 236, 238.

Criticised—Hemp. 433.

Questioned—3 Story, 649, 650, 651; 2 McLean, 173.

Cited—8 Cranch, 35; 5 Pet. 568; 12 Pet. 57; 9 How. 93, 98; 1 Ware, 180; 4 Wash. 274; 2 Ware (Dav.) 115; 8 Bank. Reg. 119; 1 Sprague, 514, 583; 2 Sawy. 358; 2 Sum. 313, 438; 3 Id. 25; 3 Story, 651; 2 Cliff. 199; 4 McLean, 52.

1.—After the opinion was given, C. Lee moved for a direction to the court below to allow a plea of *non assumpsit*. The court said they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say whether the court below would be justified in granting leave to amend.

SKILLERN'S EXECUTORS
v.
MAY'S EXECUTORS.

It is too late to question the jurisdiction of the Circuit Court after the cause has been sent back by mandate.

THIS was a case certified from the Circuit Court for the District of Kentucky, the judges of that court being divided in opinion.

The former decree of the court below had been reversed in this court, and the cause "remanded for further proceedings to be had therein, in order that an equal and just partition of the 2,500 acres of land, mentioned in the assignment of the 6th of March, 1785, be made between the legal representatives of the said George Skillern and the said John May." (*Vide* ante, vol. 4, p. 141.)

The cause being before the court below upon the mandate, the question occurred which is stated in the following certificate, viz.: "In this case a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to this court it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether it can now be dismissed for want of jurisdiction, after the Supreme Court had acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered "that the same be adjourned to the Supreme Court for their decision," &c.

This court, after consideration, directed the following opinion to be certified to the court below, viz.:

268*] *"It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

Approved—12 Pet. 343; 12 Wall. 129.
Cited—10 Wheat. 199; 3 Pet. 206; 8 Pet. 219; 2 How. 22, 25; 3 How. 425; 6 How. 39, 40; 8 How. 611; 11 Wall. 674; 17 Wall. 283; 5 Otto, 143; 12 Otto, 255; 1 Sawy. 340; 1 Wood. & M. 38; 2 Wood. & M. 80; 3 Wood. & M. 503.

THE CHESAPEAKE INSURANCE COMPANY
v.
STARK.

The agent who makes insurance for his principal has authority to abandon without a formal letter of attorney.

The informality of a deed of session is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the right of either party.

If the abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters.

A special verdict is defective which does not find whether the abandonment was in reasonable time.

What is reasonable time of abandonment is a question compounded of fact and law, which must be found by a jury under the direction of the court.

ERROR to the Circuit Court of the District of Maryland, in an action of covenant upon a policy of insurance upon goods on board the ship Minerva, from Philadelphia to Laguira, and back to Philadelphia.

The cause was tried upon the issue of *non infregit conventionem*, and the jury found a special verdict, stating the following facts:

On the 5th of March, 1807, Christian Dannenberg, as agent of the plaintiff, who was a citizen of Pennsylvania, shipped for Laguira, on account, and at the sole risk, of the plaintiff, sundry goods, being American property, and regularly documented as such, to the value of 8,700 dollars and upwards, on board the ship Minerva, and consigned them to William Parker, supercargo on board. On the 12th of March she sailed with the goods from Philadelphia for Laguira.

On the 21st of March, Charles G. Boerstler, for the plaintiff, effected an insurance with the Chesapeake Insurance Company, who are citizens of the state of Marylaud, upou the goods, to the amount of 8,700 dollars, by the policy mentioned in the declaration, which was exeeuted under the common seal of the company.

On the outward voyage she was captured by a British privateer and carried iuto Curracoa. On the 29th of April, 1807, the captain made a protest. On the 13th *of June, 1807, [***269** the ship and goods being still in possession of the captors at Curracoa, and there detained by them, the said Charles G. Boerstler, "for the plaintiff," abandoned to the Chesapeake Insurance Company, the goods shipped by Dannenberg for the plaintiff, by a letter to the president and directors of the Chesapeake Insurance Company, the defendauts, in the words and figures following:

"Baltimore, June 13, 1807.

"President and Directors of the Chesapeake Insurance Company,

"Gentlemen,

"Having this morning received a letter from Mr. C. Dannenberg, of Philadelphia, the agent for Mr. John Philip Stark, of Hanover, ordering me to abandon the goods shipped by him, for Mr. Stark's account, on board the American ship Minerva, Captain Neweomb, carried into and detained at Curracoa, on her voyage from Philadelphia to Laguira, whereby the object of the expedition is totally frustrated and destroyed; I herewith abandon to you the whole of Mr. Stark's interest in the cargo of the Minerva, which you have insured in your office.

"I have the honor to be, gentlemen, your

"most obedient servant,

"CHARLES G. BOERSTLER."

Which abandonment the defendants then refused to aecept.

W. Parker, the supercargo, addressed a memorial to the governor of Curracoa, on the 19th of June, 1810, in which he complains of the detention as being of the most ruinous consequences to the owners.

On the 25th of July, 1807, the vessel and cargo being still detained at Curracoa, in the possession of the captors, Parker entered into an agreement with I. F. Burke, the owner of the privateer, by which a certain *part of the [***270** goods should be appraised and the price paid by Parker, to be repaid by Burke in case the goods should not be adjudged good prize; and that a certain other part should be kept by Burke, upon his engaging to pay the value thereof in the like ease. In consequence of

which agreement the vessel was liberated, and proceeded to Laguira, where the goods were sold, and produced about 5,900 dollars.

Parker employed an agent to attend the trial at Tortola, and to claim the goods for the plaintiff; but a trial was never had, nor any proceedings instituted for the purpose of obtaining an adjudication.

On the 22d of August, 1807, Dannenberg, as agent of the plaintiff, executed a deed to the Chesapeake Insurance Company, transferring to them all his right and title to the goods, as attorney of the plaintiff, which deed they refused to receive.

Winder and *Martin*, for the plaintiffs in error, contended,

1. That the contract by Parker with Burke was either the personal contract of Parker or the contract of Stark, and was the cause of the loss.

2. That there was no sufficient abandonment. Dannenberg was the agent of the plaintiff to make the shipment, but he had no power to abandon, nor to transfer to the defendants the rights of the plaintiff. Much less could Boerstler, the friend of Dannenberg. If the vessel and cargo had returned after the abandonment, there was nothing to prevent Stark from claiming. The deed of cession ought to have been under the plaintiff's seal, or a power of attorney, under seal, should be produced.

3. The abandonment was not in due time.

Harper, contra.

If the authority of Dannenberg to abandon **271***] does not *appear in the special verdict, nor the time when he received notice of the loss, this court will award a *venire facias de novo*, because the jury have found the evidence of the authority and time, but not the fact of authority, nor the reasonableness of the time.

In a mercantile transaction no instrument under seal is necessary. The letter is found which states the fact of abandonment, and the jury find the agency of Dannenberg. The letter states the authority of Boerstler, and the jury have found his authority. This throws the burden of proof on the other side. The deed of cession from Dannenberg states that he acts for Stark, and as his attorney. The jury find that it was done by Dannenberg for Stark. It was not necessary that the deed should have been executed in the name of Stark. It is as well if it be signed by Dannenberg, as his agent or attorney.

After the abandonment Parker became the agent of the underwriters, who were then the owners. It is a general principle that all acts done *bona fide* for the best interest of all concerned, are the acts of the underwriters, after a rightful abandonment. The assured cannot then revoke: nor can the underwriters throw back the property, without the consent of the assured.

Martin, in reply.

The question is, whether the assured can elect by attorney to abandon. Parker could not be considered as the agent of the underwriters, in doing an act which could not benefit them.

The plea of *non infregit* was decided, before the statute of jeofails, to be an informal, but not an immaterial plea. (1 Sid., 183; 1 Lev., 290.) It would have been bad upon special demurrer, but it is aided by the verdict. No other form of pleading has ever been used in Maryland, upon a sealed policy.

*March 14. MARSHALL, *Ch. J.*, deliv- [***272**
ered the opinion of the court as follows:

On the principal question in this case the court can entertain no doubt. On the capture of the Minerva, the right to abandon was complete, and this right was exercised during her detention.

The objections to the form of the abandonment are not deemed substantial. The agent who made the insurance might certainly be credited, and, in transactions of this kind, always is credited, when he declares that, by the order of his principal, he abandons to the underwriters. In this case, the jury find that the abandonment was made for the plaintiff; and this finding establishes that fact.

The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the right of either party. Had it been demanded and refused, that circumstance might have altered the law of the case.

If the abandonment was legal, it put the underwriters completely in the place of the assured, and Parker became their agent. When he contracts on behalf of the owners of the goods, he contracts on behalf of the underwriters, who have become owners, not on behalf of Stark, who has ceased to be one. His act is no longer the act of Stark, and is not to be considered as an interference, on his part, which may affect the abandonment. If any particular instructions had been given on this subject, if any act of ownership had been exerted by Stark himself, such conduct might be construed into a relinquishment of an abandonment which had not been accepted; but as nothing of the kind exists, the act of the supercargo is to be considered as the act of the persons interested, whoever they may be.

*The only point which presents any [***273**
difficulty in the opinion of the court, is the objection founded on the omission, in the verdict, to find that the abandonment was made in reasonable time.

The law is settled that an abandonment, to be effectual, must be made in reasonable time; but what time is reasonable is a question compounded of fact and law, which has not yet been reduced to such certainty as to enable the court to pronounce upon it, without the aid of a jury. Certainly the delay may be so great as to enable every man to declare, without hesitation, that it is unreasonable, or the abandonment may be so immediate that all will admit it to have been made in reasonable time; but there may be such a medium between these extremes as to render it doubtful whether the delay has been reasonable or otherwise. If it was a mere question of law which the court might decide, then the law would determine, to a day or an hour, on the time left for deliberation, after receiving notice of the loss. But the law has not so determined, and it therefore remains a question compounded of fact and law, which must be found by a jury under the direction of the court.

In this case the jury have found an abandonment, but have not found whether it was made in due time or otherwise. The fact is, therefore, found defectively; and for that reason a *venire facias de novo* must be awarded.

It may not be amiss to remark that the judicial opinions which we generally find in the books, on these subjects, are usually given by way of instruction to the jury, or on a motion for a new trial, not on special verdicts. The distinction between the cases deserves consideration.

Judgment reversed, and the cause remanded, with direction to award a venire facias de novo.

Cited—4 Pet. 144; 8 How. 484, 487; 8 Otto, 534; 2 Curt. 337; 1 Gall. 103; Woolw. 286.

274*] *LIVINGSTON AND GILCHRIST v. THE MARYLAND INSURANCE CO.

If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality if the other joint owner, whose interest is not insured, be a belligerent.

The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

The effect of a misrepresentation or concealment, upon a policy, depends upon its materiality to the risk, which must be decided by a jury under the direction of a court.

The right to abandon may be kept in suspense by mutual consent.

If foreign laws and regulations respecting trade be not proved to have been in writing as public edicts, they may be proved by parol.

If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board will vacate the policy.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant upon a policy (of insurance against capture only) upon goods laden on board the ship Herkimer from Guyaquil, or her last port of discharge in South America, to New York; the goods were warranted to be American property, "proof of which to be required in the United States only." The ship and cargo were captured by a British ship of war and condemned at Halifax as prize.

The defense set up by the underwriters was,

1. That one Baruso, a Spanish subject, was interested in the cargo, and that Baruso being a subject of one of the belligerents, the warranty of neutrality was forfeited.

2. That certain Spanish papers were found on board stating the cargo to be the property of Baruso, and although Baruso might not be interested in the cargo, yet these papers, not being necessary, according to the usual course of the trade, were the cause of the condemnation, and as this cause proceeded from the act of the insured, the underwriters were not liable.

3. That although the interest of the plaintiffs Livingston & Gilchrist, was neutral, yet the concealment of the interest of Baruso vitiated the policy.

4. That the abandonment was not made in due time.

To these objections the plaintiffs answered,

1. That Baruso was not part owner of the goods; he had only a contingent interest in the profits of the voyage. That the subject insured was only the interest *of the plaintiffs, [*275 which was strictly neutral property.

2. That the Spanish papers were necessary to carry on the voyage insured, according to the nature and course of the trade.

3. That the interest of Baruso was not such as they were bound to disclose.

Upon the trial of the issue of *non infregit conventionem*, the jury found a special verdict; and a bill of exceptions was taken by the plaintiffs in error to the instruction of the court to the jury, that parol evidence was not competent to prove, "that according to the uniform and long-standing laws of Spain, relative to the trade of her colonies in America, and especially of Peru, no goods could, at and about the time of the making the policy in the declaration mentioned, be imported into, or exported from, the colony of Peru, from, or to any other than a Spanish port in Europe, or in any other than a Spanish bottom, without a special license from the King of Spain for that purpose, and that such licenses, at and about the said time, were never granted, with respect to the said colony of Peru, to any but Spanish subjects; and that, according to the constant course and usage of the trade, to and from that colony, under such licenses, it was usual and necessary for the property to appear, in the said colony, and at its departure therefrom, as the property of a Spanish subject, and of the person holding the license, to be accompanied by such Spanish papers as were necessary to give it that appearance, and to be cleared out as such from the port of departure in Peru; such licenses, not being avowedly transferable; although by observing the above-mentioned formalities and precautions, American property, at and about the said time, might be, and sometimes was, imported into, and exported from, the said colony by American citizens, by virtue, and under the protection, of such licenses."

The order for insurance, which was supposed to *amount to a representation that the [*276 whole cargo was neutral property, was contained in a letter from the plaintiff Gilchrist to Webster & Co., at Baltimore, in which he says: "On the recommendation of Messrs. Church & Demmill, I take the liberty of requesting you to effect insurance in your city on the cargo of the ship Herkimer, Church, master, from Guyaquil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account of seizure, for illicit or prohibited trade. The owners are already insured against the dangers of the seas, and all other risks except that of capture. You will please to insure to the amount of fifty thousand dollars in valued policies. You have already had a description of the ship from Messrs. Church & Demmill, the agents of Mr. Jackson, who is the owner, and which I presume is correct. By a letter received from Mr. James Baxter, the supercargo, dated at Lima, the 23d of September, 1805, he did not expect the Herkimer would sail from Guyaquil until the last of February. I think proper to mention that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr.

Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture, that in his letter from Lima he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The description of the ship, as given by Church & Demmill, and referred to in the above letter, was as follows: "She is a fine ship of about 400 tons burden, about three years old, sheathed and coppered to the bends, built in the state of New York, and her owner a native American citizen. She sailed from Boston on the 12th day of May last, bound for Lima, with liberty to go to one other port in South America, not west of Guyaquil and from thence to New York.

"She has permission to trade there."

277*] *On the 5th of June, 1806, the plaintiff, Gilchrist, wrote to Webster & Co. at Baltimore, informing them of the capture of the vessel, and that the plaintiffs had sent an agent to Halifax to act in behalf of the concerned, and desiring that this information should be communicated to the underwriters, and assurances that the plaintiffs should act throughout with due regard to their respective interests. He then says: "I should like them to approbate the owners in taking every measure they may judge best for our mutual interest, without prejudice to our right. I ought likewise to mention that one of the owners has also gone in her, so the underwriters will observe every measure calculated to protect their and our interest has been speedily pursued." This letter was laid before the underwriters, who returned it with their answer indorsed thereon "read and approved."

On the 22d of August, 1806, after the condemnation in the Court of Vice-Admiralty, the plaintiffs abandoned to the underwriters.

The cause was argued at great length by *Harper*, for the plaintiffs in error, and by *Winder*, *Key* and *Martin*, for the defendants, but their arguments were principally upon points not decided by the court.

March 16. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

In this case several questions have occurred, on which the court has not yet formed an opinion. The application of rules and principles, which have been framed for an action on the case, to an action of covenant, is an operation of some difficulty. The court has not decided with precision, on the extent of the plea, that the defendant has not broken his covenant, nor on the testimony which may be admitted under that plea. Some difficulty, also, arises from the circumstances, that the parties have gone to trial under the expectation that the whole **278*]** merits of the case were *open, under the issue which was joined, and that such expectation was authorized by the invariable usage of the courts of Maryland, and of the Circuit Court sitting in that state.

Upon the inspection of the special verdict in this case, it is supposed that, however these points may be decided, a *venire facias de novo* would probably be awarded; and, as the delay of a term would be a great inconvenience to the parties, it is deemed advisable to award it now.

There are, however, some points, which have been argued at great length, on which an opinion has been formed, which will now be delivered.

It is essential, in this form of action especially, to distinguish accurately between the warranty contained in the policy and those extrinsic circumstances, such as misrepresentation or concealment, which have been deemed sufficient to discharge the underwriters. Although the effect of a breach of a warranty and of a material misrepresentation may be the same on a policy, yet they cannot be confounded together in deciding on pleadings or on a special verdict.

The warranty, in this case, is in these words: "Warranted, by the assured, to be American property, proof of which to be required in the United States only."

The interest insured is admitted to be American property, in the strictest sense of the term; but it is contended that Baruso, a Spanish subject, had an interest in the cargo, which falsifies the warranty.

Whether Baruso could be considered as having an interest in the cargo, or not, is a question of some intricacy, which the court has not decided; and which, if determined in the one way or the other, would not affect the warranty; because, the assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

*If the assured represented the whole [**279** cargo to be neutral, when it was not, or if they concealed the interest of a belligerent, when it ought to have been disclosed, which facts this court neither affirm nor deny, the effect of the misrepresentation or concealment on the policy depends on its materiality to the risk. This must be decided by a jury under the direction of a court. In this case, it has not been decided. Consequently, were it even to be admitted that, under the peculiar circumstances of this case, these facts might be taken into consideration, without being specially pleaded, a *venire facias de novo* would be necessary, in order to ascertain their materiality.

So, too, with respect to the Spanish papers found on board.

It is said that the verdict finds their materiality, by finding that the fair premium on American property disguised as Spanish, on the voyage insured, was twenty-five per cent., whereas the premium, in this case, was only ten per cent.

But, it does not appear to the court that this property was, by these papers, disguised as Spanish. It is found to have been the constant course of the trade to have them on board, and, consequently, they cannot be understood to disguise the property as Spanish, when there are other papers which prove it to be American.

It is, too, as yet, undecided that this matter could be given in evidence on this issue.

Although this verdict, and these pleadings, do not present the merits of the cause in such form as to enable the court to decide them, there are some insulated points from which the cause may be relieved.

The reference to the letter of Church and Demmill, which was made by the assured, in

their letter of the 26th of March, to Alexander
280*] Webster & Co., has *been treated both as a representation, and as a warranty, which is falsified by the sentence of condemnation.

There is no color for this opinion.

Most clearly it is not a warranty, for it is not introduced into the policy; and if it were a representation, it only goes to the actnal state of the ship at the time, not to her future conduct.

But it is not even a representation. Marshall, 336, is full and clear on this point.

The letter of the assnred, of the 5th of June, is understood to ask the permission of the underwriters to keep their right to abandon in a state of snspense, and the note made by the president and directors, on that letter, is understood as granting that permission. It is difficult to ascribe this letter to any other motive.

It has been asked, for how long a time is this permission given? The answer is obvious. It is, at least, to continue while the property continued in its then situation, unless it should be sooner determined by one of the parties. The assured might abandon previous to the sentence, or immediately afterwards; and the underwriters might, at any time, require the assured to elect immediately, either to abandon or to waive the right so to do. Since they have not made this communication, their original permission continued in force. But the jury have not found that the abandonment was or was not in due time.

It is, also, the opinion of the court that, as the laws and regulations by which this trade was regulated are not proved to have been in writing, as public edicts, bnt may have depended on instructions to the governor, they may be proved by parol.

The judgment is to be reversed, because the special verdict is defective; and the cause remanded, with directions to award a *venire facias de novo*.

281*] *In the second case, it is ordered to be certified, that, if the jury should be of opinion that the Spanish papers, mentioned in this case, were material to the risk, and that it was not the regular usage of the trade insured to take such papers on board, the non-disclosure of the fact that they would be on board would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy.

S. C. 7 Cranch, 506.
Cited—1 Wheat. 55 (n); 8 How. 248, 250, 487; 8 Otto, 533; 2 Curt. 613; 1 Gall. 103; 2 Wood. & M. 492.

HUDSON AND SMITH *v.* GUESTIER.

The jurisdiction of the French courts as to seizures, is not confined to seizures made within two leagues of the coast.

A seizure, beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations.

When the reversal is in favor of the defendant upon a bill of exceptions, a new trial must be awarded by the court below.

ERROR to the Circuit Court for the District of Maryland; in an action of trover for coffee and logwood, the cargo of the brig Sea Flower, which had been captured by the French, for trading to the revolted ports of the island of Hispaniola, contrary to the ordinances of France, and carried into the Spanish port of Baracoa, but condemned by a French tribunal at Gnadaloupe, and sold for the benefit of the captors, and purchased by the defendant Guestier.

Upon the former trial of this case in the court below, a statement of certain facts was agreed to by the counsel for the parties, and read in evidence to the jury, who then found a verdict for the plaintiffs. One of the facts so admitted, and which was then deemed wholly immaterial by both parties, was, that the Sea Flower was captured within one league of the coast of the island of Hispaniola. Upon this fact, which was the only fact in which this case differed from that of *Rose* v. *Himely* (ante, vol. 4, p. 241), the Supreme Court reversed the first judgment of the court below (see ante, vol. 4, p. 293), which had been for the plaintiffs, and remanded the cause for further proceedings.

Upon the second trial in the court below, the verdict and judgment were for the defendant.

*The plaintiffs took a bill of exceptions [**282** to the opinion of the court, who directed the jury "that if they find from the evidence produced, that the brig Sea Flower had traded with the insurgents at Port au Prince, in the island of St. Domingo, and had there purchased a cargo of coffee and logwood, and, having cleared at the said port, and coming from the same, was captured by a French privateer, duly commissioned as such, within six leagues of the island of St. Heneague, a dependency of St. Domingo, for a breach of said municipal regulations, that in such case the capture of the Sea Flower was legal, although such capture was made at the distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island, and that the said capture, possession, subsequent condemnation and sale of the said Sea Flower, with her cargo, devested the said cargo out of the plaintiffs, and the property therein became vested in the purchaser."

Harper, for the plaintiffs in error.

The main question in this case is, whether the French tribunal at Gnadaloupe had jurisdiction of a seizure, under the municipal law of St. Domingo, of a vessel seized more than two leagues distant from the coast.

This question was decided by this court in this cause when it was here before. In the case of *Rose* v. *Himely* (ante, vol. 4, p. 241), this court decided, that the French tribnnal had not jurisdiction because the seizure was made more than two leagnes' distance from the coast; and in this case (ante, vol. 4, p. 293), this court decided that the French tribunal had jurisdiction, because it appeared by the statement of facts that the vessel was seized within one league from the coast. So also the cases of *Palmer & Higgins* v. *Dutilli*, and *Hargous* v. *The Brig Ceres* (ante, vol. 4, p. 298, in note), were remanded for further proceedings, because it did not appear whether the seizures in those cases were made within two leagues of the coast.

P. B. Key and *Martin*, contra. A nation has a *right to use all the means necessary [**283**

to enforce obedience to its municipal regulations and laws. It has a right to enforce its municipal laws of trade beyond its territorial jurisdiction. This right is exercised, both by Great Britain and America, to enforce their respective revenue laws. The only limit to this right is the principle that you do not thereby invade the exclusive rights of other nations. The *arretes* relative to the trade of St. Domingo do not limit the jurisdiction of their tribunals to seizures made within two leagues of the coast.

The French *ordonnances*, referred to in the sentence of condemnation, embrace four distinct descriptions of vessels.

1. Those found at anchor, &c.

2. Those cleared for ports in possession of the revolters.

3. Those coming out of the interdicted ports, with or without a cargo; and,

4. Vessels sailing in the territorial extent of the island, found within two leagues of the coast.

The distance of two leagues expressed in the *ordonnance*, is limited to the last description, and does not apply to either of the three first. It is tantamount to the hovering acts of Great Britain and the United States. Neither the object nor the policy of the law would admit such a construction. If a vessel had been trading with the blacks, she had only to wait for a fair wind, slip out of port, and in half an hour to be beyond the line of the jurisdiction.

March 17. LIVINGSTON, *J.* In this case, when here before, I dissented from the opinion of the court, because I did not think that the condemnation of a French court at Guadaloupe, of a vessel and cargo lying in the port of **284***] *another nation, had changed the property: but this ground, which was the only one taken by two of the judges in this case, and by three in that of *Himely* v. *Rose*, and was principally and almost solely relied on at bar, was overruled by a majority of the court, as will appear by examining those two cases, which were decided the same day. I am not, therefore, in determining this cause as it now comes up, at liberty to proceed upon it; and such must have been the opinion of Judge Chase, on the trial of it, who was one of the court who had proceeded on that principle.

Considering it, then, as settled that the French tribunal had jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than two leagues from the coast. If the *res* can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also that, if jurisdiction be at all permitted where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own state, whether, in the particular case, she had jurisdiction, if any objection be made to it. And, although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over the Sea Flower, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And, if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, *whether it related to his own jur- [***285**
isdiction or arose out of the law of nations, or out of the French decrees, or in any other way: and, even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property.

Believing, therefore, that this property was changed by its condemnation at Guadaloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed.

The other judges (except the Chief Justice) concurred.

MARSHALL, *Ch. J.*, observed, that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in this he was mistaken.

The opinion was concurred in by one judge. He was still of opinion that the construction then given was correct.

He understood the expression *en sortant*, in the *arrete*, as confining the case of vessels coming out, to vessels taken in the act of coming out. If it included vessels captured on the return voyage, he should concur in the opinion now delivered.

However, the principle of that case (*Rose* v. *Himely*) is now overruled.

Judgment affirmed.[1]

S. C. 4 Id. 243.
Cited—7 Cranch, 1; 12 Pet. 738; Blatchf. Pr. 83, 265, 315; Blatchf. & H. 173; 2 Gall. 36, 40, 390; 1 Brown, 21; 12 Bank. Reg. 101.

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*SMITH [***286**

v.

THE STATE OF MARYLAND, AT THE INSTANCE AND FOR THE USE OF CARROLL AND MACCUBBIN.

A writ of error lies to the highest court of a state, in a case where the question is whether a confisea-

1.—TODD, *J.*, stated that in the case of *Rose* v. *Himely*, at February term, 1808, he concurred in opinion with Judge Johnson.

Harper stated that one of the judges of the court below had doubted whether, when a case is reversed upon a bill of exceptions and remanded, the court below ought to grant a new trial.

MARSHALL, *Ch. J.* If it be upon a special verdict, or case agreed, the court above will proceed to give judgment. But when a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below.

tion under the law of the state was complete before the treaty of peace with Great Britain.

By the confiscating acts of Maryland the equitable interests of British subjects were confiscated, without office found, or entry or other act done, and although such equitable interests were not discovered until long after the peace.

ERROR to the Court of Appeals of the State of Maryland, being the highest court of law and equity in that state; and which affirmed the decree of the chancellor of Maryland.

The facts of the case appear to be correctly stated in the decree of the chancellor, which was as follows:

"The material facts appearing in this case are, that on the 4th of July, 1774, the lands mentioned in the bill were conveyed by Anne Ottey, heir at law of William Ottey, to William Smith, one of the defendants, and that an act of assembly passed in June, 1779, for recording the deed of conveyance which had not been recorded within the time limited by law. That on the 5th of July, 1774, Smith executed a bond of conveyance to Anne Ottey, widow of William Ottey, and that at the time of passing the act of October, 1780, (c. 45), 'to seize, confiscate and appropriate all British property within this state,' he held the said lands under the said deed, subject to the terms of the said bond of conveyance, and in trust for the said Anne Ottey, then and now a British subject, and that the lands are now held in the same manner. That on the 27th of April, 1801, the complainants, Carroll and Maccubbin, gave information of this property being so held, to the state's agent, and claimed the composition held out by law on the said information. That on the 22d of February, 1803, the Governor and council agreed to sell the state's right to the said lands to the said Carroll and Maccubbin. That a survey was made and a plat returned and bond given for the purchase money on the 30th of April, 1803.

"The object of the bill is to compel the defendant Smith to produce in this court all deeds, papers and writings respecting the said **287***] land, and to convey the *same to the said Carroll and Maccubbin, and for general relief, &c.

"The positions relied on by the complainants in their notes are, that the property so held in trust for a British subject, or in which a British subject had an equitable interest, but no legal estate, was liable to confiscation under the laws of this state, and was confiscated by them; and that there is nothing in any treaty between the United States and Great Britain to protect the said property, or to prevent its being liable to their claim.

"For the defendants it is contended that the 6th article of the treaty of the 3d of September, 1783, declaring that there should be no future confiscations made, had the effect of preventing any transfer, by the executive, of property which might have been confiscated, but was only legally, and not actually, transferred from private to public use, or from the possessor to the state; and that such transfer by the executive must be considered as a future confiscation, or setting apart for the public, property, the use of which an individual had, and therefore contrary to the stipulations of the treaty. And it is also contended that under the 9th article of the British treaty of the 19th of November, 1794, (by which it was agreed that the British subjects who then held lands in the territories of the United States should continue to hold them according to the nature and tenor of their respective estates and titles therein), this property is protected, being then held by the defendant Smith, as agent of and for Anne Ottey, a British subject, and therefore then held by her.

"In a case of this nature where an important question as to the operation of a treaty arises, it would be satisfactory to the chancellor to have the opinion of a court of law, or its judges. The late change in the judiciary has, however, rendered the obtaining such an opinion less practicable than it formerly was; and it appears also that the most material ground taken by the defendants has been already decided on by the general court in the case of *Norwood's Lessee* v. *Owings*.

*"A number of points were decided in [***288** that case, but the one most applicable to the present question was the determination by the court, or the opinion expressed, that the state of Maryland by their commissioners was in possession of all British property within the limits of the state, under and by virtue of the act of confiscation, October, 1780, (c. 45), and the act of the same session (c. 49), to appoint commissioners, &c.: and the possession of the said land was in the state of Maryland at the time the said Edward Norwood obtained his escheat warrant, and that no British subject could hold land in the state of Maryland on the 19th of November, 1794, the time when the treaty was entered into between Great Britain and the United States.

"It is not necessary at this time to declare any opinion as to the intent and meaning of the 9th article of that treaty, or to ascertain to what part of the territories of the United States it might have applied. It is sufficient to observe that according to the opinion of the general court, standing as yet unreversed, it could not apply to this state.

"There is nothing in this case to induce the chancellor to determine contrary to that opinion; and if the holding of the land by Smith for Anne Ottey was a holding by her in October, 1780, and occasioned its confiscation, it cannot be considered that she held the land in November, 1794, so as to be enabled, by the 9th article of the treaty with Great Britain then made, to continue to hold it according to the nature and tenor of her estate.

"The words of the 2d section of the act of October, 1780, (c. 45), are, 'That all property within this state (debts only excepted), belonging to British subjects shall be seized, and is hereby confiscated to the use of this state,' and under this general expression, it is considered that land in which the legal title was held by a citizen of this state in trust for a British subject (as is the case now in question), was included.

*"That this was the construction [***289** given to the act appears from the subsequent conduct of the legislature and the executive of this state, and particularly by the first section of the act of 1784 (c. 81), which directs, that the intendant of the revenue be authorized and required to call on all persons having confiscated British property in their possession, or the title

papers thereof, or relating thereto, to discover and deliver up the same; and if the said intendant has probable and good ground to suspect that any person holds the same in trust for any British subject, or conceals the same, or any deeds, writings or evidence of the titles to such property, he may and shall direct the Attorney-General to file a bill in the High Court of Chancery, on behalf of this state, for the discovery of such trust or concealed property, and for delivering up such deeds, writings, and evidence of title, to the same; thereupon proceedings shall be had, and decree made, according to the rules of the High Court of Chancery in such cases.

"And it will be observed that, by the fifth article of the treaty of 1783, the recommendation to be made for a restitution of property confiscated, extends to all estates, rights and properties.

"If, then, this property was confiscated, and the right to it vested in the state by the acts of October, 1780, (c. 45, and c. 49), the chancellor does not perceive how it can be affected by the sixth article of the treaty of 1783, declaring that there should be no future confiscations made.

"The future acts of confiscation to be restrained by that article were absolute confiscations, and not the dispositions that might be necessary for those which had been made.

"Such dispositions might have been the subject of consideration, if the recommendations made for a restitution of property confiscated, had been complied with by this state.

"Considering, then, the lands in question to **290***] have been *confiscated, and that the right of the state, or those claiming under the state, is not affected by either of the treaties which have been relied on, it remains only to inquire as to the grounds of the complainants' application to this court, and the nature of the relief to which they may be entitled.

"The act of 1802 (c. 100), under which the complainants allege that the purchase was made, declares, that it shall and may be lawful for any person or persons purchasing as aforesaid any confiscated British property under the authority of this act, to prosecute any suit or suits, either in law or equity, in the name of the state, for recovery of said property for their use.

"If this property had not been sold, it might have been competent for the state to have proceeded by suit to devest the legal estate from the defendant William Smith; and it seems consonant to equity, and to the provisions of the act just mentioned, that in the present case it should be vested in the complainants, who were the purchasers from the state."

Then follows the formal part of the decree, that Smith should convey the land to Carroll and Maccubbin. From this decree Smith appealed to the Court of Appeals of Maryland, who confirmed the decree; whereupon he brought his writ of error to this court, under the provisions of the 25th section of the judiciary act of 1789, (Laws U. S., vol. 1, p. 63), the decision being against the right claimed under the treaty.

Johnson, for the plaintiff in error.

The question in the case is, whether a British subject, who, in fact, by her agent and trustee, held land in Maryland, before the revolution, and continued to hold it undisturbed until the year 1802, is protected by the treaties; or whether our acts of confiscation were so operative as to enable an informer, in a court of equity, to compel the trustee to convey the legal estate to him.

*This depends upon the true con- [***291** struction of the acts of assembly of Maryland, and of the treaties with Great Britain.

It is for this court to decide whether the construction which the Maryland courts have given to their acts of assembly be consistent with the true construction of those treaties.

The 5th and 6th articles of the treaty of peace of the 3d of September, 1783, (Laws U. S., vol. 1, p. 482), relate to this subject, and are both to be taken into view in order to ascertain what the 6th article means when it says "there shall be no future confiscations made."

By the 5th article it is agreed that Congress shall earnestly recommend the restitution of confiscated property belonging to real British subjects, and also of persons resident in districts in the possession of His Majesty's arms, who had not borne arms against the United States. This was contemplated to be done without payment therefor. But as to the refugees who had borne arms against the United States, Congress was to recommend restitution only upon the terms of payment (to any person who might then be in possession) of the price which had been paid for the purchase thereof since confiscation. But if the property had not been sold, even they were not to pay for their estates, although the state might have discovered, seized and possessed them. This was the spirit of reconciliation which was entertained between the parties at that time, and ought not to be forgotten in construing the treaty. These, however, were cases where the state had actually possessed themselves of the property, and had used or disposed of it. In those cases the interposition of the state was necessary to give effect to the intention of that part of the treaty. The fifth section, therefore, relates entirely to confiscations actually made and finished, and where the state sovereignties had possessed, and used, or disposed of the property. But the cases of inchoate confiscation, where the possession had not been devested, where the party still enjoyed the property, but where the states would, under the *existing [***292** laws, have a right to seize and possess themselves of the property, and where some act still remained to be performed in order to completely vest the title and possession in the state, such cases were reserved for the subject of the 6th article; which stipulates "that there shall be no future confiscations made; nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the present war; and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued." The cases in the 5th article required some act to be done by the states to restore the property, because the party was out of possession; but where the party was already in the possession and enjoyment

of the property, no act of the states was necessary. It was competent for the treaty to provide for the case; and to stipulate, as the 6th article does in effect, that the party shall not be put in a worse situation than he then was in, either as to his person, his liberty, or his property. The treaty did not consider property as confiscated, if any further act was necessary to give the state a complete legal title.

To ascertain the true construction of the 6th article of the treaty, it is necessary to fix the meaning of the term confiscation.

1. What is confiscation?

2. On what principles does the right of confiscation depend?

1. To confiscate, is to transfer property from private to public use. But the public cannot have the use of property not known to exist. The state of Maryland had not the use of this property before it was discovered in 1801. It was not before that time transferred from private to public use, and, consequently, was not confiscated.

293*] *2. The right to confiscate the property of an enemy during war is derived from a state of war, and is called one of the rights of war. The right originates in the principle of self-preservation. It is a means of weakening the enemy, and of strengthening ourselves. (3 Dallas, 227; Vat. lib. 3, c. 8, § 138, p. 519; Lib. 3, c. 9, § 161, p. 541.)

The right to confiscate ceases with the principle upon which it is founded. In time of peace we are in no danger, and therefore self-preservation will not then justify confiscation. We have no enemy to disable, and therefore no right to strengthen ourselves at the expense of another, although he had been an enemy.

But we are told that the state is not now confiscating the property of him who was our enemy. That was done during the war. We are not now depriving him of the possession, and excluding him from the use of the land. All this was done during the war. And this is said in the same breath which admits that the party has remained in the possession, use and enjoyment of the land until this moment, and that the property was not discovered to have been the property of an enemy until twenty years after the end of the war. The right to confiscate the goods of an enemy is merely the belligerent right of capture. If the property be not taken during the war it can never be seized afterwards. This property, while it remained undiscovered, could neither weaken our enemy nor strengthen ourselves.

It would be difficult to establish the position by reason, or by the law of nations, that you can ever be placed in a situation where, although it be unlawful to pass an act declaring you will seize and confiscate enemies' property, yet that you may because you declared you had seized it when in fact you had not deprived him of the possession and use of it. As to him the effect is the same; and it is equally a just cause of hostility, whether in fact you take from him what he in fact held, without a previous declara-

294*] tion *of your intention to do so, or first make the declaration, and then do it. In order to evade the positive prohibition of the treaty, you set up a mere legal fiction in opposition to the truth of the case, and in violation of the spirit as well as the letter of a solemn national compact.

This construction deprives the words of all meaning and effect. It was absurd to make provisions against future confiscations, if everything was already confiscated. No construction of a treaty is to be admitted which leads to an absurdity, or renders the treaty null and without effect. (Vattel, 380, 381, 382.)

It is contended that the first provision in the 6th article can never apply to Maryland, because there the confiscations were complete whether the property were discovered or not, and whether the state by its agents had taken the possession or not; the law having vested the title and possession. Let it be conceded that the law, of itself, had all these effects, yet the treaty, if fairly construed, annulled the future operations of the law, and prevented the state or its assigns from making the confiscation more complete, either by taking actual possession or compelling the trustees to convey the legal estate.

We contend that the provision that no future confiscations shall be made, protects all property in fact held by British or American subjects at the time of the treaty, and prevents the laws of confiscation from having the least operation in respect to such property; or at any rate prevents the courts of justice from depriving the holder of the possession, and from forcing his trustee to convey, and from doing any other act to carry into effect an incomplete confiscation. Acts done under a law during its existence cannot be affected by the repeal of the law. But if a law authorizes an act to be done, but before the act be done, the law be repealed, there is no authority to do the act. So if the act be done in part, and be incomplete at the time of the repeal, nothing further can be done. The treaty was a repeal of all the confiscation laws, so *far as to suspend their confis- [***295**

cating effects; and no court of judicature could carry them into execution.

The stipulation "that there should be no future confiscations made," was not intended to prevent the passing of future laws of confiscation. There could be no right to pass such laws during peace. Such laws would have been a most flagrant violation of the law of nations; and would have been a good cause of war.

If it be said that the stipulation was intended to apply only to those states where the confiscation laws were incomplete, we answer, that the confiscation was incomplete even in the case now before the court. The circumstance of an application to a court of chancery to complete the title of the state, is conclusive evidence that the title was not complete; and if the title was not completely in the state, the confiscation was not complete.

In those states where an inquest of office was necessary to gain a seizin by the state, such a proceeding could not be had after the treaty; this point has been admitted by all the states. No solid reason can be given why the treaty should not equally bar a proceeding in equity, to obtain the same object.

No reason can be given why one of the states more than another should be enabled to derive a continuing revenue from the discovery of property after the peace, which had belonged to an enemy during the war.

If it be said that the act of confiscation vested

the equitable title in the state, and that that equitable title is transferred to the complainants, Carroll and Maccubbin, and that as in equity, what ought to have been done is presumed to have been done, and therefore a conveyance is to be made now as if it had been made then.

We admit that this is true in ordinary cases of equity; but this is not an ordinary case of equity; there is no equity in compelling a for- [*296
296*] feiture accruing *jure belli*. It is a mere exercise of superior power, or at most a case of the strictest law. It is not the province of a court of equity to enforce penalties and forfeitures (especially those growing out of a state of war), but to relieve against them. No man will contend that a British subject was bound in law, conscience or morality, to make a disclosure of his property to his enemy, for the purpose of being deprived of it. The same right of war which justified us in confiscating the property of British subjects, justified them in concealing it.

The general purview of the 6th article of the treaty shows that the intention of the contracting parties was, that things should remain as they then were; no future confiscations were to be made; that is, no property was to be transferred from private to public use; no person then in possession was to be turned out on account of the part he took in the war; no prosecution was to be commenced; no person was to suffer any future loss or damage, either in his person, liberty or property, on that account. To deprive a man of his property, to turn him out of a possession which he had enjoyed until that moment, to deprive him of his daily bread, is to make him suffer a loss and damage on account of the part he took in the war, and is therefore a direct violation of the treaty.

The right of confiscation is in substance the same as the right of capture; it depends upon the same principle, the right of self preservation. If the property be taken *flagrante bello*, it becomes the property of the captor. But if it be not taken during the war, he cannot afterwards claim and take it because he might have taken it during the war, if he had known where it was. He cannot make it his own by a mere declaration that it is his. The right to take can only be exercised during the war. If there be only a declaration during the war, it does not change the property. At the cessation of hostilities, the right of capture ceases. The state of Maryland cannot say, I am not now taking your property. I only take my own; and it is my own because I declared it to be so during the war.

297*] *With much more truth might Great Britain, when we charge her with a violation of the 7th article of the treaty, by carrying away the negroes and other property of Americans, say, I did not take away the property of the Americans; I only took my own. It was mine, not by a mere declaration that it was mine, but by an actual seizure of it during the war, and according to the rights of war.

But this construction of the 7th article is not admissible, because it would defeat the whole object and intent of that article. So we say the construction given by the courts of Maryland, to the term "confiscations," in the 6th article, is not admissible, because it defeats the whole object and intent of that provision.

The words of the act of October, 1780, (c. 45), entitled "An act to seize, confiscate and appropriate all British property within this state," are these: "Be it enacted," &c., "that all property within this state, debts only excepted, belonging to British subjects, shall be seized, and is hereby confiscated to the use of the state."

By the act of the same session (c. 49), entitled "An act to appoint commissioners to preserve confiscated British property," it is enacted. "William Paca, Uriah Forest, and Clement Hollyday, Esquires, or any two of them, shall be, and are hereby appointed commissioners for the purpose of preserving all British property seized and confiscated by the act of the present session to seize, confiscate and appropriate, all British property within this state; and that the said commissioners shall be, and are hereby declared to be in the full and actual seizin and possession of all British property seized and confiscated by the said act, without any office found, entry, or other act to be done. And the said commissioners shall, and may, as soon as may be, appoint proper persons, in all cases that they may think necessary, to enter into, and take possession of any part of the said property, and to preserve and keep the *same from waste and de- [*298
struction, or to occupy and employ the same for the benefit of the public, and to inventory the same, or any other of the said property which the said commissioners may not think proper or necessary to put into the keeping of any person as aforesaid; and the said commissioners shall return to the next general assembly a list or account of all such British property by them discovered, to whom the same belonged, the persons, if any, to whose keeping they committed the same, and the sums to which the same shall be valued in the next valuation of property; and the inventory aforesaid shall also be returned to the general assembly, with the list or account aforesaid; but in case any person shall be in possession of any of the said property, and claim the same, such property shall not be taken out of his possession, if he gives good and sufficient security, in double the value thereof, that the same, if moveable, shall be produced when called for by the commissioners, not any way damaged, or injured, or, if real, that no waste or destruction shall be committed thereon, but that the same shall be kept and preserved in as good order and repair as the same may then be in, until the title thereto shall be determined."

By the 4th section of the same act it is enacted, "that the said commissioners are also hereby declared to be in the full and actual seizin and possession of all property within this state which belonged to any person outlawed for treason; and may appoint proper persons to take care of and preserve the same from waste or destruction, and inventory and return the same to the general assembly at the next session, in the same manner as if the same was confiscated British property, to the end that proper measures may be taken for the disposition thereof in the manner most advantageous for the public, and the purpose to which the same is appropriated."

These acts clearly contemplate an actual seizure of the property during the existence of

the war. The title of the first act is, "to seize, confiscate, and appropriate;" and the enacting clause declares, that the property **299***] *"shall be seized." The second act declares the commissioners to be in the full and actual seizin and possession of all British property seized and confiscated by the former act. It also authorizes the commissioners to appoint other persons to enter and take possession. It directs an account of the property discovered to be returned to the next general assembly, and it provides that if the party in possession claim title, he shall not be turned out of possession until the question of title be decided.

The act of the same session (c. 51, section 6) speaks of certain manors and lands, "which are seized and confiscated as British property, in consequence of the said act." And the preamble of the 8th section of the act of November, 1802, (c. 100, sect. 8), under which Carroll and Maccubbin claim a right to apply to a court of equity in the name of the state, speaks of the discoverers of property liable to confiscation in the following terms: "Whereas many persons have made discoveries of British property, confiscated property, or property liable to confiscation, to the Governor and council, the late intendant and late agents of the state, and have made application to purchase the same upon the terms held out by law to the discoverers; and whereas there is no person invested with authority to estimate the value, or fix a reasonable price for the said property, and to compound with the person or persons making such discovery, or with the person or persons applying to purchase the same; be it enacted, that the Governor and council be and they are hereby empowered to compound with all persons who have heretofore made discovery of British property, confiscated property, or property liable to confiscation, either to the Governor and council, the late intendant, or any of the state agents, and to allow not exceeding one-third of the value of such property to any person or persons having made such discovery, and who shall make application to the governor and council on or before the first day of May next, to compound for and purchase the same, and the said Governor and council are hereby authorized to dispose of such property to such applicants, and take bonds, with **300***] good and sufficient *security, to be approved of by the treasurer of the western shore, for the purchase money, bearing interest payable to the state at the periods that may be agreed on."

The 9th section provides, that if the discoverer "shall not make known to the Governor and council the title of the state to the property aforesaid" before the 1st of May, then next, &c., the Governor and council are to sell and dispose of the "state's right" to the property, &c. And by the 10th section it is enacted, "that it shall and may be lawful for any person or persons purchasing as aforesaid any confiscated British property under the authority of this act, to prosecute any suit or suits, either in law or equity, in the name of the state, for the recovery of said property for their use: provided, that the said state shall not be liable to pay any costs incurred in prosecution of said suits;" "and provided also, that in all such sales so to be made by the Governor and council, it shall be made known, and shall be a condition thereof, that they only sell the right of the state thereto, and that the state doth not guaranty the title to the same, or any part thereof, but that the purchase must be in all respects at the risk of the purchaser."

This act is clearly a legislative construction of the former acts respecting confiscation, and it takes a distinction between British property and confiscated property, and property liable to confiscation; it supposes the existence of British property not confiscated; which could be no other than property which was once liable to confiscation, but which had never been actually discovered and seized.

But this land was, at the time of the British treaty of 1794, holden by a British subject, through the medium of a trustee, so that it is a case within the benefit of the 9th article of that treaty.

As to the question of jurisdiction of the courts of the United States, the real question in the case is, whether the property was, before the treaty of peace, *actually confis- [***301** cated, within the meaning of that treaty. It is a question upon the construction of the treaty only, and the judgment below has been against the right claimed under that treaty, and is therefore clearly within the letter of the 25th section of the judiciary act of 1789.

Ridgeley, contra.

The act of Maryland, of October, 1780, (c. 45), actually and absolutely confiscates the property, whether found or not. And the act of the same session (c. 49) declares the commissioners to be in the actual seizin and possession of the property, "without any office found, entry, or other act to be done."

The courts of the United States have not jurisdiction in the case, because the only question is, whether, by the laws of Maryland, the property was completely confiscated before the treaty of peace. If it was, the treaty does not apply; if it was not, the treaty protects it. The laws of Maryland are to be construed by this court as they are construed in Maryland; and the judgment in this very suit is conclusive evidence of the construction given to their laws by the courts of that state.

The acts of confiscation make no distinction between legal and equitable estates.

Harper, on the same side.

This case presents two questions. The first, upon the jurisdiction; the second, upon the construction of the act of Maryland.

1. This is not a case depending upon the construction of the treaties, but upon the laws of Maryland. If by those laws the property was not confiscated before the treaty of peace, we admit that it cannot now be confiscated. If it was confiscated, the treaty does not apply. The general understanding in Maryland, and the uniform decisions of their courts have been, *that the act of assembly completely [***302** confiscated all British property within that state, without office found, or entry, or seizure; so that at the peace there could not be any future confiscations, because, no British subject could then hold lands in Maryland. This is an answer to both treaties. The courts of Maryland are the exclusive judges of the construction of the laws of that state.

If this court can take cognizance of the cause,

the only question which they can decide is that which arises upon the construction of the treaty. The question of the construction of the acts of Maryland is not open to this court.

Jones, in reply.

The right of Mrs. Ottey was not of such a nature as to be within the description of the act of assembly; and as it was a highly rigorous and penal law, creating a forfeiture of lands, it ought to be strictly construed. To include the case of a *cestui que trust* would require a special description. The only term used in the act is "property," which, in its general and most obvious signification, means the legal title and possession of the thing itself. By the common law, no trust estate or use was forfeitable for treason; and an alien might hold and enjoy the profits of land through the medium of a trustee. (4 Com., Dig., 231; 2 Coke, 513; 2 Inst., 18, 19, 21.) And this principle respecting forfeitures applies to confiscations. (3 Inst., 227.)

By the act of Maryland itself, no property was confiscated until it was first seized, and it could not be seized until it was found. But the question is not whether it was a confiscation of the kind contemplated by the act of Maryland, but whether it was a confiscation of the kind contemplated by the treaty. Treaties, especially those which put an end to the miseries of war, ought to be construed with liberality, and according to the spirit of the contract and the intention of the parties. The confiscation contemplated by the acts of Maryland, if the con-**303***] struction be correct which has *been given to them by their courts, was not an actual confiscation *de facto*, but a confiscation in contemplation of law. So far as it could be supposed to apply to property not discovered nor seized, it was a mere fiction of law. The contracting parties to the treaty could only have intended actual confiscations *de facto;* cases where in truth the property had already been seized and converted to public use. The spirit of the treaty is clearly discovered, from the whole tenor of the instrument, to be, that nothing which was not already actually converted to the public use should be taken from the individual on account of the part taken in the war. A future seizure of the property holden by the individual; a future conversion of it to public use, was therefore a future confiscation within the letter and the spirit of the prohibition contained in the 6th article of the treaty. The negotiators of that treaty must be presumed to have been perfectly acquainted with the laws of England relating to treason, and forfeitures of every kind. It was known that even by the high prerogative of the crown, the king gained no title until actual seizure. The writ of seizure was a necessary consequence of an office found. (2 Inst., 206, 207, 573, 689.) Until entry or seizure there was only a possibility of an estate which was to be gained by entry. The seizure or entry is the commencement of the title. (Co. Litt., 118, a.; 12 Mod., 92, *Roberts* v. *Witherhead.*) This seems also to have been the opinion of the legislature of Maryland, when they declared that the property should be seized and confiscated; and when they passed the subsequent acts of 1797 (c. 119) and 1802 (c. 100).

The right of Mrs. Ottey is protected by the clauses of the 6th article of the treaty of peace, prohibiting future confiscations and future loss on account of the part taken in the war; and by the 9th article of the treaty of 1794, in favor of those who then held lands in the United States. Mrs. Ottey then held the land; if not at law, yet she did in equity; and as this is a suit in equity, the court will consider her as within the equity of the treaty.

*March, 16. WASHINGTON, *J.*,[1] de-[***304** livered the opinion of the court as follows:

This cause comes before the court upon a writ of error to the Court of Appeals of the state of Maryland; and the first question is, has the Supreme Court of the United States appellate jurisdiction in a case like the present? It is contended, by the defendants in error, that the question involved in the cause turns exclusively upon the construction of the confiscation laws of the state of Maryland, passed prior to the treaty of peace, and that no question relative to the construction of that treaty, did or could occur. That the only point in dispute was, whether the confiscation of the lands in controversy was complete, or not, by the mere operation of those laws, without any further act to be done. If the former, it was admitted, on the one side, that the right of Anne Ottey, the British subject, was not saved or protected by the treaty; if the latter, then it was agreed, on the other, that it was protected, and that no proceedings subsequent to the treaty, in order to perfect the confiscation, could be supported.

This argument proves nothing more than that the whole difficulty in this case depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious so soon as that construction is settled. But still the question recurs, is this a case where the construction of any clause in a treaty was drawn in question in the state court, and where the decision was against the title set up under such treaty? The only title asserted by the defendants in error, to the land in dispute, is founded upon an alleged confiscation of them by the state of Maryland, and a conveyance to them of the right thus acquired by the state. The title set up by the *plaintiffs in error, for Anne Ottey, [***305** and the only one which could possibly resist that claimed by the grantees of the state, is under the treaty of peace; the 6th article of which protects her rights, provided the confiscation, by the laws of the state, was not complete prior to the treaty. The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the 6th article of that treaty; and, in order to arrive at a correct result in the decision of that point, it became necessary, in the state court, and will be necessary in this, to inquire whether the confiscation, declared by the state laws, was final and complete at the time the treaty was made or not? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty; and it is perfectly immaterial to the point of jurisdiction that the first part of the way is the most difficult to explore. Although the defendant's counsel admit, and the Supreme Court of

1.—The Chief Justice did not sit in this cause. The judges present were Washington, Johnson, Livingston and Todd.

the state may, in this particular case, have decided that, where the confiscation is not complete before the treaty, the estate attempted to be confiscated is protected by the treaty, still, if, according to the true construction of the state laws, this court should be of opinion that the acts of confiscation left something to be done necessary to the perfection of the title claimed under them, which was not done at the time the treaty was made, we must say that, in this case, the construction of the treaty was drawn in question, and that the decision of the state court was against the right set up, under the treaty, by one of the parties.

This leads to the consideration of the merits of the cause, which depend upon the question before stated, viz., whether the confiscation of the lands in question was so far complete by the laws referred to that the title and estate of Anne Ottey was devested out of her and vested in the state, prior to the treaty of peace? This must depend upon the true construction of the acts passed in the year 1780 (chapters 45 and 49), as it is not pretended that any proceedings were instituted in the nature of an office, to **306***] complete the forfeiture *of these lands, upon the ground of alienage or otherwise.

The first law declares generally that "all property within this state, belonging to British subjects, debts only excepted, shall be seized, and is hereby confiscated to the use of this state." Anticipating, as it would seem, that questions might arise, after peace, in respect to lands not proceeded against according to the rules of the common law, the legislature, in the same session, passed a second law, appointing certain commissioners, by name, to preserve all British property seized and confiscated by the former law, and declaring the said commissioners to be in the full and actual seizin and possession of all British property seized and confiscated by the said act, without any office found, entry, or other act to be done, with power to the said commissioners to appoint fit persons to enter and take possession of said property, for the purpose of its preservation.

It would seem difficult to draught a law more completely operative to devest the whole estate of the former owner, and to vest it in the state. The arguments against giving to these laws such an effect are, that the expressions used in these laws do not import a confiscation of merely equitable estates, and that no estates were intended to be confiscated but such as were discovered and seized into the hands of the state, prior to the treaty.

It is true that the word property, used in both laws, means the thing itself, intended to be affected by them, whether it were land or personal property; but then it is equally clear that the thing itself, whatever it might be, ceased, by the operation of these laws, to belong to the British subject, and became vested in the commissioners, for the use of the state. The *cestui que trust*, though not in possession of the property, was, nevertheless, the real owner of it, and, if the property or thing itself had come into the actual possession of the commissioners, who would have held it to the use of the state, it would seem difficult to maintain the position, **307***] that a scintilla of interest *or estate remained, for an instant afterwards, in the former owner.

But no act of the commissioners was necessary in order to obtain seizin of the land, to support the use thus transferred from Anne Ottey to the state. No seizure was necessary. The second law considers that all property belonging to British subjects was, by the mere operation of the first law, seized and confiscated; and declares that the commissioners were then in full and actual seizin and possession of the property, so seized and confiscated by the first law, though no entry or other act had or should be made or done.

Being thus in the actual seizin, under the second law, which seizin had been declared, by the first law, to enure to the use of the state, it is perfectly immaterial at what time the right of the state to the lands now in controversy, thus completed prior to the treaty, was discovered, or at what time actual seizin and possession was obtained. From the time that the second law came into operation, the possession of the trustees of Anne Ottey either ceased to be legal, or it was to be considered as the possession of the commissioners to the new use which had been declared by law. The present suit is between persons claiming under the state, and others who either held the lands wrongfully, or for the use of the state, and it is, in no respect, necessary to the perfection of the change of property produced by the laws of confiscation.

Judgment affirmed, with costs.

Approved.—1 Wheat., 359, 370; 7 Wheat., 208 (n).
Distinguished—8 Wheat., 492.
Cited—4 Pet., 429; 10 Wheat., 393; 11 How., 549; 12 How., 124; 5 Wall., 268.

DUROUSSEAU AND OTHERS
v.
THE UNITED STATES.

The appellate powers of the Supreme Court of the United States, are given by the constitution; but they are limited and regulated by the judicial act, and other acts passed by Congress on the subject. This court has appellate jurisdiction of decisions in the district courts of Kentucky, Ohio, Tennessee, and Orleans, even in causes properly cognizable by the district courts of the United States. To an action of debt for the penalty of an embargo bond, it is a good plea, under the act of Congress of the 12th of March, 1808, s 3, that the party was prevented from relanding the goods in the United States, by unavoidable accident.

ERROR to the District Court of the United States, for the District of Orleans.

This was a suit brought by the United States against *Durousseau and others upon a [***308** bond, given in pursuance of the act of Congress of December 22, 1807, usually called the embargo act. (Laws U. S., vol. 9, p. 7.) The bond bears date the 16th of May, 1808, and the condition is, that the goods therein mentioned should be "relanded in the United States, at the port of Charleston, or at some other port of the United States, the dangers of the seas excepted."

The proceedings in the court below are according to the forms of the civil law, by petition or libel and answer. The libel is in the nature of an action of debt for the penalty of the bond, and the plea is in the nature of a special plea, stating facts which were supposed to be sufficient evidence that the defendants were pre-

vented by the dangers of the seas from relanding the goods in the United States.

The answer, or plea, states, that the vessel sailed from New Orleans with intent to proceed to the port of Charleston, and that in the due prosecution of her voyage from New Orleans to Charleston, she was, "on the 26th of May, 1808, and on divers days from the said 26th of May till the 1st of June then next following, upon the high seas by unavoidable accident by force of the winds and waves, so much injured and endamaged, that upon the said 1st day of June, for the preservation of the said vessel and cargo, and the lives of her crew and passengers, it was found necessary to put into the port of Havanna to refit the said vessel for her voyage aforesaid; and that the persons administering the government at the said port of Havanna, by force of arms, and against the will and consent of these defendants, and of the captain and supercargo of the said vessel, and all other persons having the charge and direction of the said vessel or cargo whatever, did detain the said vessel and cargo at the said port of Havanna, and by superior force did prevent the said vessel, with her cargo, from pursuing her said voyage to the port of Charleston aforesaid, or from going to any other port of the United States, and landing the said cargo therein pursuant to the condition of the said bond, and did also by force so as aforesaid prevent, and have **309***] *always hitherto prevented the said cargo, or any part thereof, from being sent in any other manner to the said United States and landed therein pursuant to the condition of the said bond; and these defendants aver, that the damages and injuries aforesaid sustained by the said vessel were unavoidable, and by force of the winds and waves; and that by reason of the detention, and continuation thereof, as aforesaid, by superior force as aforesaid, they could not at any time heretofore, nor can they yet, land the said goods, wares and merchandises in the said United States, pursuant to the condition of the said bond in the said petition set forth, by reason whereof, and also by force of the statutes in such case made and provided, these defendants are, as they are advised, discharged from the payment of the said sum of money in the said boud or obligation mentioned, or any part thereof; these defendants, therefore, pray, that a jury may be empaneled to inquire of the facts aforesaid, should they be denied by the United States, and that these defendants may be hence dismissed with their reasonable costs and damages in this behalf most wrongfully expended." &c.

To this answer the attorney for the United States filed a general demurrer, and the court below, without argument, rendered judgment for the United States; whereupon the defendants sued out their writ of error.

Rodney, Attorney-General, and *Jones*, for the United States,

Contended, that this court has no jurisdiction, because there can be no writ of error to, or appeal from, the decisions of the District Court of Orleans.

By the act of Congress passed March 26, 1804, entitled an act erecting Louisiana into two territories, and providing for the temporary government thereof (vol. 7, p. 117, § 8), it is enacted, that "there shall be established in the said territory a district court, to consist of one judge, who shall reside therein, and be called the district judge, and who shall hold, in the city of Orleans, four sessions annully;" "he shall in all things have the same jurisdiction and powers which are by law *given [***310** to, or may be exercised by, the judge of Kentucky district."

By the judiciary act of September 24, 1789, (vol. 1, p. 54, § 10), the District Court, besides the ordinary jurisdiction of a district court, has "jurisdiction of all other causes except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the Supreme Court in the same causes, as from a circuit to the Supreme Court, and under the same regulations."

By the ninth section of the same act the district courts have "exclusive original cognizance of all suits for penalties and forfeitures incurred under the laws of the United States."

Hence, it appears, that writs of error will lie to the Kentucky District Court in those causes only in which it acts in the capacity of a circuit court. The word "therein," means in causes other than those of which the district courts generally had cognizance under the 9th section of the act.

This court, in the cases of *Clarke* v. *Bazadone* (1 Cranch, 212), and *Bollman and Swartwout* (4 Cranch, 75), disclaimed any appellate jurisdiction not expressly given by law; and by a late act (vol. 8, p. 21, and vol. 9, p. 116), extending jurisdiction in certain cases to state judges and state courts, the jurisdiction is given without appeal; which shows that Congress are not anxious that there should be an appeal from all the courts to which they have given jurisdiction. There is no appeal from the judge of the District of Orleans in cases where he exercises only the District Court jurisdiction. In Kentucky there was no circuit court. The district judge, although he exercised the powers and jurisdiction of a circuit court, yet he did not hold a circuit court. His court was merely a district court. The courts of the United States can exercise no jurisdiction not expressly given by statute. *(3 Dallas, [***311** 337.) Although this suit was upon a bond, yet it was in fact a suit for a penalty or forfeiture, like the case of the auctioneer's bond in 2 Anstruther, 586, 587.

This is as much a penalty as if it had been merely declared by the statute without having been put into the form of a bond.

E. Livingston, contra.

This court has jurisdiction in consequence of its being the Supreme Court, and the other an inferior court. The terms supreme and inferior are co-relative, and imply a power of revision in the Superior Court.

The judiciary act of 1789 gives a writ of error from the Supreme Court to the District Court of Kentucky, in all cases where a writ of error would lie to a district court from a circuit court, as well as in those cases where a writ of error lies generally from the Supreme Court to a circuit court. The word "therein," means in that court, and not those cases only in which that court exercises the jurisdiction of a circuit court.

The act of Congress gives the Orleans judge the same jurisdiction and powers as are given to the Kentucky judge. If it had been intended to give him the same jurisdiction without limiting his power by the right of appeal, Congress would not have used the word powers. The same powers, means no greater powers; but if the Kentucky judge had limited powers, and the Orleans judge has unlimited powers, the powers cannot be the same.

C. Lee, same side, cited the case of *Morgan* v. *Callender* (4 Cranch, 370), in which this court decided that it has jurisdiction in cases of appeal from the District Court of Orleans. He also suggested the inconvenience which would result from having a revenue court in Orleans not subject to the control of the Supreme Court; and from a difference of construction in the **312***] laws respecting *trade, commerce and revenue in different parts of the territories of the United States.

Jones, in reply, observed, that the inconvenience arising from the want of uniformity of decision already exists with respect to all cases under 2,000 dollars value, in which there can be no appeal, or writ of error.

March 15. MARSHALL, *Ch. J.*, delivered the opinion of the court, upon the question of jurisdiction, as follows:

This is the first of several writs of error to sundry judgments rendered by the court of the United States for the territory of Orleans.

The Attorney-General having moved to dismiss them, because no writ of error lies from this court to that in any case, or, if in any case, not in such a case as this; the jurisdiction of this court becomes the first subject for consideration.

The act erecting Louisiana into two territories establishes a district court in the territory of Orleans, consisting of one judge who "shall, in all things, have and exercise the same jurisdiction and powers which are, by law, given to, or may be exercised by, the judge of Kentucky district."

On the part of the United States it is contended, that this description of the jurisdiction of the court of New Orleans does not imply a power of revision in this court similar to that which might have been exercised over the judgments of the District Court of Kentucky; or, if it does, that a writ of error could not have been sustained to a judgment rendered by the District Court of Kentucky, in such a case as this.

On the part of the plaintiffs it is contended, that this court possesses a constitutional power to revise and correct the judgments of inferior courts; or, if not so, that such a power is im-**313***] plied in the act by which the *court of Orleans is created, taken in connection with the judicial act; and that a writ of error would lie to a judgment rendered by the court for the District of Kentucky, in such a case as this.

Every question originating in the constitution of the United States claims, and will receive, the most serious consideration of this court.

The third article of that instrument commences with organizing the judicial department. It consists of one Supreme Court, and of such inferior courts as Congress shall, from time to time, ordain and establish. In these courts is vested the judicial power of the United States.

The first clause of the second section enumerates the cases to which that power shall extend.

The second clause of the same section distributes the powers previously described. In some few cases the Supreme Court possesses original jurisdiction. The constitution then proceeds thus: "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

It is contended that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by Congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.

The force of this argument is perceived and admitted. Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the constitution; *and, in omitting to exercise the [***314** right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers.

Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of 2,000 dollars. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in con-

troversy is of less value, and implies negative words.

This restriction, however, being implied by **315***] the court, *and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made for the purpose of defeating the intent of the legislature.

Having made these observations on the constitution, the court will proceed to consider the acts on which its jurisdiction, in the present case, depends; and, first, to inquire whether it could take cognizance of this case had the judgment been rendered by the District Court of Kentucky.

The ninth section of the judicial act describes the jurisdiction of the district courts.

The tenth section declares that the District Court of Kentucky, "besides the jurisdiction aforesaid," shall exercise jurisdiction over all other causes, except appeals and writs of error, which are made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court: "and writs of error and appeals shall lie from decisions therein to the Supreme Court, in the same causes as from a circuit court to the Supreme Court, and under the same regulations."

It is contended that this suit, which is an action on a bond conditioned to be void on the relanding of goods within the United States, is one of which the district courts have exclusive jurisdiction, and that a writ of error would not lie to a judgment given in such a case.

This court does not concur with the Attorney-General in the opinion that a circuit court has no original jurisdiction in a case of this description. But it is unnecessary to say anything on this point, because it is deemed clear that a writ of error is given in the case, however this question might be decided.

It would be difficult to conceive an intention in the legislature to discriminate between judgments rendered by the District Court of Kentucky, while exercising the powers of a district court, and those rendered by the same court while exercising circuit powers, when it is **316***] *demonstrated that the legislature makes no distinction in the cases from their nature and character. Causes of which the district courts have exclusive original jurisdiction are carried into the circuit courts, and then become the objects of the appellate jurisdiction of this court. It would be strange if, in a case where the powers of the two courts are united in one court, from whose judgments an appeal lies, causes, of which the district courts have exclusive original jurisdiction, should be excepted from the operation of the appellate power. It would require plain words to establish this construction.

But the court is of opinion that the words import no such meaning. The construction given by the Attorney-General to the word "therein," as used in the last instance, in the clause of the tenth section, which has been cited, is too restricted. If, by force of this word, appeals were given only in those causes in which the District Court acted as a circuit court exercising its original jurisdiction, the legislature would not have added the words, "in the same causes as from a circuit court." This addition, if not an absolute repetition, could only serve to create doubt where no doubt would otherwise exist.

The plain meaning of these words is, that wherever the District Court decides a cause which, if decided in a circuit court, either in an original suit, or on an appeal, would be subject to a writ of error from the Supreme Court, the judgment of the District Court shall, in like manner, be subject to a writ of error.

This construction is, if possible, rendered still more obvious by the subsequent part of the same section, which describes the jurisdiction of the District Court of Maine in the same terms. Apply the restricted interpretation to the word, "therein," in that instance, and the Circuit Court of Massachusetts would possess jurisdiction over causes in which the District Court of Maine acted as a circuit court; and not over those in which it acted as a district court: a construction which is certainly not to be tolerated.

*Had this judgment been rendered [***317** by the District Court of Kentucky, the jurisdiction of this court would have been perfectly clear.

The remaining question admits of more doubt.

It is said that the words used in the law creating the court of Orleans describe the jurisdiction and powers of that court, not of this, and that they give no express jurisdiction to this court. Hence it is inferred, with considerable strength of reasoning, that no jurisdiction exists.

If the question depended singly upon the reference made in the law creating the court for the territory of Orleans to the court of Kentucky, the correctness of this reasoning would perhaps be conceded. It would be found difficult to maintain the proposition, that investing the judge of the territory of Orleans with the same jurisdiction and powers which were exercised by the judge of Kentucky, imposed upon that jurisdiction the same restrictions arising from the power of a superior court, as were imposed on the court of Kentucky.

But the question does not depend singly on this reference; it is influenced by other very essential considerations.

Previous to the extension of the circuit system to the western states, district courts were erected in the states of Tennessee and Ohio, and their powers were described in the same terms with those which describe the powers of the court of Orleans. The same reference is made to the District Court of Kentucky. Under these laws this court has taken jurisdiction of a cause brought by writ of error from Tennessee. It is true the question was not moved, and, consequently, still remains open. But can it be conceived to have been the intention of the legislature to except, from the appellate jurisdiction of the Supreme Court, all the causes decided in the western country, except those decided in Kentucky? Can such an intention *be thought possible. Ought it to be [***318** inferred from ambiguous phrases?

The constitution here becomes all important. The constitution and the laws are to be construed together. It is to be recollected that the appellate powers of the Supreme Court are defined in the constitution, subject to such exceptions as Congress may make. Congress has not expressly made any exceptions; but they

are implied from the intent manifested by the affirmative description of its powers. It would be repugnant to every principle of sound construction, to imply an exception against the intent.

This question does not rest on the same principles as if there had been an express exception to the jurisdiction of this court, and its power, in this case, was to be implied from the intent of the legislature. The exception is to be implied from the intent, and there is, consequently, a much more liberal operation to be given to the words by which the courts of the western country have been created.

It is believed to be the true intent of the legislature to place those courts precisely on the footing of the court of Kentucky, in every respect, and to subject their judgments, in the same manner, to the revision of the Supreme Court. Otherwise the court of Orleans would, in fact, be a Supreme Court. It would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an inferior court.

The question of jurisdiction being decided, it was stated by the counsel that the seven following cases on the docket, viz., the cases of Bera and others, Connelly and others, Castries and others, Gibbs and others, Childs and others, Clay and others, and Keene and others, against the United States, all from New Orleans, stood upon the same pleas of unavoidable accident; excepting that in the cases of Bera and others, and Connelly and others, the accident was capture by the British, and prevention by superior force from relanding **319***] the goods *in the United States. The bond in Bera's case was dated the 21st of March, 1808. The condition was the same as in the case of Durousseau.

P. B. Key, E. Livingston, C. Lee and *R. G. Harper*, for the plaintiffs in error.

These cases are all within the benefit of the act of Congress passed the 12th of March, 1808, (section 3, vol. 9, p. 71), which enacts, "that in every case where a bond hath been or shall be given to the United States, under this act, or under the act entitled 'an act laying an embargo on all ships and vessels in the ports and harbors of the United States,' or under the act supplementary to the last mentioned act, with condition that certain goods, wares and merchandise, or the cargo of a vessel, shall be relanded in some port of the United States; the party or parties to such bond shall, within four months after the date of the same, produce to the collector of the port from which the vessel had been cleared with such goods, wares, merchandise, or cargo, a certificate of the relanding of the same from the collector of the proper port, on failure whereof the bond shall be put in suit, and in every such suit judgment shall be given against the defendant or defendants, unless proof shall be produced of such relanding, or of loss by sea, or other unavoidable accident."

It is contended that this act means loss by sea, or loss by other unavoidable accident; but this construction is contradicted by the punctuation of the statute. If it had been intended to have the construction contended for, it would have been pointed thus: unless proof shall be produced of such relanding or of loss, by sea or other unavoidable accident." The court can no more alter the punctuation of a statute than the words. To give it the construction contended for, is to make the legislature speak nonsense; it would make them say the sea is an accident.

We consider this point as settled by the case of *The United States* v. *Hall and Worth*, at this term (ante, p. 171).

Jones*, contra. [320*

The statute enlarges the obligation of the bond. The officer is bound to take the bond exactly in the form prescribed by the statute. There is only one act which prescribes the form of the bond; but there are several acts which modify its effect.

The third embargo act has annexed a new meaning to the condition of the bond. A bond taken under a known law, has the meaning and effect declared by that law. The act contemplates two excuses, viz., loss by perils of the sea, and loss by superior force; but at all events there must be a loss.

But in this case there is not a sufficient averment of a necessity even of going into Havanna, and there is no averment of a loss. The detention at Havanna, and not the injury by the winds and waves, is averred to be the reason why they could not comply with the condition of the bond.

If a vessel be driven by a storm upon the coast of an enemy, and there captured, it is not a loss by perils of the sea. (Peake's Cases, 130, *Green* v. *Elmsly*.) The remote cause is never stated as the cause of the loss. And the averment of loss by capture cannot be supported by evidence of a loss by perils of the sea. (1 Term Rep., 304, *Kulem Kemp* v. *Vigne;* 3 Bos. & Pull., 23, *Matthia* v. *Potts;* 1 Term Rep., 130.)

The third section of the third embargo act (vol. 9, p., 71) requires more strict proof than had been before required. The legislature was competent to say what degree of proof should be required of a *bona fide* excuse. They have supposed that nothing but the loss of the thing itself could be satisfactory evidence of the impossibility of complying with the condition of the bond.

This is also the true grammatical construction of the sentence. After saying proof of relanding, or of loss by sea, the word *of* is omitted, If proof of other unavoidable accident was intended to be admitted *as [**321* an excuse in the same manner as proof of loss by sea, the language would have been, proof of relanding, or of loss by sea, or of other unavoidable accident. If proof of unavoidable accident was intended as an excuse, they would have said, or other unavoidable accident which should actually render it impossible to reland the goods in the United States.

But as the clause now stands, if our opponents are right in their construction, proof of unavoidable accident will be in excuse, although it be not such an accident as would necessarily render, or should actually have rendered, it impossible to comply with the condition of the bond, whether it produce loss or not, and whether it prevented the relanding or not.

It does not appear by the plea that the defendants did not make a great profit by the voyage.

E. Livingston, in reply.

We are entitled to the benefit of the exception of dangers of the seas in the condition of

the bond, and also to the benefit of the exception of unavoidable accident in the statute.

The plea states as strong a case of necessity as that of the case of *The United States* v. *Hall and Worth*, decided by this court at this term.

We have made out a clear case both under the exception of dangers of the seas, and under the provision of the statute, in case of unavoidable accident. No man can be bound to do an impossibility.

Insurance cases do not apply to the present; there the contract enumerates a great number of risks, and courts and litigants employ themselves in classing losses under one or another of those risks. In every other kind of contract, the expression, "dangers of the seas," means every accident that can happen at sea. In a bill of lading the master contracts to deliver the **322***] *goods at a certain place, the dangers of the seas excepted. Nobody ever supposed he would be liable if the goods should be captured or seized by the superior force of public enemies.

The case cited from *Bunbury* was upon a statute which required proof that the goods perished in the sea; but our statute has no such clause.

MARSHALL, *Ch. J.*, delivered an opinion to the following effect:

The court considered many of the points in these cases while they had the case of *The United States* v. *Hall and Worth* under consideration, and upon the present argument I understand it to be the unanimous opinion of the court, that the law is for the plaintiffs in error in all these cases. I cannot precisely say what are the grounds of that opinion; I can only state the reasons which have prevailed in my own mind.

It is true, as contended on the part of the United States, that the legislature is competent to declare what evidence shall be received of the facts offered in excuse for a violation of the letter of a statute.

I also agree with the counsel for the United States, that the words of the statute, "loss by sea or other unavoidable accident," mean loss by sea, or loss by other unavoidable accident.

But the question is, what sort of loss is meant? It must be such a loss as necessarily prevents the party from complying with the condition of the bond. It is not necessary that it should be an actual destruction of the property, but such a loss only as necessarily prevents the relanding of the goods.

This statute is not like that upon which the prosecution was founded in the case cited from *Bunbury*. Our statute does not require evidence that the goods have "perished in the sea." It only requires proof of such a loss, by an un-**323***] avoidable accident, as prevents the *relanding of the cargo, according to the condition of the bond. When the property is captured, and taken away by the superior force of a foreign power so as to prevent the relanding, it is lost within the meaning of the statute by an unavoidable accident, although the owner may have received a compensation for it.

JOHNSON, *J.* I agree with the court in the result of the opinion, but not altogether upon the grounds stated by the Chief Justice. If the act in question will admit of two constructions, that should be adopted which is most consonant with the general principles of reason and justice. I cannot suppose that the legislature meant to do an unjust or an unreasonable act. No man can be bound to do impossibilities. The legislature must be understood to mean that the party should be excused by showing the occurrence of such circumstances as rendered it impossible to perform the condition of the bond. To make his liability depend upon the mere point of ultimate loss or gain would be unreasonable in the extreme.

LIVINGSTON, *J.* I concur in the reversal of these judgments, but not in the construction which the Chief Justice puts upon the third section of the act of March, 1808.

If the relanding of the cargo in the United States had been prevented by any unavoidable accident whatever, although the goods themselves were not lost, it would, in my opinion, have furnished a good defense to this suit.

If the Spanish government had forced a sale of the property; and the proceeds had actually come to the hands of the owners, it would have made no difference. Loss by sea is one excuse; unavoidable accident, whether followed by loss or not, is another.

*WASHINGTON and TODD, *Justices*, [***324** agreed in opinion with Judge Livingston.

Judgment reversed.

Cited—5 Pet. 203, 204, 205, 219; 14 Pet. 607; 14 How. 120; 1 Wall. 251; 3 Wall. 254, 678; 7 Wall. 384, 513; 16 Wall. 346; 18 Wall. 185, 205; 20 Wall. 620; 4 Otto, 259; 8 Otto, 401; 10 Otto, 290; 3 Cliff. 26; 1 Bald. 406.

TYLER AND OTHERS *v.* TUEL.

An assignee of part of a patent right cannot maintain an action on the case for a violation of the patent.

THIS was a case certified from the Circuit Court of the District of Vermont.

Tyler and others, as assignees of Benjamin Tyler, the original patentee of an improvement in grist-mills, which he called the wry-fly, or side-wheel.

After a verdict for the plaintiffs, the judges of the court below, upon a motion in arrest of judgment, were divided in opinion upon the question "whether the plaintiffs, by their own showing, are legal assignees to maintain this action."

There were two counts in the declaration.

The first set forth the substance of the statutes upon the subject of patents for useful discoveries, the facts necessary to entitle the patentee to a patent for his invention, and the patent itself, together with the specification, dated February 20, 1800.

The averment of the assignment of the patent right to the plaintiffs was in these words: "And the plaintiffs further say, that the said Benjamin Tyler afterwards, to wit, on the 15th day of May in the year last aforesaid, at said Claremont, by his certain deed of that date by him signed, sealed, and to the plaintiffs then and there by the said Benjamin delivered, and ready to be shown to the court, did, in consideration of the sum of six thousand dollars, to him before that

time by the plaintiffs paid, grant, bargain, sell, **325***] assign *and set over to the plaintiffs, their executors, administrators and assigns, all the right, title and privilege in, unto, and over the said improvement in the said patent described, and thereby vested in the said Benjamin in any part of the United States, excepting in the counties of Chittenden, Addison, Rutland and Windham, in the state of Vermont."

The second count, omitting the recital of the statutes and of the patent, stated concisely the same facts. The averment of the assignment of the patent right was as follows: "And the said Benjamin Tyler, afterwards and before the expiration of the said fourteen years, to wit, at said Claremont, on the 15th day of May, in the year last aforesaid, by his certain deed of that date by him then and there signed, sealed, and to the plaintiffs delivered, assigned to the plaintiffs the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, in and throughout the United States, excepting in the counties of Chittenden, Addison, Rutland and Windham, in the state of Vermont, as fully and amply as by said letters patent the said Benjamin Tyler was thereto entitled, and all his title and interest in and unto said improvement excepting as aforesaid."

Hubbard, for the defendant, contended that the assignment, being of part of the patent right only, was not such as would authorize the assignees to maintain an action on the statute. (Laws U. S., vol. 2, p. 202, § 4, 5.)

The fourth section of the act declares, "that it shall be lawful for any inventor, his executor or administrator, to assign the title and interest in the said invention at any time, and the assignee, having recorded the said assignment in the office of the Secretary of State, shall thereafter stand in the place of the original inventor both as to right and responsibility, and so the assignees of assigns to any degree."

The fifth section provides, "that if any person shall make, devise and use, or sell the thing **326***] so invented, the *exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators or assigns first obtained in writing, every person so offending shall forfeit and pay to the patentee a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed to other persons the use of the said invention; which may be recovered in an action on the case founded on this act, in the Circuit Court of the United States, or any other court having competent jurisdiction."

It is evident from the whole purview of the statute, especially from the 4th, 5th, 6th and 10th sections, that no person can be considered as an assignee under the statute who is not the assignee of the whole right of the original patentee.

Rodney, Attorney-General, contra.

Upon a motion in arrest of judgment, if the judges are divided, the motion fails, and the judgment must be entered of course. It must follow the verdict, unless sufficient cause be shown to the contrary. (1 Salk., 17; Ld. Raym., 271; 3 Mod., 156.)

If there can be no assignment but of the whole right, then the exception of particular counties is void; it being repugnant to the prior words and intention of the grant.

So, if the jury find a fact inconsistent with a fact previously found, the latter fact shall be rejected. (Cro. Car., 130; 3 East.; 6 Bac. Abr., 381; Plowd., 564; 1 Bl. Com., 89; 2 Co., 83; 8 Co., 56; Dyer, 351; 1 Co., 3; 1 Vent., 521; Cro. Eliz., 244.)

The whole passed at law by the deed of assignment. The exceptions are in the nature of equitable assignments.

On a subsequent day the court directed the following opinion to be certified to the Circuit Court for the District of Vermont, viz.:

*It is the opinion of the court that [***327** the plaintiffs, by their own showing, are not legal assignees to maintain this action, in their own names, and that the judgment of the Circuit Court be arrested.

Distinguished—1 Gall. 430.
Cited—7 Wall. 521; 4 Blatchf. 210.

THE SCHOONER JULIANA
v.
THE UNITED STATES;
AND
THE SHIP ALLIGATOR
v.
THE UNITED STATES.

It was no offense against the embargo law to take goods out of one vessel and put them into another in the port of Baltimore, unless it be with an intent to export them.

THESE were appeals from the sentence of the Circuit Court for the District of Maryland, affirming the sentence of the District Court, which condemned the schooner Juliana, and the ship Alligator and cargo, for a supposed violation of the 3d section of the act of Congress of the 9th of January, 1808, entitled, "An act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," by putting goods from the Juliana on board the Alligator.

The libel, in the case of the Juliana, stated, that on the first of January, 1808, she, being a Swedish vessel, cleared from Baltimore for Port-au-Prince, having on board 100 barrels of herrings, which were on board when her master was notified of the embargo; that she proceeded on her voyage to her port of destination, but before she left Patapsco River, there were laden on board of her a complete cargo of merchandise, foreign and domestic, with which she proceeded, in prosecution of her said voyage, until the 1st of January, 1808, when she was arrested by the officer of the custom-house of the port of Baltimore, and brought back; after which, and while she was in that port, viz., the 11th of January, 1808, sundry goods, described in the libel, were taken and removed from the Juliana and put on board the Alligator, then lying in the port of *Balti- [***328** more, "contrary to the provisions of the statutes of the said United States, in such case made and provided, and with intent to violate the provisions of the said statutes, for which cause she was seized by the collector of that port as for-

feited. The libel in the case of the Alligator was a copy of that against the Juliana.

The words of that part of the 3d section of the act of January 9, 1808, (vol. 9, p. 11), upon which these libels were founded, are as follows:

"And be it further enacted, that if any ship or vessel shall, during the continuance of the act to which this act is a supplement, depart from any port of the United States without a clearance or permit; or if any ship or vessel shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel, any goods, wares or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares and merchandise, shall be wholly forfeited."

Harper and *Martin*, for the appellants, contended

That the sentence ought to be reversed,

1. Because it appears from the libel that if any goods were put on board the Alligator, it was after the Juliana had been seized and brought back, and while the Alligator was at the wharf a perfect hulk, totally unfit to proceed on a voyage, and entirely passive as to any improper use made of her.

2. The libel does not charge that the goods put on board the Alligator were the same which were on board the Juliana when she was seized and brought back.

3. It does not charge that the owner of the Alligator had any knowledge of, or concern in, the business.

4. The evidence is insufficient to prove any cause of condemnation.

329*] *5. It is not averred that the goods were put on board the Alligator with intent to export them; which is the offense contemplated by the act.

6. The libel does not allege that the seizure was made within the district of the seizing officer; nor upon the water. It does not appear to be a case of admiralty jurisdiction.

The Attorney-General, on the next day, abandoned the causes as untenable.

Sentence reversed, and restitution ordered.

THE SCHOONER RACHEL
v.
THE UNITED STATES.

No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States before the expiration of the law. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made.

THIS was an appeal from the sentence of the District Court of the United States for the District of Orleans, which condemned the schooner Rachel for having traded with certain prohibited ports of St. Domingo, contrary to the act of Congress.

The sentence of condemnation was passed, and the vessel sold, and the proceeds paid over to the United States, while the act was in force. The act had since expired. It was a case within the principle decided at last term, in the case of *Yeaton and Young* v. *The United States*, but it having been made a question whether the sale and payment over of the money did not prevent the operation of that principle, and there being also a question of jurisdiction, the cause stood over to this term for consideration.

The general question of jurisdiction of that court having been settled at this term in the case of *Serré and Laralde* v. *Pitot and others*, and the fact of the sale and payment over of the money being admitted,

Martin* and *P. B. Key*, for the [330** claimants, prayed the court to direct that the proceeds should be paid over to the claimants.

But the court said that it was a matter to be left to the consideration of the court below. This court will only make a general order for restitution of the property condemned.

Cited—2 Wall. 465; 9 Id. 575.

THE BRIGANTINE AMIABLE LUCY
v.
THE UNITED STATES.

The act of Congress of the 28th of February, 1803, to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited, is not in force in the territory of Orleans.

ERROR to the District Court of the United States, for the District of Orleans, to reverse the sentence of that court which condemned the brigantine Lucy, for importing a slave from the West Indies, contrary to the act of Congress of the 28th of February, 1803, (vol. 6, p. 212), entitled, "An act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited;" by the first section of which it is enacted, that no master of a vessel, "or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state which by law has prohibited, or shall prohibit, the admission or importation of such negro," &c.

And by the second section it is enacted, "that if any such negro or mulatto, or other person of color, shall be landed from on board any ship or vessel, in any of the ports or places aforesaid, or on the coast of any state prohibiting the admission or importation as aforesaid, the said ship or vessel," &c., "shall be forfeited to the United States."

By the seventh section of the act of March 26, 1804. *"erecting Louisiana into [**331** two territories, and providing for the temporary government thereof," (Laws U. S., vol. 7, p. 116,) it is enacted, that the above act of 28th of February, 1803, "shall extend to, and have full force and effect in, the above-mentioned territories."

And the tenth section of the same act (vol. 7, p. 119) prohibits the importation of slaves into the territory of Orleans, from any place without the United States, under the penalty of 300

dollars; and also prohibits, under the like penalty, the importation from the United States of any slave imported into the United States since the first of May, 1798, and of all other slaves except by a citizen of the United States removing into the territory for actual settlement, and being the *bona fide* owner of such slaves, at the time of such removal.

By the fourth section of the act of March 2, 1805, (vol. 7, p. 281), entitled, "An act further providing for the government of the territory of Orleans," it is enacted, "that the laws in force in the said territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified or repealed by the legislature," by that act established. And the eighth section enacts, "that so much of an act, entitled, an act erecting Louisiana into two territories, and providing for the temporary government thereof, as is repugnant with this act, shall, from and after the first Monday of November next, be repealed; and the residue of the said act shall continue in full force, until repealed, anything in the 16th section of the act to the contrary notwithstanding."

This act (March 2, 1805) establishes a government for the territory of Orleans, similar to that before exercised in the Mississippi territory (vol. 5, p. 164), with a few exceptions. The fifth section declares that the article of the ordinance of the old Congress for the government of the territory north-west of the Ohio, which prohibits slavery, is excluded from all operation within the territory of Orleans.

It was admitted that the territorial legislature **332***] had *never passed any law prohibiting the importation of slaves.

It was contended by Rodney, Attorney-General, that as Congress by the act of the 26th of March, 1804, prohibited the importation of slaves from foreign countries into the territory of Orleans, and as the same act expressly extends to the territory the act of the 28th of February, 1803, which forfeits the ship which imports a slave into a state where such importation is prohibited, the evident meaning and intention of Congress was, to declare that the vessel should be forfeited which should import a slave into the territory of Orleans.

E. Livingston, contra, contended, that inasmuch as the territorial legislature of Orleans had never prohibited such importation, the act of the 28th of February, 1803, did not apply. If the territory is to be assimilated to a state, so as to bring the case within the spirit of the law, yet, there must have been a prohibition by the territorial legislature, to make it a parallel case.

And of that opinion was this court, the case having been submitted without argument.

Sentence reversed.

SERE AND LARALDE

v.

PITOT AND OTHERS.

A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts.

The citizens of the territory of Orleans may sue and be sued in the District Court of that territory in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

ERROR to the District Court of the United States for the District of Orleans, in a suit in equity, in which Sere and Laralde were complainants, against Pitot and others, defendants.

The complainants stated that they were aliens, and syndics of the creditors of the joint concern of Dumas & Janeau, Pierre Lavergne and Joseph Faurie; that Faurie died insolvent; that Dumas & Janeau were *also insol- [***333** vent, and made a surrender of all their effects to their creditors, and that Lavergne acknowledged himself to be unable to pay the debts of the joint concern; that the joint concern, as well as the individual members, being insolvent, "application was made by their creditors to the Superior Court of the territory of Orleans, and such proceedings were thereupon had that, according to the laws of the said territory, the complainants were, at a meeting of the creditors of the said partnership, duly nominated syndics for the said creditors, and, by the laws of the said territory, all the estate, rights and credits of the said partnership were vested in the complainants." They also stated that the defendants were citizens of the United States.

The defendants pleaded to the jurisdiction, and the court below allowed the plea.

E. Livingston, for the plaintiffs in error, contended,

1. That the eleventh section of the judiciary act of 1789 did not apply to those assignees to whom the choses in action of an insolvent were transferred by operation of law, as in the case of executors and administrators. (4 Cranch, 306, *Chappedelaine* v. *Decheneau;*) and,

2. That under the third article of the constitution of the United States, and the judiciary act of 1789, it was sufficient to aver one of the parties to be a citizen of the United States, generally, if the other party were an alien. It is to be presumed that he was a citizen of some one of the states.

Harper, contra.

The judiciary act is express in prohibiting a suit in the federal court by an assignee, if the suit could not have been maintained between the original parties. The expression is general, "or other chose in action," which comprehends the present case.

By the constitution, if one party be an alien the *other must be a citizen of one [***334** of the states; it is not sufficient that he be a citizen of one of the territories of the United States.

The case of Chappedelaine was that of an administrator; this is of a mere assignee.

Livingston, in reply.

The act of Congress speaks of recovering the contents of a chose in action, evidently referring only to cases of individual assignments of particular choses in action, not to a general assignment of all his effects by an insolvent.

March 17. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows, viz.:

This suit was brought in the court of the United States for the Orleans territory, by the plaintiffs, who are aliens, and syndics or assignees of a trading company composed of citizens of that territory, who have become in-

solvent. The defeudauts are citizens of the territory, and have pleadcd to the jurisdiction of the court. Their plea was sustained, aud the cause now comes on to be heard on a writ of error to that judgment.

Two objections are made to the jurisdiction of the District Court.

1. That the suit is brought by the assignees of a chose in action, in a case where it could not have been prosecuted if no assignment had been made.

2. That the District Court cauuot entertain jurisdiction, because the defeudants are not citizens of any state.

The first objection rests ou the 11th section of the judicial act, which declares "that no district or circuit court shall have cognizauce **335***] of auy suit to recover *the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had beeu made."

The plaintiffs are admitted to be the assignees of a chose in action; but it is contended that they are not within the meaning of the provision which has been cited, because this is a suit for cash, bills and notes, generally, by persons to whom the law transfers them, and not by such an assignee, as is contemplated in the judicial act. The words of the act are said to apply obviously to assignments made by the party himself, ou an actual note, or other chose in action, assiguable by the proprietor thereof, and that the word "contents" cannot, by any fair constructiou, be applied to accounts or uuliquidated claims. Apprehensions, it is said, were entertained that fictitious assignments might be madc to give jurisdiction to a federal court, and, to guard against this mischief, every case of an assignment by a party holding transferable paper, was excepted from the jurisdiction of the federal courts, unless the original holder might have sued in them.

Without doubt, assignable paper, being the chose in action most usually transferred, was in the mind of the legislature when the law was framed; and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts as to exclude the same person, when the assignee of a particular note. The term "other chose in action" is broad cnough to comprehend either case; and the word "contents" is too ambiguous in its import to restrain that general term. The "contents" of a note are the sum it shows to be due; and the **336***] *same may, without much violence to language, be said of an account.

The circumstance, that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a chose in action in favor of an assignee, which suit could not have been prosecuted if no assignment had been made; and is therefore within the very terms of the law. The case decided in 4 Cranch was ou a suit brought by au administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term "assignees," and are, therefore, not within the words of the act. That case, therefore, is not deemed a full precedent for this.

It is the opiniou of the court that the plaintiffs had no right to maintain this suit in the District Court agaiust a citizen of the Orleans territory, they beiug the assignees of persous who were also citizens of that territory.

It is of so much importance to the people of Orleans to decide on the secoud objection, that the court will proceed to consider that likewise.

Whether the citizens of the territory of Orleaus are to be considered as the citizens of a state, within the meaning of the constitution, is a question of some difficulty, which would be decided should one of them sue in any of the circuit courts of the United States. The preseut inquiry is limited to a suit brought by or against a citizen of the territory, iu the District Court of Orleaus.

The power of governing and of legislating for a territory is the inevitable consequeuee of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares *that "Con- [***337** gress shall have power to dispose of and make all ueedful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find Congress possessiug and exercising the absolute aud undisputed power of goverening and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with sueh powers as it has been their will to assign to those departments respectively.

The court possesses the same jurisdictiou which was possessed by the court of Keutucky. In the court of Kentucky, a citizen of Kentucky may sue or be sued. But it is said that this privilege is not imparted to a citizen of Orleans, because he is not a citizen of a state. But this objection is founded on the idea that the constitution restrains Congress from giving the court of the territory jurisdiction over a case brought by or against a citizen of the territory. This idea is most clearly not to be sustained, aud, of consequence, that court must be considered as having such jurisdiction as Congress intended to give it.

Let us inquire what would be the jurisdiction of the court on this restricted construction.

It would have no jurisdictiou over a suit brought by or against a citizen of the territory, although an alien, or a citizen of another state, might be a party.

It would have no jurisdiction over a suit brought by a citizeu of one state against a citizen of another state, because neither party would be a citizen of the "state" in which the court sat. Of what civil causes, then, between private individuals, would it have jurisdiction? Only of suits between an alien and a citizen of

another state who should be found in Orleans. Can this be presumed to have been the intention of the legislature in giving the territory a court possessing the same jurisdiction and power with that of Kentucky?

The principal motive for giving federal courts jurisdiction, is to secure aliens and citi-
338*] zens of other *states from local prejudices. Yet all who could be affected by them are, by this construction, excluded from those courts. There could scarcely ever be a civil action between individuals of which the court could take cognizance, and if such a case should arise, it would be one in which no prejudice is to be apprehended.

It is the unanimous opinion of the court that, by a fair construction of the act, the citizens of the territory of Orleans may sue and be sued in that court in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

Judgment affirmed with costs.

Questioned—9 Wall. 393; 1 Mason, 251.
Cited—19 How. 611, 613; 9 Otto, 400; 1 Biss. 102; Id. 277, 278; 2 Curt. 583; 2 McLean, 134; 229; 3, 208; 4 Wash. 352; 4 Mason, 438.

THE MARYLAND INSURANCE CO.

v.

RUDEN'S ADMINISTRATOR.

What is reasonable time for abandonment is a question for the jury to decide under the direction of a court.

The operation of a concealment, on the policy, depends on its materiality to the risk; and this materiality is a subject for the consideration of a jury.

A bill of lading, stating the property to belong to A and B, is not conclusive evidence, and does not estop A from showing the property to belong to another.

ERROR to the Circuit Court for the District of Maryland in an action of covenant upon a policy of insurance upon the cargo of the brig Sally at and from Surinam to New York.

There was no warranty as to the character of the property.

Upon the trial below the plaintiffs in error took three bills of exception; and the verdict and judgment being against them, they brought their writ of error.

The cause was argued by *Winder* and *Martin*, for the plaintiffs in error, and by *Harper*, for the defendant.

The case being fully stated by the Chief Justice in delivering the opinion of the court, it is deemed unnecessary to report the arguments of counsel.

March 17. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

339*] *This case depends on the correctness of the Circuit Court in giving some opinions, and refusing others, to which exceptions have been taken.

It appears that, on the 22d of October, the assured received notice of the capture of the vessel insured, and that, on the 25th, he wrote a letter abandoning to the underwriters, which letter was received in course of the mail, and immediately acted upon. Some reasons were assigned, by the plaintiff below, for not having abandoned more immediately after receiving notice of the capture, and the defendant below moved the court to instruct the jury that the assured did not elect to abandon in reasonable time. To the refusal of the court to give this instruction the first exception is taken.

It has been repeatedly declared by this court that what is reasonable time for abandonment is a question compounded of fact and law, of which the jury must judge under the direction of a court. It does not appear that the court below erred in refusing, in this case, to give the instruction required.

The insured was a subject of a belligerent power, but had resided four years in the United States. His letter, representing the risk, was laid before the jury, and a good deal of testimony was taken to prove that a belligerent not named in the representation was interested in the cargo. Some counter testimony was also introduced by the assured. Whereupon the counsel for the underwriters moved the court to instruct the jury that, if they believe the facts stated by him, there was such a concealment as, in contemplation of law, vitiated the policy. This direction the court refused to give, but did direct the jury that, if they should be of opinion that any circumstances were stated by Ruden, or his agent, or that any circumstances were suppressed by either of them, which, in the opinion of the jury, would increase the risk, then the plaintiff cannot recover.

To this opinion an exception was taken.

It is well settled that the operation of any concealment on the policy depends on its materiality to the *risk, and this court has [***340** decided that this materiality is a subject for the consideration of a jury. Consequently, the court below did right in leaving it to them.

The counsel for the underwriters then gave some very strong evidence to prove that the property insured was not the sole property of the assured, but was property in which another person held a joint interest. Some counter testimony was adduced; on which the defendant below moved the court to direct the jury to find that the property was not the sole property of Ruden, but the joint property of Ruden and another.

This direction also the court refused to give, and did direct the jury that it was their peculiar province to determine the fact whether Ruden was the sole owner of the property or not; and to this opinion an exception was taken.

It is contended by the plaintiffs in error that the testimony offered by them, among which was the bill of lading stating the property to belong to Ruden and another, was such as absolutely to conclude him, and estop him from denying that another was concerned in the cargo.

The court is not of this opinion. The covering of property does not conclude the person interested, so as to estop him from proving the truth of the case. There is the less reason for that effect being given to these papers in this case, because the letter to the underwriters in-

dicated that the cargo might be shipped in the name of other persons.

If the insured was not absolutely estopped, the court did not err in permitting the jury to weigh his testimony. They had a right to weigh it, and to decide to whom the property belonged. If their verdict was against evidence, the only remedy was a new trial to be granted by the court in which the verdict was found.

There is no error, and the judgment is to be affirmed with costs.

Cited—1 Pet. 191; 8 How. 248; 8 Otto, 533; 2 Wood. & M. 492.

VI CRANCH.

6 Cr. 3–8, 3 L. 135, SCOTT v. NEGRO BEN.

Construction of statutes.— In spite of ambiguous terms, court will endeavor to construe statute so as to accomplish its intent, p. 7.

Cited to this point in Commonwealth v. Baird, 4 S. & R. 145.

6 Cr. 8–29, 3 L. 136, FIELD v. HOLLAND.

Equity — Functions of auditors.— Auditors are not arbiters. They do not decree, but prepare materials from which a decree may be made, p. 21.

Cited in Dorsey v. Hammond, 1 Bland Ch. 469, 470, as to character of auditor's office and duties.

Equity.— Auditor's report does not conclude court, which may, on exceptions filed, look into the evidence, direct an issue, which it may revoke, either expressly or by implication, p. 22.

The following citing cases discuss and apply this principle: City of Memphis v. Brown, 20 Wall. 322, 22 L. 272, upholding right of court upon notice to parties to refer matter to master for decision before cause is ready for decree; Garsed v. Beall, 92 U. S. 694, 23 L. 690, as supporting propriety of reference in case of greatly involved questions of fact; Fitton v. Phoenix Assurance Co., 23 Blatchf. 111, 23 Fed. 4, as supporting right of Circuit Court to send issues to jury in equity case under section 648, Revised Statutes; Pulliam v. Pulliam, 10 Fed. 27, F. C. 11,463a, as to duty of court of equity before making reference to ascertain facts and principles for guidance of master; Simonds Rolling-Machinery Co. v. Hathorn Mfg. Co., 83 Fed. 492, as to right of Circuit Court to permit inquiries by master incidental to principal labor which rests upon court; May v. May, 19 Fla. 394, holding that where facts and law are not in doubt, and it is plain what decree should be made, chancellor need not state an account either before rendering decree or in body of it; dissenting opinion, Jenkins v. International Bank, 97 Ill. 581, as to right of court before reference to determine rights of parties by interlocutory decree, and settle rules to govern master; Head v. Head's Admr., 3 A. K. Marsh, 120, upholding right of court of equity to complete decision of controversy without reference, where questions are legal; McKim v. Thompson, 1 Bland Ch. 160, maintaining right of court to render interlocutory decree from facts as presented without master's report; Holmes v. Hunt, 122 Mass.

513, 23 Am. Rep. 383, as to right of Chancery Court to refer matters of account to auditors, there being no master in chancery; dissenting opinion, Hill v. Jones, 2 Dev. Eq. 109, upholding right of court, if judgment on issue ordered is not satisfactory, to set it aside or decree against it without setting it aside.

Practice.— An interlocutory decree is an implied discharge of a previous order directing an issue, p. 22.

Cited to this point, in Lane v. Kingsberry, 11 Mo. 408, holding granting a new trial impliedly sets aside a former judgment.

Evidence.— In suit by purchasers from judgment debtor to set aside title to land obtained by levy of execution, answer of judgment creditor, responsive to bill, is evidence against plaintiffs, though answer of judgment debtor is not evidence in their favor against judgment creditor, p. 25.

This holding has been extensively relied upon by the citing cases, as follows: Lenox v. Natrebe, Hemp. 257, F. C. 8,246c, holding that answer of one codefendant, though not evidence against another, may be evidence against complainant; West v. Randall, 2 Mason, 205, F. C. 17,424, holding answer of one codefendant not evidence against another; Chambliss v. Smith, 30 Ala. 368, to same general rule; Barraque v. Siter, Price & Co., 9 Ark. 547, holding answer of one defendant not evidence against codefendant, because no cross-examination is allowed; Whiting v. Beebe, 12 Ark. 563, holding answer of one defendant evidence against codefendants claiming under or through him as purchasers pendente lite; Pleasanton v. Raughley, 3 Del. Ch. 129, holding that while such answer is not evidence against codefendant, it is evidence in favor of him so far as responsive; Admrs. of Ligon v. Rogers, 12 Ga. 292; Clayton v. Thompson, 13 Ga. 208, holding such answer evidence against codefendant where relation of partners subsists or there is privity between them; Robinson v. Sampson, 23 Me. 389, to general rule; case recognizes exceptions to rule, but does not come within them; Powles v. Dilley, 9 Gill, 237, as modifying rule excluding defendant's answer as evidence against codefendant; Jones v. Magill, 1 Bland Ch. 198, holding that answer of defendant binds those claiming under him; Lingan v. Henderson, 1 Bland Ch. 267, as raising exception to general rule where one codefendant claims under another; Mills v. Gove, 20 Pick. 34, where codefendant was depositary of chattel claimed by plaintiff and defended under title of another defendant, and holding of principal case was approved; Etheredge v. Partain, 10 Rich. Eq. 216, where facts were similar; Salmon v. Smith, 58 Miss. 409, holding answer of defendant responsive to bill, to inure to benefit of codefendants, and that where such answer shows plaintiff not entitled to relief, latter must overcome it to recover; Bellows v. Stone, 18 N. H. 472, as

giving same effect to answer where distinction between matters responsive to bill and those of defense set up by way of avoidance was not raised; Miles v. Miles, 32 N. H. 166, 64 Am. Dec. 367, holding answer, so far as responsive to bill, conclusive in his favor until overcome, but requiring matters set up in defense and avoidance to be independently proved; Brown v. Bulkley, 14 N. J. Eq. 300, holding that plaintiff cannot impeach answer of defendant upon bill of discovery on account of latter's want of integrity; Woodcock v. Bennet, 1 Cow. 743, 13 Am. Dec. 579; Dade v. Madison, 5 Leigh, 405, holding, in action upon note, that answer of drawer that it was founded upon gaming consideration is not evidence against drawee, no other evidence being given and notice being denied by latter.

Denied in Blakeney v. Ferguson, 14 Ark. 655, 656, 659, 660, 664, except in cases where codefendant, by admissions or otherwise, binds himself by declaration or answer of other codefendant. Criticised in Dunn v. Graham, 17 Ark. 69, and Glenn v. Baker, 1 Md. Ch. 77, 78, as opposed to Maryland doctrine so far as it holds answer of defendant evidence against codefendants claiming under him. Limited in Schwarz v. Wendell, Walk. Ch. 296. Criticised in Christie v. Bishop, 1 Barb. Ch. 116, 117, 121, as opposed to authority in so far as it allows answer of one defendant to be evidence against codefendant; Wright v. Bates, 13 Vt. 351, holding that such answer should not be evidence against codefendants, except such as acquire title subsequent to answer, as where grantee of mortgagee is held bound by his grantor's answer; Pettit v. Jennings, 2 Rob. (Va.) 681, holding assignee of bond not affected by answer of assignor or obligee, his codefendant, though bond was based upon gaming consideration. Denied in Ward v. Davidson, 2 J. J. Marsh. 445, as opposed to Kentucky authority; Jones v. Hardesty, 10 Gill & J. 415, 32 Am. Dec. 185, as opposed to an otherwise unbroken series of authorities, both English and American; Winn v. Albert, 2 Md. Ch. 176, as to point criticised in above citations, namely, that answer of defendant is evidence against codefendant claiming under him.

Application of payments.— Upon debtor's failing to direct application, power to make such application devolves upon creditor, p. 27.

Cited and rule applied in Page v. Patton, 5 Pet. 310, 8 L. 137, holding election as to application of payments conclusive; note to Lanusse v. Barker, 3 Wheat. 155, 4 L. 359, note, upholding creditor's right to apply, in default of debtor; Wendt v. Ross, 33 Cal. 657, holding that there was sufficient evidence of application by the direction of one or agreement of both parties; Pickering v. Day, 3 Houst. 538, 95 Am. Dec. 310, holding that creditor may exercise his option any time before account settled or action brought; National Mahaiwe Bank v. Peck, 127 Mass. 301, 34 Am. Rep. 370, upholding right of bank holding personal and official notes of depositor, latter being

secured by surety's indorsement, to apply depositor's account to either note, though secured note matured first; Shortridge v. Pardee, 2 Mo. App. 366, holding that creditor may exercise his option any time before suit and need not consult debtor's benefit; Christnot v. Montana Gold, etc., M. Co., 1 Mont. 48, as to creditor's right to apply, upon default of debtor, where creditor entitled to mechanic's lien had two accounts against debtor; National Bank of Newburgh v. Bigler, 83 N. Y. 64, holding that creditor may apply proceeds of collateral security to any notes due when money is received; Jones v. Benedict, 83 N. Y. 86, to direct point; Bank of California v. Webb, 94 N. Y. 472, allowing creditor to apply more than a year after payments made; Gaston v. Barney, 11 Ohio St. 514, allowing creditor to apply to unsecured notes regardless of interests of sureties on remaining notes; Jones v. Williams, 39 Wis. 308, holding that debtor must have had opportunity to apply and failed to do so before creditor's right arises, hence, that where debtor dies without opportunity to apply creditor's right does not arise.

Application of payments.— If both parties fail to exercise their power, it becomes duty of court to apply payments equitably, and it will so apply them as to extinguish first those debts for which security is most precarious, pp. 27, 28.

This is a recognized leading case on this subject. Citing cases have affirmed and applied the rule as follows: Page v. Patton, 5 Pet. 310, 8 L. 137, holding that debt of administrator against estate having been paid, amount should be credited to fund out of which paid, which, under facts of case, was not administration fund; Boody v. United States, 1 Wood. & M. 168, F. C. 1,636, holding that court should apply to oldest debt; Whetmore v. Murdock, 3 Wood. & M. 395, F. C. 17,510, holding that if one demand is secured and another not, court will apply to latter; Schuelenburg v. Martin, 1 McC. 350, 351, 2 Fed. 749, 750, where earlier items of account were secured and later items unsecured; Nichols, Shepherd & Co. v. Knowles, 3 McC. 479, 17 Fed. 495, holding that presumption favors application to least secured debt; Coons v. Tome, 9 Fed. 536, favoring such application as most favorable to creditor; Kortlander v. Elston, 52 Fed. 184, 6 U. S. App. 283; National Bank v. Mechanics' Nat. Bank, 94 U. S. 439, 24 L. 178, holding that neither party can make application after trial begun; The Katie O'Neil, 65 Fed. 117, 118, to point that court should make application to least secured debt, as also in the following: Robinson's Admrs. v. Allison, 36 Ala. 531; Randall v. Pettes, 12 Fla. 535; Wilhelm v. Schmidt, 84 Ill. 188; King v. Andrews, 30 Ind. 430; Bond v. Armstrong, 88 Ind. 69; Blanton v. Rice, 5 T. B. Mon. 254; McDaniel v. Barnes, White & Co., 5 Bush. (Ky.) 186; Poulson v. Collier, 18 Mo. App. 608; Goetz v. Piel, 26 Mo. App. 641, 643; Hilton v. Burley, 2 N. H. 196; Smith v. Steam Mill,

66 N. H. 615, 34 Atl. 154; Clarksville B. & L. Assn. v. Stephens, 26 N. J. Eq. 556; Webster v. Singley, 53 Ala. 210, 25 Am. Rep. 610, holding that mortgagor receiving money from mortgaged property must apply to mortgage and not to unsecured debt; Murdock v. Clarke, 88 Cal. 390, 26 Pac. 603, holding that court acting in accordance with justice and equity will respect rights of both parties; California Nat. Bank v. Ginty, 108 Cal. 153, 41 Pac. 40, recognizing right of creditor holding collateral security to have it applied to least secured debt; Stamford Bank v. Benedict, 15 Conn. 443, holding, however, that court will not apply to undue debt if there be one already due; Snyder v. Robinson, 35 Ind. 315, 9 Am. Rep. 741, where purchaser of land assumed portion of mortgage thereon and later made general payment on mortgage debt, which court applied to portion assumed by him; First Nat. Bank v. Hollinsworth, 78 Iowa, 577, 579, 43 N. W. 537, 538, to point that payments upon open running account should be applied to items in order of date; Burks v. Albert, 4 J. J. Marsh. 99, 20 Am. Dec. 211, holding that in applying payments, court will prefer note upon which there is no surety to one upon which there is; Lash v. Edgerton, 13 Minn. 219, holding that court will apply to interest before principal; Hersey v. Bennett, 28 Minn. 91, 41 Am. Rep. 275, 9 N. W. 593, to general rule; Caldwell v. Wentworth, 14 N. H. 438, raising an exception to general rule applying payment to earliest debt; Stone v. Seymour, 15 Wend. 24, 29, 31, as holding that court must consult benefit of creditor, as to which authorities are in conflict; Camp v. Smith, 136 N. Y. 201, 32 N. E. 644, where, debtor being liable to creditor upon individual and upon joint debt, it was queried whether court would apply payment to former; Moss v. Adams, 4 Ired. Eq. 53, where creditor was allowed to apply long after payment to least secured debt, debtor's insolvency intervening; Patterson v. Bank, 26 Or. 522, 38 Pac. 821, applying payments to oldest items in account regardless of rights of accommodation indorser; Stafford v. Walker, 12 S. & R. 195, applying successive payments of dues so as to avoid forfeiture of membership, because of arrears; Pierce v. Sweet, 33 Pa. St. 157, applying payments to debts as to which creditor had no lien; Morgan v. Tarbell, 28 Vt. 504, where payments to partnership taking old firm's accounts were applied to old debts rather than to debts of new firm; Smith v. Loyd, 11 Leigh, 516, 37 Am. Dec. 622, holding that court should consult interests of neither party, but only equity of case; Chapman v. Commonwealth, 25 Gratt. 747, where payments to officer having had two successive bonds were applied to bond under term of which made; Lingle v. Cook's Admrs., 32 Gratt. 272, applying legacy to debt from legatee to testator and discharging sureties thereon; Smythe v. New England Loan, etc., Co., 12 Wash. 427, 41 Pac. 185, where in case of involuntary payment on guaranty it was held that application should be to unsecured principal rather than secured interest; Hempfield R. R. Co. v. Thornburg, 1 W. Va. 267, applying

right of way payments by railroad company to removal of buildings rather than price of land, vendor having lien for latter; Illsly v. Grayson, 105 Iowa, 687, 75 N. W. 518, affirming rule in considering a question of application of counterclaim in action for rent. See also M. & M. Bank v. Evans, 9 W. Va. 389, where cited principle was not directly applied; note to Harker v. Conrad, 14 Am. Dec. 694. Cited arguendo, in Reed v. Board of Education, 39 Ohio St. 638.

Criticised in Hersey v. Bennett, 28 Minn. 92, 41 Am. Rep. 276, 9 N. W. 594, applying payments to earlier items of continuous account, though such items might be satisfied out of resulting trust in favor of creditor, and later items could not be; Pattison v. Hull, 9 Cow. 771, as opposed to weight of authority requiring court to consult benefit of debtor rather than creditor; Norris v. Beatty, 6 W. Va. 483; Orleans County Nat. Bank v. Moore, 112 N. Y. 555, 556, 8 Am. St. Rep. 784, 785, 20 N. E. 363, 364, restricting application of rule in principal case to voluntary payments, not to payments by process of law in applying which, priority and security are disregarded; Blackmore v. Granbery, 98 Tenn. 283, 39 S. W. 230, adhering to Story's rule in 9 Wheat. 720, 6 L. 199, Robinson v. Doolittle, 12 Vt. 249, holding that application by court should be to greatest benefit of debtor.

6 Cr. 29–51, 3 L. 143, MARYLAND INS. CO. v. WOODS.

Construction of insurance policy may be according to construction given it in commercial world, p. 46.

Cited to this point in General Mut. Ins. Co. v. Sherwood, 14 How. 362, 14 L. 456, holding that such construction may be governed by probable intent of parties; as also in Hernandez v. Sun Mut. Ins. Co., 6 Blatchf. 325, F. C. 6,415.

Blockade, warning as to.— Where no capture is to be made, except of vessels previously warned, master of ship is not bound to inquire elsewhere than of blockading squadron, and other knowledge will not dispense with warning off, p. 49.

Cited to this point, in Prize Cases (Hiawatha), 2 Blackf. 686, 17 L. 482, holding that vessel cannot be captured except where there is attempt to enter after warning off.

Denied in The Revere, 2 Sprague, 117, F. C. 11,716, holding that only vessels ignorant of blockade are entitled to warning off and indorsement.

Miscellaneous.— Cited in United States v. Bearnes, 24 Fed. Cas. 1052, as to power of admiralty courts, holding that court has full power to fine party who takes vessel from its custody without permission.

Blockade.— Under British orders of April, 1804, vessel might sail to blockaded port, unless warned off, p. 48.

Marine insurance.— If vessel sail to port within policy, although it intended to go to a port not within the policy, in case former should be blockaded, this is not a deviation, p. 47.

6 Cr. 51, 52, 3 L. 149, YOUNG v. GRUNDY.

Pleading.— If answer neither admits nor denies allegations in bill, they must be proved on final hearing. Upon question of dissolution of injunction they are to be taken as true, p. 51.

Cited and principle applied in United States v. Low, 16 Pet. 168, 10 L. 925, applying rule to allegations of location of claim neither admitted or denied; Brown v. Pierce, 7 Wall. 211, 212, 19 L. 136, holding that after lapse of time, however, answer taken as sufficient tends to prove bill; Board of Public Works v. Columbia College, 17 Wall. 528, 21 L. 691, where allegations in bill being denied case was brought up on pleadings without further evidence; Robinson v. Cathcart, 2 Cr. C. C. 600, F. C. 11,946, holding answer evidence for defendant so far as responsive to bill, pp. 601, 603, to direct point; Rogers v. Marshall, 3 McC. 93, 13 Fed. 64; Wooster v. Muser. 20 Fed. 163, where answer was insufficient, but orator traversed and joined issue and was required to overcome denials and maintain his bill; Jones v. Lamar, 34 Fed. 470, holding that silence as to point upon which bill in terms does not seek discovery, does not warrant decree for specific amount; Whittemore v. Patten, 81 Fed. 528, upholding right of complainant to except to evasive answer in order to have judgment of court as to its effect as denial or admission; Mason v. Jones, 16 Fed. Cas. 1042, applying rule where motion was to dissolve injunction against negotiating notes alleged to be vitiated by fraud; Blakeney v. Ferguson, 14 Ark. 652, holding that complete failure to answer exception taken to answer for incompleteness constitutes admission; Warfield v. Gambell, 1 Gill & J. 510, holding that to give to defective answer effect of admission, complainant must except to it; Dugan v. Gittings. 3 Gill, 165, 43 Am. Dec. 319, holding that answer of executrix admitting possession of assets does not admit allegation of sufficiency of such assets; Briesch v. McCauley, 7 Gill, 196, holding that where one defendant answers in full, but others do not, his admissions do not conclude them; Gartman v. Jones, 24 Miss. 536, holding that allegations not responded to in answer are in issue, and decree must accord with proof; Brockway v. Copp, 3 Paige, 545; McArthur v. Phoebus, 2 Ohio, 424.

Criticised in Neale v. Hagthrop, 3 Bland Ch. 576, 579, holding that unanswered allegations in bill are deemed true and taken pro confesso.

Appeal does not lie from interlocutory decree, dissolving injunction, p. 52.

Cited and rule applied in The Palmyra, 10 Wheat. 504, 6 L. 376, refusing to allow division of cause so as to bring up part on appeal; Clark v. Shelton, Hemp. 208, F. C. 2,833b; Norton v. Hood, 12 Fed. 765; Blakely v. Fish, Hemp. 12, F. C. 18,240, refusing to allow appeal, no final decree being shown; Thomas v. Woolbridge, 23 Wall. 288, 23 L. 136, refusing to allow appeal from such decree where bill was not dismissed before appeal; Kirwan v. Murphy, 170 U. S. 209, 42 L. 1010, 18 S. Ct. 593, refusing appeal from interlocutory order of Circuit Court for issue of temporary injunction; Johnson's Admrs. v. Henry's Exrs., Minor, 13, to direct point refusing writ of error; Garrow v. Carpenter, 4 Stew. & P. 345, holding that appeal from such decree does not revive injunction; Hicks v. Michael, 15 Cal. 111, nor does it create one where decree appealed from refused injunction; Russell v. Pierce, 7 Port. 277, refusing to allow writ of error to such decree where enabling statute authorized appeal; Andrews v. Loveland, 1 Colo. 10; Nacoochoe H. M. Co. v. Davis, 40 Ga. 317, requiring final judgment before allowing writ of error; Pentecost v. Magahee, 4 Scam. 327, intimating that where bill merely asks for injunction, order dismissing injunction might be final and appealable; Cain v. Foote, 8 Blackf. 454, refusing writ of error in like case, though there was statutory appeal lost through failure to perfect; Ringgold's Case, 1 Bland Ch. 17, holding final decree not always necessary to appeal in Maryland; Cohn v. Lehman, 93 Mo. 584, 6 S. W. 270, refusing to allow action on injunction bond until final decree in cause where given; Browne v. Edwards, etc., Lumber Co., 44 Neb. 365, 62 N. W. 1072; Wood v. Dwight, 7 Johns. Ch. 296, holding that appeal from order dissolving injunction does not suspend plaintiff's right to proceed with his execution.

6 Cr. 52, 53, 3 L. 149, EX PARTE WILSON.

Habeas corpus is not the proper remedy in case of arrest under civil process, p. 53.

Cited and principle applied in In re Barry, 136 U. S. 613, 34 L. 509, 42 Fed. 124, refusing habeas corpus to determine, between parents living apart, right to custody of child; Wilson v. Marshall of D. C., 1 Cr. C. C. 609, F. C. 17,822, releasing prisoner on habeas corpus where illegally held for debt greater than due; Bell v. State, 4 Gill, 305, 306, 45 Am. Dec. 132, refusing habeas corpus where execution issued on erroneous judgment; Peltier v. Pennington, 14 N. J. L. 318, refusing habeas corpus where sole question was as to regularity of process and validity of arrest; Cabe v. Cooper, 15 Johns. 156, where it appeared to court that habeas corpus did not apply to cases of imprisonment, on cure process.

Criticised in King v. McLean Asylum, 64 Fed. 343, 21 U. S. App. 481, discussing habeas corpus to determine custody of insane person; Ex parte Rollins, 80 Va. 318, 2 Brock. 475, F. C. 11,558, holding that doubt expressed in principal case no longer exists.

6 Cr. 53–70, 3 L. 150, ONEALE v. THORNTON.

Municipal corporations.— Legislative power to resell lots already sold for default in payment contemplates single resale only, p. 67.

Cited and quoted in Stoddart v. Smith, 5 Binn. 362, construing similar statute as constitutional and binding upon those who contract in view of it; New Orleans, etc., R. R. Co. v. City of New Orleans, 26 La. Ann. 521, as to general legislative control over cities, and especially as to power of legislature to grant railroad right of way through street in New Orleans; Wilder v. Lumpkin, 4 Ga. 220, as to sacred character of private rights against ex post facto legislation.

Estoppel.— By selling and conveying property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defense, affirmed title of third purchaser, p. 70.

6 Cr. 71–82, 3 L. 155, KING v. DELAWARE INS. CO.

Abandonment.— Questions whether a voyage be broken up, and whether captain was justified in returning, are questions of law, p. 80.

Abandonment.— If voyage is abandoned by reason of fear of seizure founded on false information, no real cause for seizure existing, underwriters are not liable, p. 81.

No citations.

6 Cr. 82–86, 3 L. 160, LEWIS v. HARWOOD.

Assignability of bond.— Where particular breaches must be assigned and damages estimated by jury, bond is not assignable under Virginia statute, p. 85.

Cited and applied in Winston v. Metcalf, 6 Ala. 760, 7 Ala. 841, holding that assignee of bond given for hire of slaves cannot avail himself of obligor's failure to keep condition as to clothing slaves; Brown v. Chambers, 12 Ala. 707, where assignee of bond with reciprocal covenants was allowed to maintain action thereon upon showing performance by assignor; Wilson v. McElroy, 2 S. & M. 250, construing statute authorizing assignees of choses in action to sue thereon, with reference to assignment of judgments; Shackleford v. Franks, 25 Miss. 53, holding nonassignable, bond conditioned to be void upon breach of warranty therein; Craig v. Craig, 1 Call

(Va.), 484, holding assignee of bond with collateral conditions cannot sue thereon; and in Henderson v. Hepburn, 2 Call. (Va.), 238, holding that such bond is nonassignable under act of 1748.

6 Cr. 86, 3 L. 161, RIDDLE v. MANDEVILLE.

Costs.— Court below, upon mandate on reversal of its judgment in chancery suit, may award costs and issue execution therefor, p. 86.

Cited and rule followed in Burnham v. Rangeley, 2 Wood. & M. 419, 422, F. C. 2,177, refusing award of costs to defendant when bill dismissed for want of jurisdiction; Tugman v. National Steamship. 24 Blatchf. 309, 30 Fed. 804, holding that State court may not award costs in suit wherein it has been determined it has no jurisdiction; United States v. Southern Pac. R. R. Co., 56 Fed. 866, holding that Circuit Court may award costs in favor of United States where mandate from Supreme Court directs decree in favor of United States; Elliott v. The Leah H. Miller, 8 Fed. Cas. 543, holding that it rests within discretion of court to entertain motion for reargument on question of costs after decree.

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6 Cr. 87–148, 3 L. 162, FLETCHER v. PECK.

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Pleading.— If a plea to any count of the declaration is bad, judgment for defendant cannot be sustained, p. 125.

Cited to this point in Tucker v. Lee, 3 Cr. C. C. 686, F. C. 14,221, holding that general verdict for plaintiff, where some of breaches of contract averred in the contract are insufficient, is bad and judgment must be arrested.

Pleading.—A plea that a State governor had authority to convey State lands, in answer to declaration averring that the legislature had not authority, is argumentative and bad, p. 126.

Cited to this point in Roosevelt v. Fulton, 7 Cow. 76, holding, however, that such plea, though bad on demurrer, is cured by verdict.

Pleading.— Declaration need not assign breach in the words of the covenant. It is enough that it shows a substantial breach, p. 127.

Approved and followed in Murphy v. Lawrence, 2 Ga. 262; Pumeroy v. Bruce, 13 S. & R. 189, and Smith v. Lloyd, 16 Gratt. 312.

Amendment of pleadings may be made in Supreme Court by consent of parties, p. 127.

Cited and practice followed in Hudgins v. Kemp, 18 How. 534, 15 L. 512; Warren v. Moody, 9 Fed. 674, where amendments were made in the Circuit Court upon appeal from the District Court, United States v. Hopewell, 51 Fed. 800, 5 U. S. App. 137, where the doctrine was applied upon appeal to the Circuit Court of appeal; and in Fitchburg v. Nichol, 85 Fed. 870, which holds that a defective allegation of citizenship of the parties may, by consent of the parties, be corrected on appeal to sustain the judgmeut.

Constitutional law.— Grant of State lands may be made by the legislature, p. 128.

In the citing case of Doe v. Mobile, 9 How. 469, 13 L. 220, it was held that a grant of lands of congress to the city of Mobile did not need the aid of a patent. In the citing cases of Strother v. Lucas, 12 Pet. 454, 9 L. 1154; Angle v. Chicago, etc., Ry. Co., 151 U. S. 40; Farmers' L. & T. Co. v. Chicago, etc., Ry. Co., 39 Fed. 151; McNee v. Donahue, 76 Cal. 502, 18 Pac. 440, and in North P. R. R. Co. v. Majors, 5 Mont. 126, 2 Pac. 325, it is said that "a grant may be made by law, as well as by a patent pursuant to law." In the citing cases of Daggett v. Bonewitz, 107 Ind. 278, 7 N. E. 901; Dolph v. Barney, 5 Or. 202, and Blakesly v. Caywood, 4 Or. 288, it is held that a grant of lands made by law in words of present grant, vests an immediate legal estate in the grantee. In the citing cases of Canal Co. v. Railroad Co., 4 Gill & J. 128, and Matheny v. Golden, 5 Ohio St. 366, it is said that "a State may contract by act of its legislature," and that "a legislature has the capacity to contract." In

Piscataqua Bridge v. N. H. Bridge, 7 N. H. 61, 6 Cr. 128, is cited as sustaining the power of the legislature to make grants, though the Constitution does not expressly confer it. The citation in Houston, etc., R. R. Co. v. Kuechler, 36 Tex. 410, respecting the power of the political department to dispose of the public domain, probably has reference to this holding.

Constitutional law.— Unconstitutionality of a statute is not to be affirmed in cases of doubt, p. 128.

This language has been quoted from in whole or in part, and applied in the following cases: Ogden v. Saunders, 12 Wheat. 294, 6 L. 634; Passenger Cases, Mr. Justice Daniels' opinion, 7 How. 496, 12 L. 791; Legal Tender Cases, 12 Wall. 531, 20 L. 306; Livingston Co. v. Darlington, 101 U. S. 410, 25 L. 1017; Civil Right Cases, 109 U. S. 27, 27 L. 845; Brown v. Walker, 161 U. S. 596, 40 L. 821, 16 S. Ct. 646; Scott v. McDonald, 165 U. S. 106, 41 L. 647, 17 S. Ct. 274; Illinois Central R. R. Co. v. State, 20 Fed. 471; Smith v. Fond du Lac, 8 Fed. 295, 10 Biss. 427; Singer Mfg. Co. v. Wright, 33 Fed. 128; United States v. Goldman, 3 Woods, 194, F. C. 15,225; Brown v. Walker, 70 Fed. 48; Baltimore, etc., R. R. Co. v. Van Ness, 4 Cr. C. C. 600, F. C. 830; United States v. Rhods, 1 Abb. 52, F. C. 16,151; Owen v. Branch Bank, 3 Ala. 262; State v. Sorrells, 15 Ark. 679; Carpender v. Atherton, 25 Cal. 569, 572; Cohen v. Wright, 22 Cal. 308; Bourland v. Hildreth, 26 Cal. 228; Lick v. Faulkner, 25 Cal. 420; Olmstead v. Camp, 33 Conn. 551, 89 Am. Dec. 228; Cotton v. County Commissioners, 6 Fla. 614; Wooley v. Watkins, 2 Idaho, 564, 22 Pac. 105; People v. Marshall, 1 Gilm. 689; C. D. & V. R. R. Co. v. Smith, 62 Ill. 272, 14 Am. Rep. 101; Harmon v. Chicago, 140 Ill. 399, 29 N. E. 740; Lafayette, etc., R. R. Co. v. Geiger, 34 Ind. 199; Coffman v. Keightley, 24 Ind. 514; M'Comas v. Krug, 81 Ind. 332, 42 Am. Rep. 139; Nicholson v. Thompson, 5 Rob. (La.) 391, 404; Edwards v. Dupuy, 21 La. Ann. 695; Fisher v. Auditor, etc., 39 La. Ann. 450, 1 So. 185; State v. Taylor, 34 La. Ann. 981; Davidson v. Houston, 35 La. Ann. 493; Kennebec Purchase v. Laboree, 2 Me. 297, 11 Am. Dec. 97; Spring v. Russell, 7 Me. 291; Opinions in Personal Liberty Laws, 46 Me. 586; Eames v. Savage, 77 Me. 216, 52 Am. Rep. 752; Ames v. Lake Superior, etc., R. R. Co., 21 Minn. 282; State v. Fry, 4 Mo. 177; State v. Camp Sing, 18 Mont. 138, 56 Am. St. Rep. 553, 44 Pac. 517; Evans v. Job, 8 Nev. 337; Harris v. Vanderveer, 21 N. J. Eq. 440; Payne v. Mahon, 44 N. J. L. 215; Baca v. Perez, 8 N. Mex. 196, 42 Pac. 165; Bloodgood v. M. & H. R. R. Co., 18 Wend. 50, 31 Am. Dec. 347; Morris v. People, 3 Den. 394; Newell v. People, 7 N. Y. 122; Metropolitan Bank v. Van Dyck, 27 N. Y. 460; Stanmire v. Tyler, 3 Jones L. 211; Jacobs v. Smallwood, 63 N. C. 126; Cincinnati, etc., R. R. Co. v. Commissioners of Clinton Co., 1 Ohio St. 83; Opinion of Hitchcock, C. J., 20 Ohio App. 5; Kneedler v. Lane, 45 Pa. St. 310; Shollenberger v. Brinton, 52 Pa. St. 58, 89; State v. Narragansett, 16 R. I. 440, 16 Atl. 906; M'Cullough v. Brown, 41

S. C. 234, 19 S. E. 467; Railroad Co. v. Commissioners, etc., 36 Tex. 407, 410; Henderson v. Beaton, opinion of Associate Justice Bonner, 52 Tex. 38; Brimm v. Jones, 11 Utah, 205, 39 Pac. 825; Eyre v. Jacob, 14 Gratt. 426, 73 Am. Dec. 369; Roberts v. Cocke, 28 Gratt, 219; Ah. Lim v. Territory, 1 Wash. 159, 24 Pac. 588; Bridges v. Shallcross, 6 W. Va. 568; Newcomb v. Smith, 2 Pinn. 139.

In Sweet v. Rechel, 159 U. S. 393, 40 L. 194, 16 S. Ct. 46, the court, citing Fletcher v. Peck, said: "It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limit of legislative authority, the existence of circumstances necessary to support it must be presumed." In United States v. Boyer, 85 Fed. 430, it is said: "The judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by congress." In In re Smith, 2 Woods, 463, F. C. 12,996, the court, in making the citation, said: "The court ought not to pronounce a law unconstitutional, unless its incompatibility be then decided and inevitable." In the citing case of United States v. Fairchild, 1 Abb. 76, F. C. 15,067, the court said: "To warrant the courts in setting aside this law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist." But see Sadler v. Langham, 34 Ala. 321. In the citing cases of Alabama & Florida R. R. Co. v. Burkett, 42 Ala. 87, and People v. Wilson, 15 Ill. 392, it is held that "limitation of power of the State legislature should be strictly construed." In the citing case of Osborne v. Mayor, etc., 44 Ala. 499, it is held that "a State law, and for like reason the law of a State municipal corporation, will not be declared unconstitutional unless it is clearly not in conformity to that instrument." In the citing case of Thorne v. San Francisco, 4 Cal. 158, Heydenfeldt, J., said: "It is indisputable now that a law will not be declared invalid, unless there is a clear and strong conviction of its repugnancy to the Constitution." In the citing case of People v. Scott, 9 Colo. 432, 12 Pac. 613, it is said that the principles announced in the cited case are "only suggestions to be considered by the judiciary." In the citing case of Eames v. Savage, 77 Me. 216, 52 Am. Rep. 752, it is declared that the presumption is in favor of the validity of a statute, "and it is a presumption of great strength — all the judges and writers agree on that." In the citing case of Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 449, 6 Am. Rep. 250, it is said: "No act of the legislature is to be declared invalid unless its repugnancy to the Constitution is manifest and unavoidable." In the citing case of Bank v. Darlington, 50 S. C. 363, 27 S. E. 858, it is held that a statute must be construed as qualified by the Constitution upon the well-settled principle that a statute will never be construed as unconstitutional when it can be in way possible reconciled with the Constitution.

In the citing case of Sears v. Cottrell, 5 Mich. 259, the court said: "The power of declaring laws unconstitutional should be exercised

with extreme caution, and never where serious doubt exists as to the conflict. And see Mitchell v. Blodgett, 13 Mich. 151. In the citing case of Whaley v. Whaley, 51 Mo. 86, the court said: "When the Constitution restrains the exercise of legislative power, the restraint itself, and the terms upon which it is imposed, should be so construed as to sustain the power as exercised unless such construction is clearly unconscionable." In the citing case of George v. Concord, 45 N. H. 437, it is said: "Courts will never decree a statute void, unless the nullity and invalidity of the act are placed in their judgment beyond a reasonable doubt." In the citing case of Williams v. Bank of Michigan, 7 Wend. 556, it is held that one State will not inquire into the constitutionality of a law of another State or territory. In the citing case of Wooley v. Watkins, 2 Idaho, 564, 22 Pac. 105, it is said: "More than three-quarters of a century ago, that great lawyer and eminent jurist, Chief Justice Marshall, announced a rule of interpretation in cases involving alleged conflicts between statutes and constitutions, which has ever since commanded the respect of courts of justice."

The principles of the cited case have been held to apply to the construction of the Constitution as to the governor's power of appointment, Nicholson v. Thompson, 5 Rob. (La.) 391, 404; and to the sustaining of the validity of a constitutional amendment, Koehler v. Hill, 60 Iowa, 588, 14 N. W. 761. They have been cited and applied in support of the constitutionality of a State insolvency law, Ogden v. Saunders, 12 Wheat. 294, 6 L. 634; of a State law taxing alien passengers upon their arrival in port, Passenger Cases, 7 How. 496, 12 L. 791; of the legal tender acts of congress, Legal Tender Cases, 12 Wall. 531, 20 L. 306; Lick v. Falkner, 25 Cal. 420; Metropolitan Bank v. Van Dyke, 27 N. Y. 460; Shollenberger v. Brinton, 52 Pa. St. 58, 89; of an act establishing a State reform school, and authorizing municipal corporation to devote money to secure its locatino. Livingston Co. v. Darlington, 101 U. S. 410, 25 L. 1017; of the civil rights act of congress, Civil Rights Cases, 109 U. S. 27, 27 L. 845, dissenting opinion; United States v. Rhodes, 1 Abb. 52, F. C. 16,151; of a law suppressing the manufacture of oleomargarine, Powell v. Pennsylvania, 127 U. S. 685, 32 L. 256, 8 S. Ct. 996; of the act of congress compelling testimony before the interstate commerce commission, Interstate Commerce Commission v. Brimson, 154 U. S. 478, 38 L. 1058, 14 S. Ct. 1133; Brown v. Walker, 161 U. S. 596, 40 L. 821, 16 S. Ct. 646, 70 Fed. 48; of a law authorizing a city to take lands for public use, under the police power, prior to making compensation, Sweet v. Rechel, 159 U. S. 393, 40 L. 194, 16 S. Ct. 46; of acts authorizing municipal corporations and counties to subscribe to railroad stock, Smith v. Fond du Lac, 8 Fed. 295, 10 Biss. 427; Ex parte Selma, etc., R. R. Co., 45 Ala. 728, 733, 6 Am. Rep. 727, 732; Cotton v. County Comrs., 6 Fla. 614; C. D. & V. R. R. Co. v. Smith, 62 Ill. 272, 14 Am. Rep. 101; Lafayette, etc., R. R. Co. v. Geiger, 34 Ind. 199; Stewart v. Supervisors, 30 Iowa, 15, 1 Am. Rep.

242; Cincinnati, etc., R. R. Co. v. Commissioners, 1 Ohio St. 83, 20 Ohio App. 5; Sharpless v. Mayor, 21 Pa. St. 164, 59 Am. Dec. 769; of a State law imposing a tax upon sewing machine companies, Singer Mfg. Co. v. Wright, 33 Fed. 128; of the act of congress against the intimidation of voters, United States v. Goldman, 3 Woods, 194, F. C. 15,225; of the bankrupt law of 1873, In re Smith, 2 Woods, 463, F. C. 12,996; of the pension act of 1864, United States v. Fairchild, 1 Abb. 76, F. C. 15,067; of the law authorizing condemnation of lands for railroads, Baltimore, etc., R. R. Co. v. Van Ness, 4 Cr. C. C. 600, F. C. 830; of a postal law, United States v. Hall, 26 Fed. Cas. 77; of naval court-martial law, United States v. Mackenzie, 30 Fed. Cas. 1162; Bloodgood v. M. & H. R. R. Co., 18 Wend. 50, 31 Am. Dec. 347; of laws establishing State banks, Owen v. Branch Bank, 3 Ala. 262; People v. Marshall, 1 Gilm. (Ill.) 689; of a law allowing the nomination of a judge by consent of parties, when the judge is disqualified, Alabama & Florida R. R. Co. v. Burkell, 42 Ala. 87; of a State act enforcing the fourteenth amendment to the Federal Constitution, McElvain v. Mudd, 44 Ala. 78; of a law changing the charter of a municipal corporation, Mayor, etc. v. Dargan, 45 Ala. 318; of various State acts relating to judges and counties, State v. Sorrello, 15 Ark. 679; Edwards v. Dupuy, 21 La. Ann. 695; Harris v. Vanderveer, 21 N. J. Eq. 440; Skinner v. Collector, 42 N. J. L. 410; Payne v. Mahon, 44 N. J. L. 215; Morris v. People, 3 Den. 394; Grant Co. v. Sels, 5 Or. 245; Tribou v. Strowbridge, 7 Or. 159; Cresap v. Gray, 10 Or. 349; Henderson v. Beaton, 52 Tex. 38; of a retrospective redemption act, Thorne v. San Francisco, 4 Cal. 158.

Elsewhere this doctrine is relied upon in affirming the constitutionality of an act imposing test oaths of allegiance, Cohen v. Wright, 22 Cal. 308; contra, Murphy v. Glover, 41 Mo. 373, 382; of an act allowing soldiers to vote, Bourland v. Hildreth, dissenting opinion of Sanderson, J., 26 Cal. 228; contra, Twitchell v. Blodgett, 13 Mich. 151; of a specific contract act, Carpentier v. Athertou, 25 Cal. 572, 569; of a flowage act, Olmstead v. Camp, 33 Conn. 551, 89 Am. Dec. 228; of a local option liquor law, Territory v. O'Connor, 5 Dak. 413, 41 N. W. 752; People v. Collins, 3 Mich. 404; contra, Maize v. State, 4 Ind. 344; of an act disfranchising a voter for nonpayment of taxes, Frieszleben v. Shallcross, 9 Houst. 108, 111, 19 Atl. 595, 597; of a municipal license tax upon boats and vessels, Harmon v. Chicago, 140 Ill. 399, 29 N. E. 740; of an act changing the inchoate right of dower, Noel v. Ewing, 9 Ind. 43; of acts authorizing municipal appropriations for bounties to volunteers, Coffman v. Keightley, 24 Ind. 514; Speer v. School Directors, 50 Pa. St. 158; of an act authorizing the removal of an officer for intoxication, McComas v. Krug, 81 Ind. 332, 42 Am. Rep. 139; of an act for the suppression of intemperance, Santo v. State, 2 Iowa, 208, 63 Am. Dec. 506; of an act requiring judicial advertisements in French as well as English, Davidson v. Houston, 35 La. Ann. 493; of persoual liberty laws

respecting fugitive slaves, Opinions of Judges Appleton and Kent, 46 Me. 586; of acts relating to canals, Spring v. Russell, 7 Me. 291; Newell v. People, 7 N. Y. 122; of an act amending a corporate charter under reserved power, Commissioners on Inland Fisheries v. Holyoke Water Co., 104 Mass. 449, 6 Am. Rep. 250; Ames v. Lake Superior, etc., R. R. Co., 21 Minn. 282; of an act granting a divorce, State v. Fry, 4 Mo. 177; of laws relating to taxes and revenue, State v. Cumberland & Pennsylvania R. R. Co., 40 Md. 54; Sears v. Cottrell, 5 Mich. 259; Whaley v. Whaley, 51 Mo. 36; State v. Camp Sing, 18 Mont. 138, 56 Am. St. Rep. 553, 44 Pac. 517; Ash v. Parkinson, 5 Nev. 35; of an act equalizing loans to depositors in insolvent savings banks, Simpson v. Savings Bank, 56 N. H. 469, 22 Am. Rep. 493; of the judiciary act of congress giving original but not exclusive jurisdiction of controversies when another State is a party, Delafield v. State, 26 Wend. 217; of a retrospective stay law, Jacobs v. Smallwood, dissenting opinion of Rodman, J., 63 N. C. 126; of the conscription act of congress of 1863, Kneedler v. Lane, 45 Pa. St. 310; of acts taxing litigation, Harrison v. Willis, 7 Heisk. 44, 19 Am. Rep. 609; and collateral inheritance, Eyre v. Jacob, 14 Gratt. 426, 73 Am. Dec. 369; and the occupation of attorney, Languille v. State, 4 Tex. App. 322; of an act to prevent opium smoking, Ah Lim v. Territory, 1 Wash. 159, 24 Pac. 588; and of various other State acts, Demott v. Swaim, 5 Stew. & P. 308; Citizens' M. I. Co. v. Lott, 45 Ala. 196; Wilder v. Lumpkin, 4 Ga. 212, 215; State v. County Judge, 2 Iowa, 283; State v. Taylor, 34 La. Ann. 981; Fisher v. Auditor, etc., 39 La. Ann. 450, 1 So. 885; Kennebec Purchase v. Laboree, 2 Me. 297, 11 Am. Dec. 97; Eames v. Savage, 77 Me. 216, 52 Am. Rep. 752; Mayor v. State, 15 Md. 389; Curryer v. Merrill, 25 Minn. 4, 33 Am. Rep. 452; Evans v. Job, 8 Nev. 337; State v. Narragansett, 16 R. I. 440, 16 Atl. 906; Railroad Co. v. Commissioners, 36 Tex. 407; Brimm v. Jones, 11 Utah, 205, 39 Pac. 825; Danville v. Pace, 25 Gratt. 9, 18 Am. Rep. 668; Roberts v. Cooke, 28 Gratt. 208; Bridges v. Shallcross, 6 W. Va. 568; Newcomb v. Smith, 2 Pinn. 139.

The following cases while citing and approving the principles of Fletcher v. Peck as applied to cases where the unconstitutionality of an act is a matter of doubt, also affirm and apply the doctrine of that case in regard of the duty of the court to hold an act unconstitutional in a clear case, and have held various statutes unconstitutional, Illinois Central R. R. Co. v. Stone, 20 Fed. 471; Sadler v. Langham, 34 Ala. 321; Eason v. State, 11 Ark. 486; Patterson v. Temple, 27 Ark. 206; People v. Scott, 9 Colo. 432, 12 Pac. 613; Mun v. Georgia, 1 Ga. 246; Bank of St. Mary's v. State, 12 Ga. 498; Maize v. State, 4 Ind. 344; State v. Springfield, 6 Ind. 87; State v. Fagan, 22 La. Ann. 557; Gross v. Rice, dissenting opinion, 71 Me. 258; Murphy v. Glover, 41 Mo. 382; Newell v. People, 7 N. Y. 109; Stanmire v. Taylor, 3 Jones L. 211; McCullough v. Brown, 41 S. C. 234, 19 S. E. 467; Atkins v. Randolph, 31 Vt. 242.

Constitutional law.— Corruption or improper motives of legislature in passing a bill cannot be inquired into in suit between private individuals upon question growing out of such bill, p. 131.

This portion of Chief Justice Marshall's opinion has been cited with approval in the following cases: Dodge v. Woolsey, 18 How. 371, 15 L. 418; United States v. Des Moines, etc., Co., 142 U. S. 545, 35 L. 1109, 12 S. Ct. 318; United States v. Old Settlers, 148 U. S. 466, 37 L. 523, 13 S. Ct. 666; Angle v. Chicago, etc., R. R. Co., 151 U. S. 17, 38 L. 64, 14 S. Ct. 246; Farmers' L. & T. Co. v. Chicago, etc., Ry. Co., 39 Fed. 154, 155, 151 U. S. 43, 45; Ex parte Newman, 9 Cal. 515; First Society v. Platt, 12 Conn. 192; Bartlett v. Kennedy, 15 Conn. 334; State v. Blake, 69 Conn. 75, 36 Atl. 1022; Macon, etc., R. Co. v. Little, 45 Ga. 389; Wright v. Defrees, 8 Ind. 303; Miners' Bank v. United States, 1 G. Greene, 565; Corbin v. Marsh, 2 Duv. 198; Elmondorff v. Carmichael, 3 Litt. 482, 14 Am. Dec. 95; Jones v. Chiles, 4 J. J. Marsh. 613; Villavaso v. Barthet, 39 La. Ann. 258, 1 So. 607; State v. Fagan, 22 La. Ann. 548; Frederick v. Gill, 38 Mo. 527; Tennant's Case, 3 Neb. 429; Gibson v. Mason, 5 Nev. 299; Jersey City, etc., R. R. Co. v. Jersey City, etc., R. R. Co., 20 N. J. Eq. 76; People v. Devlin, 33 N. Y. 279, 88 Am. Dec. 383; State v. Cincinnati G. L. Co., 18 Ohio St. 300; Jones v. Jones, 12 Pa. St. 357, 51 Am. Dec. 615; Sharpless v. Mayor, 21 Pa. St. 163, 59 Am. Dec. 767; Helsey v. Gaines, 2 Lea. 356; Crutchfield v. Car Works, 8 Baxt. 245; Lynn v. Polk, 8 Lea, 218, 233, 298; State v. Cunningham, 81 Wis. 509, 51 N. W. 738; 49 Am. Dec. 621, note, 51 Am. Dec. 623, note.

In Dodge v. Wolsey, 18 How. 371, 15 L. 418, Mr. Justice Campbell said: "The courts cannot look to the corruption, the blindness, nor the mischievous effects of State legislations to determine its binding operation." In United States v. Des Moines, etc., R. R. Co., 142 U. S. 545, 35 L. 1109, 12 S. Ct. 318, the court said: "Although it has sometimes been argued at the bar that the courts ought to inquire into the motives of the legislature when fraud and corruption are alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered into." In Angle v. Chicago, etc., R. R. Co., 151 U. S. 17, 18, 38 L. 64, 14 S. Ct. 246, the court citing the rule in Fletcher v. Peck, at length, said: "The rule upon which this decision rests has been followed in many cases and has become a settled rule of jurisprudence." In United States v. Old Settlers, 148 U. S. 466, 37 L. 523, 13 S. Ct. 666, the Supreme Court approved of the action of the Court of Claims in declining to go behind the treaty of 1846, upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an act of congress had been procured by duress or fraud and declare it inoperative for that reason. In First Society v. Platt, 12 Conn. 192, it was held that a resolution of the

general assembly could not be disregarded as constructively fraudulent for want of notice to an ecclesiastical society affected by it. In State v. Blake, 69 Conn. 75, 36 Atl. 1022, it is held that it cannot be shown that the legislature was misled or acted under a mistake in its action. In Elmondorff v. Carmichael, 3 Litt. 482, 14 Am. Dec. 95, the court said: "No instance, it is believed, can be found of either estoppel being allowed to operate or fraud to be charged against the crown of England, or the commonwealth of America." In Jones v. Chiles, 4 J. J. Marsh. 613, the court, in its opinion, said: "Fraud cannot be imputed to the government, nor is there in her grants any warranty, express or implied." In Corbin v. Marsh, 2 Duv. 198, the court said: "This court must look only to the power, and never presume an unconstitutional motive for its exercise." In Jones v. Jones, 12 Pa. St. 357, 51 Am. Dec. 615, it was held that evidence was inadmissible to show that a divorce granted by the legislature was obtained by fraud or falsehood, or that one of the members of the legislature misrepresented the facts." In Lynn v. Polk, 8 Lea, 218, 233, 298, it was held that bribery of the legislature could not be shown to invalidate an act." In Tennant's Case, 3 Neb. 429, Mason, C. J., held that this doctrine was also applicable to the motive of the executive in issuing a proclamation to convene the legislature. In the citing cases of Bartlett v. Kingsley, 15 Conn. 334; Villavaso v. Barthet, 39 La. Ann. 258, 1 So. 607; Crutchfield v. Car Works, 8 Baxt. 245; and Jersey City, etc., R. R. Co. v. Jersey City, etc., R. R. Co., 20 N. J. Eq. 76, it was held that the same principles which forbid an investigation into the motives of the State legislature forbid such investigation into the motives of a municipal legislature in the passage of a municipal ordinance; and that such ordinance could not be avoided for illegal intention, or for fraud in its procurement. But see contra, State v. Cincinnati G. L. Co., 18 Ohio St. 300.

Bona fide purchasers for value, without notice of fraud, as between a prior grantor and grantee, are protected from rescission on account of it, pp. 132, 133, 134, 135.

This doctrine in regard to the protection of bona fide purchasers for value, without notice of a secret fraud or concealed defect has been expressly approved and applied in the following cases: Cochran v. Cobb, 43 Ark. 184, applying it to a purchase of State swamp lands in levee bounds, and holding that where the contract was executed by conveyance and the lands had passed into the hands of innocent third parties for value, the State was estopped by its own grant to resort to the land; Bleecker v. Bond, 3 Wash. C. C. 542, F. C. 1,534, bona fide purchasers from the State of Georgia were held protected; Johnston v. Smith, 21 Tex. 729, holding that in case of a grant by the government, parol evidence of fraud in obtaining the grant should not be permitted to impeach the grant in the hands of bona fide purchasers after a great lapse of time.

In Smith v. Ewing, 11 Sawy. 64, 23 Fed. 747; Quick v. Milligan, 108 Ind. 423, 58 Am. Rep. 52, 9 N. E. 395; Broussard v. Broussard, 45 La. Ann. 1089, 13 So. 701; Blanchard v. Castillo, 19 La. 364; Hubbard v. Greeley, 84 Me. 347, and Somes v. Brewer, 2 Pick. 201, 13 Am. Dec. 417, the doctrine was applied to the protection of a bona fide purchaser from a defrauded grantor. In Myers v. Sanders, 7 Dana, 519, it was applied to the protection of a bona fide purchaser under a sheriff's deed, made with fraudulent collusion; in Jackson v. Henry, 10 Johns. 197, 6 Am. Dec. 331, to the protection of a bona fide purchaser under a sale of mortgaged property against usury in the mortgage debt. In Paddock v. Fish, 10 Fed. 128; Wood v. Mann, 1 Sumn. 510, F. C. 17,951; Thames v. Rembert, 63 Ala. 571; Paige v. O'Neal, 12 Cal. 497; George v. Kimball, 24 Pick. 239; Thomas v. Mead, 8 Mart. (N. S.) 343, 19 Am. Dec. 187; Water v. Riggin, 19 Md. 554; Wineland v. Coonce, 5 Mo. 300, 32 Am. Dec. 323; Gordon v. Haywood, 2 N. H. 403; Savings Bank v. Mead, 63 N. H. 436; 82 Am. Dec. 248; Anderson v. Roberts, 18 Johns. 531, 9 Am. Dec. 242; Mateer v. Hissim, 3 Pen. & W. 165; Sawtelle v. Weymouth, 14 Wash. 27, 43 Pac. 1103, and Simms v. Morse, 2 Fed. 329, 4 Hughes, 583, the doctrine was applied to the protection of bona fide purchasers of property conveyed in fraud of the creditors of the grantor. In Danbury v. Robinson, 14 N. J. Eq. 219, it is held that the rights of such a bona fide purchaser are not affected or impaired by the fact that judgments were reversed against the fraudulent grantor prior to the conveyance. But in the citing case of Agricultural Bank v. Dorsey, Freem. Ch. 343, it was held that the protection of bona fide purchasers against the creditors of the grantor does not extend to a purchase or a mortgage for a pre-existing debt. In Miles v. Oden, 8 Mart. (N. S.) 227, 19 Am. Dec. 183, it was held that the protection of a bona fide purchaser from the fraud of the vendor, applies to the protection of a bona fide purchaser of a note given to the vendor upon fraudulent transfer of his property. In Henninger v. Heald, 52 N. J. Eq. 439, 29 Atl. 194, it is held that the doctrine of the protection of a bona fide purchaser without notice of a prior equity, arising out of fraud, extends to the protection of the grantee of such grants, though he had notice of the fraud if he was not a participant therein. In Gilman v. Hamilton, 16 Ill. 232, it is held that the doctrine applies to the protection of a bona fide purchaser at a judicial sale under a voidable decree of sale. In Barrow v. Bispham, 11 N. J. L. 116, it was held that the doctrine does not extend to the assignment of a chose in action, the purchaser of which, however bona fide, must abide by the case of the one from whom he bought. Cited also arguendo, on question of Spanish title in Chew v. Calvit, Walk. (Miss.) 61.

Constitutional law.— A party should not be judge in his own cause, and if the legislature claim this right it must be governed by equitable and legal rules, pp. 132, 133.

Cited in Clyma v. Kennedy, 64 Conn. 318, 42 Am. St. Rep. 196, 29 Atl. 539, holding a justice of the peace not qualified to decide a criminal action for a newspaper libel against himself upon complaint of a grand juror.

Constitutional law.— In general it is competent for one legislature to repeal any act which it was competent for a former legislature to pass, and one legislature cannot abridge the powers of its successors, pp. 135–143.

This proposition is approved in Gilleland v. Schuyler, 9 Kan. 580; State v. Dews, Charlt. (Ga.) 412, 419; Bank v. Bond, 1 Ohio St. 640; Sandusky Bank v. Wilbur, 7 Ohio St. 497, and Dartmouth College v. Woodward, 1 N. H. 132, 135. In the citing case of Smith v. Westcott, 17 R. I. 367, 22 Atl. 281, it is held that the legislature may transfer the custody of funds held upon a public trust from one set of commissioners to another. But in the citing case of Blair v. Marye, 80 Va. 491, it is held that the power of the legislature over public officers generally does not extend to constitutional officers. In the quoting case of Gilleland v. Schuyler, supra, it is held that the right to contest the election of a public officer given by one legislature may be taken away by another legislature, and that the appeal of the law authorizing such contest could abate an action already commenced. In the quoting cases of Bank v. Bond, and Sandusky City Bank v. Wilbur, supra, it is held that an act incorporating a State bank and other banking companies was a public and general law, which might be changed upon the subject of taxation. In the citing cases of Providence Bank v. Billings, 4 Pet. 563, 7 L. 956; Seymour v. Hartford, 21 Conn. 486; Grand Lodge of Masons v. City, 44 La. Ann. 665, 11 So. 151; Washington University v. Rouse, 42 Mo. 317; Plankroad Co. v. Husted, 3 Ohio St. 583; and Iron City Bank v. Pittsburg, 37 Pa. St. 343, it is held that the State has a general power of taxation over corporations, when exemption from taxation does not form a valid and binding part of the charter. In the citing case of Dodge v. Woolsey, 18 How. 378, 15 L. 421, Campbell, J., dissenting, insists upon the sovereign power of the legislature over the subject of taxation. In the citing case of Appeal Tax Court v. Patterson, 50 Md. 372, it is held that the general power of taxation by a State is not affected by the exemption from taxation under the laws of another State of corporate stocks held by citizens of taxing State. In the quoting case of Dartmouth College v. Woodward, supra, it is held that the charter of Dartmouth College was a subject of general legislation which might be changed; but the doctrine of that case was overruled in 4 Wheat. 518, 4 L. 629. In the citing case of State v. Southern Pac. Co., 24 Tex. 125, it is held that the charter of a railroad corporation does not prevent the exercise of the general power of the legislature, and that it may authorize a suit in the name of the people to forfeit the charter for violation of law. In the citing case of Railroad Co. v.

Transportation Co., 25 W. Va. 353, it is held that irrevocable grants and franchises conferred upon a railroad company are, nevertheless, subject to the general power of the legislature to fix charges for transportation. And in the citing cases of Pennsylvania College Cases, 13 Wall. 213, 20 L. 553; Miller v. New York, 15 Wall. 489, 21 L. 101; Leep v. Railway Co., 58 Ark. 429, 41 Am. St. Rep. 124, 25 S. W. 81; State v. Northern Cent. Ry. Co., 44 Md. 165; Comrs. on Inland Fisheries v. Holyoke Water Co., 104 Mass. 448, 6 Am. Rep. 249; Proprs. of Side Booms v. Haskell, 7 Me. 477; In re Matter of Bank, 21 N. Y. 14; M'Laren v. Pennington and Others, 1 Paige, 108; Iron City Bank v. Pittsburg, 37 Pa. St. 343, and State v. Brown, etc., Mfg. Co., 18 R. I. 24, 25 Atl. 249, it is held that the general power of the legislature over corporations continues to exist, when a power of amendment or repeal has been reserved from its charter. In the citing case of Ex parte Mayer, 27 Tex. 720, it is held that the legislature may repeal acts which relate to public policy; and that a conscription law allowing substitutes for drafted men could be repealed, and one who had sent a substitute be made liable to military duty.

Constitutional law.— Acts done under one law cannot be undone by a succeeding legislature, p. 135.

Cited with approbation in the following cases: State v. County Court, 19 Ark. 373, 374; State v. Southern Bank, 23 La. Ann. 272; United States v. Minnesota, etc., R. R. Co., 1 Minn. 133; People v. Collins, 3 Mich. 395; People v. O'Brien, 111 N. Y. 48, 7 Am. St. Rep. 702, 18 N. E. 702; Eakin v. Raub, 12 Serg. & R. 366, 372; Bank v. M'Veigh, 20 Gratt. 467.

Constitutional law.— Rights vested under a law, which is in its nature a contract, cannot be divested by the legislature, p. 135.

Cited and principle applied in State Branch Bank v. Knoop, 16 How. 284, 14 L. 983, and State v. County Court, 19 Ark. 373, 374, which hold that a law exempting lands from taxation under contract with the legislature cannot be repealed; Poindexter v. Greenhow, 114 U. S. 297, 29 L. 195, 5 S. Ct. 918, which holds that an act making coupons receivable for taxes conferred a contract right upon the holders of coupons, which could not be impaired by the legislature; Filer v. Fuller, 44 Ark. 282, holding that an act repealing an overdue tax law cannot deprive attorneys of their vested right to compensation in pending suits; in Boston, etc., R. R. Co. v. Salem, etc., R. R. Co., 2 Gray, 31, 34, which holds that a railroad charter made exclusive by the act granting it is a contract of the commonwealth protected as a grant of a vested right; and in People v. O'Brien, 111 N. Y. 48, 7 Am. St. Rep. 702, 721, n., 18 N. E 702, which holds that the vested rights of a corporation in its property cannot be divested, under a reserved power to repeal its charter.

In the citing cases of Comrs.' Court v. Rather, 48 Ala. 447; Howard v. Jones, 50 Ala. 69; Watson v. Rose, 51 Ala. 300; Micou v. Tallassee B. Co., 47 Ala. 656; English v. Oliver, 28 Ark. 334; Co. Comrs. v. King, 13 Fla. 474; State v. Walsh, 31 Neb. 476, 48 N. W. 265; Munday v. Rahway, 43 N. J. L. 340; Moore v. State, 43 N. J. L. 217, 39 Am. Rep. 570; Homestead Cases, 22 Gratt. 287, 288, 12 Am. Rep. 514, 515; United States v. Quincy, 4 Wall. 549, 18 L. 408; United States v. Johnson, 5 Dill. 212, F. C. 15,489, it is held that the law in force at the time of the making of a contract and in any manner affecting it enter into and become a part of the contract, and cannot be repealed or altered so as to affect the obligation of the contract or to impair rights vested under those laws. In Robinson v. Reid, and Homestead Cases, supra, it was held that a law exempting certain property from execution when a debt was incurred, could not be changed so as to increase the exemption against the creditor. In Comrs'. Court v. Rather; English v. Oliver; County Comrs. v. King; State v. Walsh; Munday v. Rahway; United States v. Quincy, and United States v. Johnson Co., supra, it was held that holders of bonds issued under a statute have a vested right in the statutory remedy of levying a tax to pay the bonds, of which they cannot be deprived by repeal or change of the statute. In the citing case of Graham v. Chicago, etc., R. R. Co., 53 Wis. 484, 10 N. W. 613, it is held that the lawfulness of an act done depends upon the laws in force at the time, and that vested right of action for unlawful acts cannot be taken away by repeal of the statute making such acts unlawful. In the citing case of Enfield Toll Bridge v. Hartford, etc., R. R. Co., 17 Conn. 61, 42 Am. Dec. 723, it is held not a violation of the Constitution or of vested rights to take lands held either under an executed or an executory contract under the power of eminent domain upon making compensation therefor.

In a number of citing cases it is held that vested rights are protected against any power of the legislature to divest them. Thus it is held that the property of an alien cannot be divested by law without his consent, otherwise than by the power of eminent domain, Bonaparte v. Camden, etc., R. R. Co., 1 Bald. 220, F. C. 1,617; that the legislature cannot divest any citizen of a lawfully acquired right or title to property, Dockery v. McDowell, 40 Ala. 482; that the property of a ward cannot be converted into illegal Confederate money by authority of the legislature; Newman v. Reed, 50 Ala. 303; that county bonds issued under a law in aid of harbor improvement could not be curtailed in amount by the legislature to the injury of bondholders, Slaughter v. Mobile County, 73 Ala. 138; that the State cannot by a change of the Constitution cut off or destroy rights and remedies vested under valid contracts lawfully made under the former Constitution, Jacoway v. Denton, 25 Ark. 643; Berry v. Bellows, 30 Ark. 204. So also that rights vested in a fund provided for the payment of bonds under an internal improvement act cannot be divested by a subsequent act devoting

the fund to other purposes, Trustees, etc. v. Bailey, 10 Fla. 130, 81 Am. Dec. 199; that an act for the issuance of county bonds providing for levy of a tax to pay them cannot be repealed or changed to the detriment of the bondholders, County Comrs. v. King, 13 Fla. 474; that a remedial act cannot be allowed to operate retrospectively so as to divest a right of action in a pending cause, Wilder v. Lumpkin, 4 Ga. 215, 220; Satterlee v. Matthewson, 16 S. & R. 185. But see 2 Pet. 380, 7 L. 458, contra. Again that a retrospective act cannot take away any existing personal liability of an executor or administrator, Martindale v. Moore, 3 Blackf. 277, 278; that rights of property vested under a contract for State printing, authorized by law, cannot be divested by repeal of the law, State v. Barker, 4 Kan. 387, 96 Am. Dec. 179; that rights vested under a State grant cannot be divested by eminent domain for the purpose of establishing a town, Jackson v. Winn, 4 Litt. (Ky.) 329; that rights vested under a legislative grant of a lottery privilege cannot be divested by repeal of the law, Gregory v. Trustees, 2 Met. (Ky.) 598, quoted from, but overruled in Douglas v. Commonwealth, 168 U. S. 500, 42 L. 557, 18 S. Ct. 203; that the vested property rights of a city are protected against divestiture by the legislative power, New Orleans, etc., R. R. Co. v. New Orleans, 26 La. Ann. 521; Milwaukee v. Milwaukee, 12 Wis. 102; In re Malone, 21 S. C. 449. It has been further held that rights vested under a valid common-law rule of property cannot be divested by a retrospective statute, Kennebec Purchase v. Laboree, 2 Me. 289, 11 Am. Dec. 90; that while the legislature may control the general plan of a city laid out under authority of a law of congress, rights vested in purchasers, whose lots are bounded on a street or square, cannot be divested, Cooper v. Alden, Harr. Ch. (Mich.) 85; that a vested right of defense under the statute of limitations cannot be divested by a change or repeal of the statute, Davis v. Minor, 1 How. (Miss.) 192, 28 Am. Dec. 330; Newland v. Marsh, 19 Ill. 385; Eakin v. Raub, 12 S. & R. 366, 371; that a right vested by lapse of the time within which an appeal might be taken, cannot be divested by a retrospective act allowing an appeal, Burch v. Newburg, 10 N. Y. 391; that congress cannot confiscate debts due from one citizen to another, Clark v. Mitchell, 64 Mo. 575; that the legislature cannot lawfully deprive a person of a legally vested right, but that the decision of a law court that such vested right might be taken under the power of eminent domain, in establishing a ferry, was binding upon a court of equity, Stark v. McGowan, 1 Nott & McCord, 400; that an act allowing parol evidence to identify lands which were previously inadmissible under the statute of frauds, could not have retrospective effect upon a previous contract which was void under that statute, Lowe v. Harris, 112 N. C. 480, 481, 17 S. E. 540; that the legislature cannot validate void deeds of married women, Robinson v. Barfield, 2 Murphy, 422; that a State cannot make scrip a legal tender for the payment of a note,

Knighton v. Burns, 10 Or. 550; nor suspend execution upon judgments unless plaintiff should accept bank notes in payment. Townsend v. Townsend, Peck. 12, 14 Am. Dec. 732; that the vested rights of an owner of land held under the State cannot be affected by an act allowing a trespasser for his improvements in an action of ejectment, Briscoe v. Evans, 2 Overt. 346; that an act allowing appeal after the prescribed time, impaired the contract arising from the judgment, Bates v. Kimball, 2 D. Chip. 89; Nelson v. Allen, 1 Yerg. 379; that an act authorizing payment in Confederate currency cannot be made to apply to debts contracted before its passage, Bank v. McVeigh, 20 Gratt. 466, 467; that a remedy cannot be taken away or incumbered with burdensome restrictions without impairing the obligation of the contract, American B. & L. Assn. v. Rainbolt, 48 Neb. 450, 67 N. W. 499; and that a legislative divorce impairs the marriage contract and is void, State v. Fry, 4 Mo. 132.

On the other hand, the following cited cases hold that rights may be affected or changed by retrospective legislation where the obligation of contracts is not impaired thereby; in Satterlee v. Matthewson, 2 Pet. 413, 7 L. 469, the reference of which to Fletcher v. Peck is repeated in the cases of Charles River Bridge v. Warren Bridge, 11 Pet. 581, 9 L. 837, and Cochran v. Van Surlay, 20 Wend. 371, 373, 32 Am. Dec. 572, 574, it is said that the case of Fletcher v. Peck nowhere intimates that a statute which divests vested rights retrospectively is repugnant to the Constitution of the United States, provided it does not impair the obligation of contracts, and it is held that an act making a change in the relation of landlord and tenant between Connecticut settlers and Pennsylvania claimants might operate retrospectively on pending suits. In Charles River Bridge v. Warren River Bridge, 11 Pet. 581, 9 L. 837, it is held that an act legalizing competition of the Warren Bridge with the Charles River Bridge was a valid exercise of legislative power, and violated no right guaranteed to the latter by the State of Massachusetts. Contra, per Story, J., dissenting, pp. 617, 634, 645, 9 L. 851, 858, 863. In United States ex rel. v. Stockslager, 129 U. S. 477, 32 L. 787, 9 S. Ct. 384, it is held that an act of congress for the relief of heirs did not give vested rights in certificates to be issued thereunder, and that such act may be suspended by congress before any certificates had been taken out. In the citing cases of Buckner v. Street, 1 Dill. 251, F. C. 2,098, and McElvain v. Mudd, 44 Ala. 76, 4 Am. Rep. 106, it is held that slave contracts were abolished and made illegal by the constitutional amendment abolishing slavery.

In other citing cases it is held that the law-making power may pass retrospective enactments, as follows: To confirm deeds of married women which were defectively acknowledged, Watson v. Mercer, 8 Pet. 110, 8 L. 884; to direct the court to set aside the inquisition of a jury as to damages for the condemnation of land, and to order a new inquisition, Baltimore, etc., R. R. Co. v. Nesbit,

10 How. 402, 13 L. 472; to impose a collateral inheritance tax applying in the case of persons who died before the passage of the law, Carpenter v. Commonwealth, 17 How. 463, 15 L. 129; to require a retrospective test oath, Ex parte Garland, dissenting opinion of Miller, J., 4 Wall. 390, 18 L. 374; Green v. Shumway, dissenting opinion of Mann, J., 39 N. Y. 432; the majority of opinions of the court in each case being to the contrary; Ex parte Hunter, 2 W. Va. 159; Ex parte Quarrier, 4 W. Va. 223; to divest rights accrued under a mere gratuitous grant of a lottery franchise, by repeal of the law granting the license, such rights being deemed to have accrued subject to the police power of the State to revoke the license, Douglas v. Commonwealth, 168 U. S. 500, 42 L. 557, 18 S. Ct. 203, overruling Gregory v. Trustees, 2 Met. (Ky.) 598; to repeal an act conferring a military title, and settling an annuity, Dale v. Governor, 3 Stew. 395, Collier, J., dissenting, id. 422; to affect the rights of heirs after descent cast, Holmes v. Bank of Norfolk, 12 Ala. 417; to make Confederate money illegal by ordinance of a convention, Lawson v. Miller, 44 Ala. 626, 4 Am. Rep. 150; to tax insurance companies by percentage on premiums for a year commencing before the passage of the act, Citizens' M. I. Co. v. Lott, 45 Ala. 196; to confirm municipal bonds, Bridgeport v. Housatonic R. R. Co., 15 Conn. 497; to repeal an act containing an executory promise without consideration, before rights are acquired under it, Trustees of Bishop's Fund v. Rider, 13 Conn. 96; Allen v. Forrest, 8 Wash. 703, 36 Pac. 972; to repeal a bridge franchise granted without consideration, before it is put into execution, Young v. Harrison, 6 Ga. 155; to repeal a penal statute giving a qui tam action to an informer, so as to abate an action pending prior to judgment, Bank of St. Marys v. State, 12 Ga. 498; to validate the previous action of a municipal corporation, Bass v. Mayor, etc., 30 Ga. 851; to change a water front line previously established by law, in front of a line of water lots, Floyd v. Blanding, 54 Cal. 46; to change the rules of evidence in action upon antecedent contracts, and dispense with proof of execution of a note unless denied under oath, Temple v. Hayes, Morris (Iowa), 12; to prohibit, by police power of the State, the use of land granted for burial purposes, Lake View v. Rose Hill Cemetery Co., dissenting opinion of Sheldon, J., 70 Ill. 203; to take away a right to complete the contest of an election already begun, Gilleland v. Schuyler, 9 Kan. 580; to establish a drainage company to drain marsh lands, if not infringing the rights and obligations of vendors and vendees, Petition of New Orleans Drainage Co., 11 La. Ann. 348.

Other citing cases have found this principle no obstacle to affirming the following laws: To limit the rate of parish taxation so as to affect the salary of a parish attorney appointed by the District Judge, State v. Police Jury, 34 La. Ann. 45; to take away an exemption from taxation forming no part of a charter grant, Grand Lodge of Masons v. City, 44 La. Ann. 665, 11 So. 151; Washington University v. Rouse, 42 Mo. 317; Providence Bank v. Billings, 4 Pet. 563,

7 L. 956; Seymour v. Hartford, 21 Conn. 486; Plank Road v. Husted, 3 Ohio St. 583; Iron City Bank v. Pittsburg, 37 Pa. St. 343; to regulate the remedies between borrower and lender upon a usurious contract, and to require the usury to be pleaded, and the sum due to be paid with interest, Baugher v. Nelson, 9 Gill, 307, 52 Am. Dec. 699; to provide the mode of proceeding against banks for violating their charter, and to authorize an injunction to restrain the collection of demands due them, Commercial Bank v. State, 4 Sm. & M. 507; to remove the disqualification of interested witnesses, as applied to causes of action existing prior to passage of the act, Rich v. Flanders, 39 N. H. 313, 376; to authorize sale of the estate of infants for their maintenance and education, Cochran v. Van Surlay, 20 Wend. 371, 32 Am. Dec. 572; to confirm validity of taxes and take away a right to recover them when paid without authority of law, and to take away the right to recover costs in pending action prior to judgment, Grim v. School District, 57 Pa. St. 435, 98 Am. Dec. 238; to cure defects in judicial proceedings, and validate a sale of land therein, Lane v. Nelson, 79 Pa. St. 410; to change a provision in a municipal charter that when a street has been once improved it should not be again improved, Ladd v. Portland, 32 Or. 273, 51 Pac. 654; to change the remedy upon appeal bonds, and transfer appeal causes from one court to another, Mexican N. R. R. Co. v. Mussette, 86 Tex. 715, 26 S. Ct. 1077; and retrospectively to extend the time for the redemption of lands under execution, Scobey v. Gibson, 17 Ind. 577.

Constitutional law.— It seems that the nature of society and of government establish certain limitations upon legislative power apart from constitutional provisions, pp. 135, 136, 139, 143.

The language of Chief Justice Marshall in reference to this proposition has been quoted from in the following cases: Satterlee v. Matthewson, 2 Pet. 413, 7 L. 469; Poindexter v. Greenhow, 114 U. S. 297, 29 L. 195, 5 S. Ct. 918; Legal Tender Cases, 12 Wall. 581, 20 L. 322; Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 237, 41 L. 985, 17 S. Ct. 585; Avery v. Fox, 1 Abb. 253, F. C. 674; Baltimore, etc., R. R. Co. v. Van Ness, 4 Cr. C. C. 600, F. C. 830; Albee v. May, 2 Paine, 80, F. C. 134; Bleecker v. Bond, 3 Wash. C. C. 541, F. C. 1,534; Ex parte Martin, 13 Ark. 207, 58 Am. Dec. 327; Jacoway v. Denton, 25 Ark. 643; Hooker v. Van Haven & N. Co., 14 Conn. 153, 36 Am. Dec. 479; Campbell v. State, 11 Ga. 370; Beebe v. State, 6 Ind. 525; Petition of New Orleans Drainage Co., 11 La. Ann. 349; Kennebec Purchase v. Laborec, 2 Me. 289, 11 Am. Dec. 90; People v. Collins, 3 Mich. 395; People v. Gallagher, 4 Mich. 251; Clark v. Mitchell, 64 Mo. 575; Griffin v. Mixon, 38 Miss. 434; Wynehamer v. People, 13 N. Y. 391; Kelly v. Pittsburg, 85 Pa. St. 182, 186; Bristoe v. Evans, 2 Overt. 346; Peerce v. Carskadon, 4 W. Va. 247, 6 Am. Rep. 292; Baugher v. Nelson, 9 Gill, 307, 52 Am. Dec. 699; Kelly v. Pittsburgh, 27 Am. Rep. 639, 642, note. Mr. Justice Johnson's observations

upon the same matter are quoted in Durkee v. Janesville, 28 Wis. 468, 9 Am. Rep. 503, and in Milwaukee v. Milwaukee, 12 Wis. 100. In the citing case of Charles River Bridge v. Warren Bridge, 11 Pet. 617, 9 L. 851, Mr. Justice Story says: "It would be against the first principles of justice to presume that the legislature reserved a right to destroy its own grant. That was the doctrine of Fletcher v. Peck, 6 Cr. 87, in this court, and in other cases turning upon the same grand principle of political and constitutional duty and right." In The Legal Tender Cases, 12 Wall. 581, 20 L. 322, Chase, C. J., after quoting the words of Chief Justice Marshall, said: "These remarks of Chief Justice Marshall were made in a case in which it became necessary to determine whether a certain act of the legislature of Georgia was within the constitutional prohibition against impairing the obligations of contracts. And they assert fundamental principles of society and government in which that prohibition had its origin. They apply with great force to the construction of the Constitution of the United States. In like manner and spirit, Mr. Justice Chase had previously declared (Calder v. Bull, 3 Dall. 388, 1 L. 649), that an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." In Poindexter v. Greenhow, 114 U. S. 297, 29 L. 195, 5 S. Ct. 918, the words of Chief Justice Marshall are quoted and referred to as expressing the doctrine on which the constitutional provision rests. In Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 237, 41 L. 985, 17 S. Ct. 585, Mr. Justice Harlan said: "In Citizens' S. & L. Assn. v. Topeka, 20 Wall. 663, 22 L. 461, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power was after all a despotism, said: The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined power. There are limitations on such power which grow out of the essential nature of all free governments." In accordance with these principles it was held in that case, that the property of the citizen could not be taken under the power of taxation to promote private objects.

In the case of Boswell v. Dickerson, 4 McLean, 267, F. C. 1,683, Fletcher v. Peck is cited to sustain the proposition that "an act assuming the power to dispose of the property of nonresidents without notice would be opposed to the immutable principles of justice, and under the doctrine of the Supreme Court of the Union, the law would be held void." In the citing case of Wilder v. Lumpkin, 4 Ga. 215, it is said that "the fundamental principles of the social compact and free government require that private rights be

held sacred." In the quotiug case of Campbell v. State, 11 Ga. 370, it is held that "any law subversive of the principle of personal liberty and natural justice is invalid, indcpendently of written constitutions." In the quoting cases of Bleecker v. Bond, 3 Wash. C. C. 541, F. C. 1,534, and Griffin v. Mixon, 38 Miss. 434, the language of Chief Justice Marshall is expressly approved. In the citing case of Schroder v. Ehles, 31 N. J. L. 50, the court after citing English opinions said: "If in England at this day an act should be passed totally subversive of the great natural rights of man, a question by no means settled would be presented for adjudication. In this country likewise, that important subject has received considerable attention at the hands both of judges and speculative writers, and the preponderance of authority seems to be adverse to the omnipotence of the legislative power. This side of the controversy is certainly sustained by the great names of Marshall and of Story." In the citing case of State v. Flanders, 24 La. Ann. 71, a quotation is made from Story on the Constitution, 1399, on this point. In the quoting case of Wynehamer v. People, 13 N. Y. 391, the language of Chief Justice Marshall is approved, and it is said that "aside from the special limitations of the Constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive, but where the Constitution is silent, and there is no clear usurpation of power, there would be great difficulty and danger in attempting to define the limits of the power." In Kelly v. Pittsburg, 85 Pa. St. 182, 186, 27 Am. Rep. 639, note, Chief Justice Agnew quotes the words of Chief Justice Marshall with approval, and in support of the invalidity of an act taxing farming lands within the boundaries of a city, which could derive no benefit from municipal taxation, which, it was urged, infringed the fundamental rights of the citizen. In the quoting case of Peerce v. Carskadou, 4 W. Va. 247, 6 Am. Rep. 292, the court expressly approves the lauguage of Chief Justice Marshall. In Durkee v. Janesville, 28 Wis. 468, 9 Am. Rep. 503, the language of Mr. Justice Johnson is quoted with approval, and a number of cases are referred to similar effect.

But in the citing case of Bridgeport v. Housatonic R. R. Co., 15 Conn. 497, it is said that "a conflict of opinion is noted as to whether the legislature may take away vested rights by retroactive legislation, without just compensation, as being opposed to the spirit of the Coustitution and the fancied social compact, though not withiu the letter of any constitutional prohibition." To similar effect is Bass v. Mayor, etc., of Columbus, 30 Ga. 851; Stewart v. Supervisors of Polk Co., 30 Iowa, 17, 1 Am. Rep. 244, it is said that "there is no paramount and supreme law which defines the law of nature independent of the Constitution, and courts caunot assume the rights of the people to correct unwise legislation." In Beebe v. State, 6 Ind. 525, in the quoting opinion of Stewart, J., the language of Chief Justice Marshall is distinguished as inappli-

cable to the exercise of the police power, in prohibiting the liquor traffic. In Petition of New Orleans Drainage Co., 11 La. Ann. 349, it is said: "This is very delicate ground. It is asking us to hush the declared will of a co-ordinate branch of the government, not because it contravenes any provision of the organic law which we are to expound, but because it contradicts our notion of justice. Perhaps we have such power; like the right of revolution, it is continuously hinted at in judicial opinions." In the quoting case of People v. Gallagher, 4 Mich. 251, a conflict of opinion is declared upon the point stated. But in the dissenting opinion of Pratt, J., in the same case, p. 275, the language of Chief Justice Marshall is quoted with approval. In the citing case of Orr v. Quimby, 54 N. H. 647, the doctrine is criticised. In the case of Milwaukee v. Milwaukee, 12 Wis. 100, which cites the opinion of Mr. Justice Johnson, it is said: "There are those who, independently of constitutional restriction, and upon general principles, and on the reason and nature of things, hold that legislative bodies have no such authority (as to divest vested rights), and that such a proceeding would be an act of lawless violence. The Constitutions, State and Federal, furnish ample grounds against such abuses, without resort to such general principles." In the citing case of State v. Allmond, 2 Houst. 640, it is stated that Chief Justice Marshall "recoiled from the doctrine" announced by him, supra, and that "there is no judicial precedent for it," and the court declines to make the first judicial precedent, as being unnecessary, for the reason that the guaranties of the Constitution afforded sufficient grounds for protection.

Constitutional law.— It is the legislative function to prescribe general rules for the government of society. But the application of those rules to individuals seems to pertain to some other department, p. 136.

In the citing case of St. Paul, etc., R. R. Co. v. St. Paul, etc., R. R. Co., 68 Fed. 18, 32 U. S. App. 372, the question is suggested, but left undecided, whether the exercise of power to forfeit lands under a voidable grant pertains solely to the judiciary, or may be done by legislative enactment. In the citing cases of Dale v. Governor, 3 Stew. 418; Flint River S. Co. v. Foster, 5 Ga. 205, 48 Am. Dec. 257; Beall v. Beall, 8 Ga. 218, and Louisville, etc., R. R. Co. v. County Court, 1 Sneed, 671, 62 Am. Dec. 438, it is held that it is the province of the judiciary to pronounce upon the invalidity of a law. In Beall v. Beall, supra, it is said that this power belongs to every branch of the judiciary from the highest to the lowest. But in the citing case of Turner v. Althaus, 6 Neb. 72, it is held that the power of the judiciary department does not extend to the declaring of a law invalid merely because it is wrong or unjust. In the citing case of Coleman v. Newby, 7 Kan. 87, it is said that "it is the province of the legislature to make laws, of the judiciary to construe and to expound them, and of the executive to execute and enforce

them." And it is held that rules adopted by the court are not in the nature of law. In the quoting case of State Bank v. Cooper, 2 Yerg. 605, 24 Am. Dec. 522, it is held that the legislature could not create a special court for the determination of suits commenced by a State bank. In the citing case of Fisher v. Dabbs, 6 Yerg. 150, it is held that the legislative department cannot control the judiciary, within their peculiar sphere, nor direct the chancellor to dismiss certain cases, and to send the record to another court for trial. In the citing case of Powell v. State, 17 Tex. App. 361, it was held to be "beyond the power of the legislative department to interpret and declare the meaning of a constitutional provision." In the citing case of Seat of Government Case, 1 Wash. Ter. 127, it is held that the legislative department of the Federal government acts under a grant of power from the Federal Constitution, while a State Constitution is a mere limitation of power of the legislative department of the State.

Constitutional law.— How far the power of giving the law may involve every other power, in cases where the Constitution is silent, has never been and perhaps never can be definitely stated, p. 136.

Cited and relied upon in the following: Territory v. Cox, 6 Dak. 508, 524, saying that "the powers of the co-ordinate departments of government overlap so that the line of separation is often indiscernible by the judicial eye;" Hovey v. State, 119 Ind. 402, 21 N. E. 24, observing that: "The line between the legislative and executive departments is not clearly defined. The legislature may name agencies or leave their selection to the executive;" Commissioners v. Carter, 2 Kan. 132, holding that while the line separating the legislative from the judicial departments is not clearly marked, yet the legislature has no power to declare void county bonds valid; Ex parte Williams, 31 Tex. Cr. 273, 20 S. W. 581, holding "the possibility of abuse is not a valid argument against legislative power;" and that an occupation tax upon lawyers cannot be held to be an indirect crippling of the judicial department; Commissioners of Sinking Fund v. George, 47 S. W. 780, affirming act making penitentiary commissioners elective by legislature; Purnell v. Mann, 48 S. W. 410, upholding similar act respecting election commissioners. See also 13 Am. St. Rep. 139, note.

Constitutional law.— The States are not sovereign powers, but members of the Union, whose Constitution is supreme, p. 136.

Cited to this point in The Parkhill, 18 Fed. Cas. 1188, denying restitution of corporate merchantman captured during civil war.

Constitutional law.— The prohibition against impairing contract obligations includes and protects executed contracts or grants as well as executory contracts. Contracts defined, and these two kinds distinguished, pp. 136, 137.

The language of Chief Justice Marshall upon this point is quoted

from, in whole or in part, in Dartmouth College v. Woodward, opinion of Story, J., 4 Wheat. 682, 4 L. 670; Green v. Biddle, 8 Wheat. 92, 5 L. 570; Coast Line R. R. Co. v. Mayor, etc., 30 Fed. 649; State v. Illinois Central R. R. Co., 33 Fed. 774, 775; St. Louis v. Western Union T. Co., 63 Fed. 70; Cincinnati, etc., R. R. Co. v. McKeen, 64 Fed. 46, 24 U. S. App. 218; Stein v. Mobile, 49 Ala. 368, 20 Am. Rep. 285; Mobile v. Railroad Co., 84 Ala. 120, 5 Am. St. Rep. 346, 4 So. 108; State v. County Court, 19 Ark. 364, 367; Myers v. English, 9 Cal. 349; Adams v. Barrett, 5 Ga. 414, 415; Chanely v. Bailey, 37 Ga. 536; State v. Mayor, 32 La. Ann. 716; State v. Mayor, etc., of Jersey City, 31 N. J. L. 581, 86 Am. Dec. 244; Sandusky City Bank v. Wilbur, 7 Ohio St. 494, 497; Adams v. Reed, 11 Utah, 502, 40 Pac. 724; and 7 Am. St. Rep. 720, note. In the citing case of Charles River Bridge v. Warren Bridge, 11 Pet. 573, 9 L. 834, McLean, J., said: "If it had not been otherwise laid down in Fletcher v. Peck, I should have doubted whether this inhibition did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which the provision is intended to guard, as from the language of the provision itself." In the quoting case of Myers v. English, supra, Fletcher v. Peck is criticised as applied to executed contracts, upon the ground that an executed contract has no obligation to be impaired, and is to be protected merely on the ground of a vested right. But the contrary is held and the doctrine of Fletcher v. Peck on this point affirmed, not only in quoting cases supra, but also in many other citing cases hereinafter set forth.

In State v. Mayor, etc., supra, as also in Peerce v. Kitzmiller, 19 W. Va. 573, it is held that judgments for damages in tort are not contracts within the protection of the constitutional provision against impairment of the obligation of contracts. In Illinois v. Illinois Central R. R. Co., supra, it is said: "This general language is to be interpreted with reference to the facts and issue in that particular case." In the citing case of Adams v. Reed, 11 Utah, 502, 40 Pac. 724, it is held that a defective deed is an executory contract, and stands upon the same footing as a contract to convey. In the following citing cases it is held that a promise without consideration is not a binding contract within the constitutional provision where no rights have become vested under it; Young v. Harrison, 6 Ga. 155; Trustees of Bishops' Fund v. Rider, 13 Conn. 96; Allen v. Forrest, 8 Wash. 703, 36 Pac. 972. In the citing case of Mexican N. R. Co. v. Mussette, 86 Tex. 715, 26 S. W. 1077, it is said: "Obligations which are protected are such as exist by reason of contract, which never exists without consent or agreement of parties, express or implied; and it cannot be implied when the party in whose favor the obligation exists has no power to prevent it," and it is held that appeal bonds are not based upon the consent of adverse litigants, and that the legislature may retroactively affect the remedy upon such bond. In the citing case of Ex parte Mayer, 27 Tex. 720, it

is held that contracts whose obligations are protected do not include rights growing out of regulations of the government relating to public policy. In the citing case of Bates v. Kimball, 2 D. Chip. 88, it is held that a report of commissioners allowing claims against an estate has the effect of a judgment, and of a perfected contract of record, the obligation of which cannot be impaired by the legislature.

The language of the chief justice as to the invalidity of a law divesting an executed grant is quoted in Grogan v. San Francisco, 18 Cal. 612. In Roach v. Gunter, 44 Ala. 212, 4 Am. Rep. 134, it is held that the State cannot provide that the grantor of a conveyance may rescind it, without the excuse of fraud, accident or mistake. In the citing case of Newlan v. Marsh, 19 Ill. 385, it is held that a statute cannot be operative to take the title of one citizen and confer it upon another, and it must not be so construed. In the citing case of Lowe v. Harris, 112 N. C. 480, 481, 17 S. E. 540, it is said: "No law which divests property out of one person, and vests it in another for his own private purposes, without the consent of the owner, has ever been held a valid exercise of legislative power, in any State of the Union." In the following citing cases it is held that a municipal corporation is estopped by its grant of a franchise, and that it cannot resume, modify or impair the obligation of the grant; Coast Line, etc., R. R. Co. v. Mayor, etc., 30 Fed. 649; St. Louis v. Western Union T. Co., 63 Fed. 70; Stein v. Mobile, 49 Ala. 368, 369, 20 Am. Rep. 285; Los Angeles v. L. A. C. W. Co., 61 Cal. 69; Jewett v. Alton, 7 N. H. 256; Mayor, etc. v. Houston S. R. Co., 83 Tex. 555, 29 Am. St. Rep. 685, 19 S. W. 129. See also cases cited supra, under a preceding syllabus. In Lonsdale v. Moies, 15 Fed. Cas. 863, the proposition that a grant is a contract is relied on to justify calling a deed an agreement.

Constitutional law.— Contracts to which a State is a party are within the obligation clause, and consequently legislative grant, being a contract, may not be subsequently impaired, p. 137.

This doctrine is reaffirmed in State v. Wilson, 7 Cr. 166, 3 L. 303, and Louisiana v. Jumel, 107 U. S. 750, 27 L. 462. In citing cases of Greenwood v. Union F. Co., 105 U. S. 20, 26 L. 964, and Leep v. Railway Co., 58 Ark. 429, 41 Am. St. Rep. 124, 25 S. W. 81, it is observed that the doctrine of Fletcher v. Peck was extended and advanced in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. 629, for the protection of franchises granted by the State to private corporations. In the citing case of Canal Co.'s Case, 83 Md. 626, 35 Atl. 365, it is stated that "the State can no more impair through her judiciary her own contract than she can impair the obligation of the same contract through her legislature."

In the citing case of Commissioners v. Holyoke W. Co., 104 Mass. 448, 6 Am. Rep. 249, the court said: "In the United States it has been settled for more than half a century by the decision of

the Supreme Court that a grant or charter from a State legislature is a contract within the meaning of the article of the Constitution which declares that no State shall pass any law impairing the obligations of contracts." In the citing case of State v. Young, 29 Minn. 525, 9 N. W. 739, it is said: "There seems to have been doubt suggested at an early day that the clause applied to contracts made by a State. The question was first raised in Fletcher v. Peck." In the citing case of Jackson, etc., R. R. Co. v. Davison, 65 Mich. 452, 37 N. W. 544, Moore, J., said: "Since the case of Fletcher v. Peck, no one has supposed that a State can revoke its own grant, without legal proceedings."

In the following citing cases the principle that the Constitution forbids a State to impair the obligations of its own grants and contracts has been recognized and applied to the protection against impairment by subsequent enactment, of acts exempting property from taxation under a contract made by the State: State v. Wilson, 7 Cr. 166, 3 L. 303, State Bank v. Knoop, 16 How. 384, 14 L. 983; State v. County Court, 19 Ark. 364, 367, 373, 374; Seymour v. Hartford, 21 Conn. 486; State v. Southern Bank, 23 La. Ann. 272; State v. Comrs., 37 N. J. L. 251; State v. Branin, 23 N. J. L. 500; Worth v. Railroad Co., 89 N. C. 300, 45 Am. Rep. 686; Matheny v. Golden, 5 Ohio St. 366; though a grant of such exemption is not to be construed as a contract unless made clearly binding as such, London v. Litchfield, 11 Conn. 268; Seymour v. Hartford, 21 Conn. 486; Providence Bank v. Billings, 4 Pet. 563, 7 L. 956; Grand Lodge v. City, 44 La. Ann. 665; Washington University v. Rouse, 42 Mo. 317; Plank Road Co. v. Husted, 3 Ohio St. 583; Iron City Bank v. Pittsburg, 37 Pa. St. 343, and Herrick v. Randolph, 13 Vt. 530; nor is an exemption in another State effective to preclude taxation, Appeal Tax Court v. Patterson, 50 Md. 372. Again the doctrine has been applied to the protection of acts conferring charters and franchises upon private corporations: Dartmouth College v. Woodward, 4 Wheat. 656, 682, 4 L. 664, 670; Planters' Bank v. Sharp, 6 How. 331. 12 L. 460; Davis v. Gray, 16 Wall. 232, 21 L. 457; Greenwood v. Union Freight Co., 105 U. S. 20, 26 L. 964; Pearsall v. Great N. R. R. Co., 161 U. S. 662, 40 L. 843, 16 S. Ct. 708; Gray v. Davis, 1 Woods, 423, 424, F. C. 5,715; Camblos v. Philadelphia, etc., R. R. Co., 4 Fed. Cas. 1106; Bronson v. Taylor, 33 Conn. 117; W. & B. R. R. Co. v. Bowers, 4 Houst. 533; Young v. Harrison, 6 Ga. 154; Hamilton v. Keith, 5 Bush, 462; Montpelier A. Trustees v. George, 14 La. 408, 33 Am. Dec. 590; State v. Noyes, 47 Me. 206; Canal Co. v. Railroad Co., 4 Gill & J. 128, 146; Boston, etc., Corp. v. Salem, etc., R. R. Co., 2 Gray, 31, 34; Michigan State Bank v. Hastings, 1 Doug. (Mich.) 234, 41 Am. Dec. 551; Dow v. Northern R. R. Co., 36 Atl. 534; State v. Branin, 23 N. J. L. 500; Matheny v. Golden, 5 Ohio St. 366; State v Matthews, 3 Jones L. 464; State v. Heyward, 3 Rich. L. 409; Attorney General v. Railroad Co., 35 Wis. 563; but where there is a reserved power to repeal or amend the charter of a corporation, no contract is violated or im-

paired by such repeal or amendment, Penn. College Cases, 13 Wall. 213, 20 L. 553; Miller v. New York, 15 Wall. 489, 21 L. 101; Leep v. Railway Co., 58 Ark. 429, 41 Am. St. Rep. 124, 25 S. W. 81; Bronson v. Taylor, 33 Conn. 117; State v. Northern C. R. R. Co., 44 Md. 165; Comrs. v. Holyoke W. Co., 104 Mass. 448, 6 Am. Rep. 249; Props. v. Haskell, 7 Me. 477; In the Matter of Oliver Lee, etc., Bank, 21 N. Y. 14; M'Laren v. Pennington and Others, 1 Paige, 108; Iron City Bank v. Pittsburg, 37 Pa. St. 343; State v. Brown Mfg. Co., 18 R. I. 24, 25 Atl. 249; though, even in such cases, the property rights of a corporation remain inviolable, Attorney General v. Railroad Co., 35 Wis. 563; People v. O'Brien, 111 N. Y. 48, 7 Am. St. Rep. 702, 721, note, 18 N. E. 702.

Acts and Constitutions of Kentucky and Virginia constituting a compact between those States for the protection of claimants of lands under laws of Virginia are protected by this principle, Green v. Biddle, 8 Wheat. 92, 5 L. 570; as also a patent to lands granted by a State, Williams v. Norris, 12 Wheat. 125, 6 L. 574; Doe v. Buford, 1 Dana, 488; a grant of lands by the King of Spain, United States v. Arredondo, 6 Pet. 738, 8 L. 565; acts granting lands in aid of railroads, Davis v. Gray, 16 Wall. 232, 21 L. 457; Gray v. Davis, 1 Woods, 423, F. C. 5,715; United States v. Minnesota, etc., R. R. Co., 1 Minn. 133; Koenig v. Omaha, etc., R. R. Co., 3 Neb. 383; Railroad Co. v. Commissioners, 36 Tex. 427, 434; but congress may repeal a territorial grant to a railroad company made upon condition which was not fulfilled, Rice v. Minn, etc., R. R. Co., 1 Black, 374, 17 L. 151; and a State may repeal a grant of submerged lands in a harbor made without consideration to a railroad company, so far as not executed by improvements actually made, State v. Illinois C. R. R. Co., 33 Fed. 774, 775; acts granting lands for public squares may not be impaired, United States v. Illinois Cent. R. R. Co., 154 U. S. 244, 38 L. 976, 14 S. Ct. 1019; Warren v. Mayor, 22 Iowa, 358; Cooper v. Alden, Harr. (Mich.) 85; Le Clercq v. Trustees, 7 Ohio, 221, 28 Am. Dec. 643; nor an act granting a franchise to build a track in a street, Port of Mobile v. L. & N. R. R. Co., 84 Ala. 120, 5 Am. St. Rep. 346, 4 So. 108; or a right to construct locks, Enfield Toll B. Co. v. Conn. R. R. Co., 7 Conn. 48; a State contract leasing a State's prison is inviolable, McCauley v. Brooks, 16 Cal. 30; a State grant of swamp lands, Montgomery v. Kasson, 16 Cal. 194; legislative grant of lands to a city or town, Grogan v. San Francisco, 18 Cal. 612, 613; Richardson v. Brown, 6 Me. 358; In re Malone's Estate, 21 S. C. 449; Brownsville v. Basse, 36 Tex. 501; or to a county, Galveston v. Tankersley, 39 Tex. 657; lands granted in aid of schools, State v. Springfield Tp., 6 Ind. 97; Roberts v. M. & Ky., etc., R. R. Co., 43 Kan. 108, 22 Pac. 1008; Simmons v. Holmes, 49 Miss. 140; Grammar School v. Burt, 11 Vt. 641; Grammar School v. Bailey, 62 Vt. 476, 477, 20 Atl. 823; but congress with the consent of the State at any time prior to survey could change the terms of the grant of the

sixteenth and eighty-sixth section in aid of schools so as to except mineral lands, and grant others in lieu thereof, Haydenfeld v. Daney, etc., Co., 10 Nev. 310; other grants of land from the State are protected, Hilliard v. Connolly, 7 Ga. 179; Winter v. Jones, 10 Ga. 196, 54 Am. Dec. 382.

The following have also been held inviolable contracts under the doctrine of the leading case: An act granting a lottery franchise for a license paid therefor, Boyd v. State, 46 Ala. 334; the executed compact of the States with the Federal government, Hawkins v. Filkins, 24 Ark. 319; Chanceley v. Bailey, 37 Ga. 536; an act granting to a purchaser at tax sale the right to repayment with interest of all money paid, Corbin v. Comrs., 3 Fed. 362, 1 McCrary, 527; and the right to a deed within a specified time, Hull v. State, 29 Fla. 89, 30 Am. St. Rep. 99, 11 So. 99; Bruce v. Schuyler, 9 Ill. 276, 278, 46 Am. Dec. 458, 460; a legislative grant of a right to take tolls upon a turnpike; Derby Tp. v. Parks, 10 Conn. 541, 27 Am. Dec. 704; a municipality's lighting contract, Blood v. Manchester Elec. L. Co., 39 Atl. 336; an exclusive right to erect a toll bridge, Enfield T. B. Co. v. Hartford, etc., R. R. Co., 17 Conn. 61, 42 Am. Dec. 723; Piscataqua Bridge v. N. H. Bridge, 7 N. H. 68. See Charles River Bridge v. Warren Bridge, 7 Pick. 507, 11 Pet. 420, 9 L. 773; Chenango B. Co. v. Binghamton B. Co., 27 N. Y. 92, 119; a State indorsement of bonds of railroad companies, except as adjusted with the consent of bondholders, State v. Cobb, 64 Ala. 152; a State appropriation for payment of its obligations, Carr v. State, 127 Ind. 207, 22 Am. St. Rep. 627, 26 N. E. 779; State railroad bonds, which cannot be impaired by constitutional amendment, State v. Young, 29 Minn. 525, 529, 531, 9 N. W. 739, 741, 743; a legislative grant of a charity, Prince William S. Board v. Stuart, 80 Va. 80, per Lewis, J., majority holding contra that the charity was within the scope of general legislative power; a grant from the State authorizing the obstruction of a stream by a dam, Glover v. Powell, 10 N. J. Eq. 229; People v. Platt, 17 Johns. 215, 8 Am. Dec. 388; State v. Glenn, 7 Jones L. 327; a State contract for the construction of a public work, Danolds v. State, 89 N. Y. 45, 46, 42 Am. Rep. 280; an act granting a right to cut a canal through the State, State v. Burgess, 23 La. Ann. 227; a State grant of a right of wharfage, Langdon v. Mayor, 93 N. Y. 156; a sale of land by commissioner appointed by the legislature, Stanmire v. Taylor, 3 Jones L. 213; and an act funding the public debt and making coupons receivable for demands due the State, Antoine v. Wright, 22 Gratt. 872. See also 35 Am. St. Rep. 533, note, and cases cited under a preceding syllabus.

In the citing case of Boston Water P. Co. v. Boston, etc., R. R. Co., 23 Pick. 394, it is held that a State grant of land does not preclude the taking of the land by the State by the power of eminent domain, upon payment of compensation. In the citing

case of Allen v. Forrest, 8 Wash. 703, 36 Pac. 972, it is held that a law granting to the improver of tide lands a right to purchase them from the State conferred no vested right prior to purchase, and that as to cases when the privilege of purchase had not been exercised, the legislature might repeal the law, and provide for use and occupation of the lands for other purposes. In the citing case of Russell v. Barney, 6 McLean, 582, F. C. 12,152, it is held that the principle, that a grant made pursuant to an act of the legislature may not be impaired by the State, is inapplicable to a statute of limitations operating conditionally to defeat the title granted. In the citing case of The Palo Alto, 2 Ware (Dav.), 356, F. C. 10,700, it is held that the principle of the cited case is inapplicable where a donation from the government is not delivered or is coupled with a condition precedent to be performed by the grantee. In the citing case of State v. Young, 29 Minn. 529, 531, 9 N. W. 741, the question is discussed as to how far there may be an obligation resting upon a State for which there may be no judicial remedy. In the citing case of Carr v. State, 127 Ind. 207, 22 Am. St. Rep. 627, 26 N. E. 779, it is said that the State may defeat enforcement of its obligation by failure to make an appropriation, and that it cannot be sued. In the citing case of Poindexter v. Greenhow, 114 U. S. 286, 29 L. 191, 5 S. Ct. 912, it is said: "It is true that no remedy for breach of its contract by a State by way of damages for its compensation, or by means of process to compel its performance, is open in the courts of the United States, by a direct suit against the State itself on the part of the injured party, being a citizen of another State or subject of foreign State. But it is equally true that whenever in a controversy between parties to a suit of which these courts have jurisdiction, the question arises upon the validity of a law of a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequence to the rights of the litigants, may be the result of the determination."

Constitutional law.— The Federal limitations upon State power are founded upon the desire to protect life and property from the sudden and strong passions to which men are exposed, and the Constitution contains what may be deemed a bill of rights for the people of each State, p. 138.

Fletcher v. Peck is quoted to this point in Cummings v. Missouri, 4 Wall. 322, 18 L. 362; United States v. Johnson Co., 5 Dillon, 212, F. C. 15,485; Bonaparte v. Camden Co., 1 Bald. 220, F. C. 1,617; Jacoway v. Denton, 25 Ark. 643; Weidenger v. Spruance, 101 Ill. 298; State v. Johnson, 12 Minn. 485, 93 Am. Dec. 248; Garland v. Brown, 23 Gratt. 176. In the last cases cited the same principle was held applicable to a State Constitution.

Bills of attainder may affect the life of an individual or confiscate his property, or may do both, p. 138.

The language of Chief Justice Marshall on this point is quoted in Norris v. Doniphan, 4 Met. (Ky.) 434, where an act of 1862 confiscating the property of rebels as a punishment for treason was held unconstitutional. It is said in that case that a "bill of attainder includes a bill of pains and penalties," and the same is said in the citing case of In re Yang Sing, 13 Sawy. 485, 36 Fed. 439, where it is held that a legislative act which undertakes to inflict upon Chinese the punishment of banishment or exile from the United States is void as being a bill of attainder. It is cited also in Ex parte Law, 35 Ga. 302, 15 Fed. Cas. 10, and In re Shorter, 22 Fed. Cas. 19, which affirm the invalidity of the test oath act of congress of 1865; in Myers v. Sanders, 7 Dana, 519, where it is held that an act making a patent from the State a subject of forfeiture was a bill of pains and penalties.

Ex post facto law is one which renders an act punishable in a manner in which it was not punishable when committed, p. 138.

This definition has been referred to and relied upon by the citing cases as follows: Cummings v. Missouri, 4 Wall. 326, 18 L. 364, which holds a test oath imposed by the Missouri Constitution to be ex post facto; Gut v. Minnesota, 9 Wall. 38, 19 L. 574, which holds that a law changing the place of trial of a criminal case, though passed subject to the commission of the offense or the finding of the indictment, is not invalid; Lapeyre v. United States, 17 Wall. 206, 21 L. 611, where Hunt, J., expressed the opinion that an act previously lawful cannot be made unlawful and punishable whether the matter was considered as criminal or civil in its nature; Burgess v. Salmon, 97 U. S. 384, 24 L. 1106, where the same doctrine is stated and it is held that an act increasing a duty on tobacco and imposing a penalty for nonpayment is ex post facto as applied to a lesser duty paid before the act took effect; Ex parte Medley, 134 U. S. 171, 33 L. 840, 10 S. Ct. 387, where it was held that an act providing solitary confinement before the execution of a murderer was ex post facto as to a crime committed before its passage; Whitney v. Emmet, 1 Bald. 316, F. C. 17,585, where it is held that a law construed as imposing a forfeiture of the rights of a plaintiff in a patent case, when he was entitled to treble damages for the injury, would be ex post facto; Hart v. State, 40 Ala. 38, 88 Am. Dec. 756, which holds that a law authorizing a conviction upon less evidence than was required when the offense was committed is ex post facto; Ex parte Law, 35 Ga. 310, 15 Fed. Cas. 12, where it is said that the definition of Chief Justice Marshall is approved by Chancellor Kent (Com. 409), and held that the retrospective part of the test oath act of congress of 1865 was a bill of attainder and ex post facto; Blake's Case, 1 Blackf. 483, which cites Fletcher v. Peck as to the nature of an ex post facto law, but holds that a retrospective act requiring an attorney to take oath that he has not engaged in a duel is not ex post facto; Wooley v. Watkins, 2 Idaho, 566, and Shepherd v. Grimmett, 2 Idaho, 1128, 31 Pac. 795, and

Anderson v. Baker, 23 Md. 566, 582, 605, where it is held that a law requiring electors to verify their qualifications by oath was not ex post facto; Strong v. State, 1 Blackf. 198, n, 2, where the definition is held not to preclude an act changing the punishment of an offense after its commission, from stripes to confinement in the State prison; Wilson v. O. & M. R. W. Co., 64 Ill. 546, 16 Am. Rep. 568, where it is held that an act substituting a new punishment for violation of a prior prohibited act is ex post facto; Weidenger v. Spruance, 101 Ill. 298, where Mr. Justice Dickey is of opinion that a law imposing a new liability upon holders of fully paid up stock in a corporation was in the nature of a bill of attainder and an ex post facto law; In re Petty, 22 Kan. 482, where it is said that the definition given by Chief Justice Marshall "is subject to the qualification that when the new law mitigates the character or punishment of a crime already committed, it does not fall within the prohibition of the Constitution," but it is held that a law imposing one year's imprisonment in addition to the penalty of death, as to crimes previously committed, is ex post facto and void; Lynn v. State, 84 Md. 78, 35 Atl. 22, where it is held that a retrospective act for the benefit of the accused, lessening the penalty, is not ex post facto; In re Miller, 110 Mich. 677, 64 Am. St. Rep. 377, 68 N. W. 990, upholding a statute denying to convicts serving a second term any reduction in sentence for good behavior, though the first offense was prior to its enactment (see 64 Am. St. Rep. 379, note, on this point); Murphy and Glover Test Oath Cases, 41 Mo. 371, where Holmes, J., is of opinion that a retrospective test oath act is a bill of pains and penalties merging ex post facto elements.

Other citing cases have affirmed and relied upon the definition as follows: State v. Johnson, 12 Minn. 484, 93 Am. Dec. 247, where it is held that an act allowing evidence of an indirect character to prove marriage under an indictment for polygamy was ex post facto as applied to past offenses; State v. Thompson, 141 Mo. 417, 42 S. W. 951, which holds that a law regulating the evidence and mode of procedure in a criminal case and providing for a comparison of handwriting is not ex post facto as applied to crimes previously committed; State v. Ryan, 13 Minn. 375, where it is held that an act allowing seven peremptory challenges to the State upon the trial of offenses committed before its passage was not ex post facto; State v. McDonald, 20 Minn. 139, where it is held that an act adding an alternative punishment of fine and imprisonment for an offense previously punishable only by imprisonment, as to offenses previously committed, is ex post facto; Lindzey v. State, 65 Miss. 546, 7 Am. St. Rep. 677, 5 So. 100, holding ex post facto an act precluding a defense to a misdemeanor, and changing, without mitigating, the punishment; Moore v. State, 43 N. J. L. 217, where the definition of Chief Justice Marshall was criticised as not providing for the validity of a mitigation of punishment, and it was held that an act authorizing a trial and punishment of one against whose

punishment limitation had previously run, was ex post facto, and the quoting case, State v. Moore, 42 N. J. L. 232, was overruled on that point, Van Syckel, J., dissenting, pp. 231, 235; Hartung v. People, 22 N. Y. 104, 109, where Chancellor Kent's approval of Chief Justice Marshall's definition is referred to and it is held that an act adding imprisonment at hard labor to the death penalty, as to persons previously convicted, was ex post facto; Shepherd v. People, 25 N. Y. 415, where Sutherland, J., says, in reference to the definition quoted: "Add to this 'or which increases the punishment with which the act was punishable when committed,' and I think the definition will be as complete and certain and safe as can well be made," but it was held that an act changing the punishment for arson in the first degree from death to imprisonment for life could not be said with certainty not to increase the punishment, and was ex post facto as applied to previous offenses; Green v. Shumway, 39 N. Y. 424, where a retrospective test oath law was held ex post facto; Holt v. State, 2 Tex. 364, where an act requiring the jury to assess the punishment to be inflicted was held not ex post facto as applied to prosecution pending; Murray v. State, 1 Tex. App. 428, where it was held that a change of Constitution taking away an alternative power of the jury to substitute imprisonment for life for the death penalty, secured by a previous Constitution, as applied to previous offenses, is ex post facto; and In re Wright, 3 Wyo. 483, 27 Pac. 567, where it is held that an act substituting trial by information instead of by indictment is not ex post facto as to previous offenses. See also valuable note in 37 Am. St. Rep. 584, 587.

In the following citing cases it is held that the doctrine of ex post facto laws applies to criminal cases only, and not retrospective laws affecting civil cases or vested rights: Watson v. Mercer, 8 Pet. 110, 8 L. 884; Baltimore, etc., R. R. Co. v. Nesbit, 10 How. 402, 13 L. 472; Carpenter v. Commonwealth, 17 How. 463, 15 L. 129; Society v. Wheeler, 2 Gall. 138, F. C. 13,156; Ex parte Garland, 4 Wall. 390, 18 L. 374; Holmes v. Bank of Norfolk, 12 Ala. 417; Wilder v. Lumpkin, 4 Ga. 215; Martindale v. Moore, 3 Blackf. 277, 278; Baugher v. Nelson, 9 Gill, 305, 52 Am. Dec. 698; Anderson v. Baker, 23 Md. 566, 582, 605; Davis v. Minor, 1 How. (Miss.) 192, 28 Am. Dec. 330; Rich v. Flanders, 39 N. H. 313, 376; Suydam v. Bank of New Brunswick, 3 N. J. Eq. 117; Green v. Shumway, 39 N. Y. 432; Burch v. Newburg, 10 N. Y. 391; Grim v. Weisenburg S. Dist., 57 Pa. St. 435, 98 Am. Dec. 238; Lane v. Nelson, 79 Pa. St. 410; Ex parte Hunter, 2 W. Va. 159; Ex parte Quarrier, 4 W. Va. 223.

For a full discussion of ex post facto laws, see note to Calder v. Bull, 3 Dall. 386–400, 1 L. 648.

Constitutional law.— A provision of the Constitution, afterwards changed by amendment, considered in arguing as to a question of construction, p. 139.

In the citing case of Hoffman v. Harrington, 28 Mich. 109, it is said: "A constitutional provision may have a modified application in consequence of a construction based on its original connection with clauses erased by amendment." The citing case of Norris v. Clinkscales, 47 S. C. 506, 25 S. E. 804, applies the cited case to a change in the language in a section of a new Constitution as compared with the same section in the other Constitution.

Indian lands.— The reservation of Indian lands did not alter the boundaries of the colony, and the State was seized in fee of such lands, notwithstanding the Indian title which was to be respected until extinguishment, pp. 142, 143.

In the citing cases of Johnson v. McIntosh, 8 Wheat. 592, 5 L. 693; Cherokee Nation v. State, 5 Pet. 48, 8 L. 42; Clark v. Smith, 13 Pet. 201, 10 L. 126; Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 754, 23 L. 643, it is held that the Indian title was in its nature a mere right of occupancy, which was incapable of alienation. In the citing case of Cherokee Nation v. Georgia, 5 Pet. 57, 70, 8 L. 45, 50, Mr. Justice Thompson approves of the opinion of Mr. Justice Johnson in Fletcher v. Peck, pp. 146, 147, that the Indian nations have a right of soil, and says: "Whether they have a right of soil or a right of occupancy, they are entitled to protection according to Fletcher v. Peck." In the citing case of Elk v. Wilkins, 112 U. S. 108, 28 L. 648, 5 S. Ct. 48, the remarks of Mr. Justice Johnson in Fletcher v. Peck, 146, are quoted that certain tribes have totally extinguished their national fire and submitted themselves to the laws of the States, and it is held that an Indian who is a member of a tribe recognized by the government, though residing in a State, is not a citizen of the United States under the fourteenth amendment.

In the citing cases of Blecker v. Bond, 3 Wash. C. C. 542, F. C. 1,534, and Gilman v. Brown, 1 Mason, 212, F. C. 5,441, the doctrine of Fletcher v. Peck as to the nature of the Indian title and the power of the State to grant lands in fee was approved. In the citing case of Goodfellow v. Muckey, 1 McCrary, 244, F. C. 5,537, it is said: "It has been uniformly held by the Supreme Court that the Indian title was but a mere right of occupancy, the fee remaining in the United States," and it is held that the treaty with the Pottawatomie tribe of Indians did not amount to a grant in presenti to that tribe. In the citing case of Thompson v. Doaksum, 68 Cal. 595, 10 Pac. 200, it is held that congress has control over all Indian lands, and that lands in California in the occupancy of Indian tribes at the date of the treaty of Hidalgo because part of the public domains are subject to pre-emption. In the citing case of East Haven v. Hemingway, 7 Conn. 198, it is held that the Indians had no legal capacity to sell lands occupied by them, and the legislature could grant them or ratify the sale of them to a town. In the citing case of Doe v. Avaline, 8 Ind. 13, it is held

that a legislative designation of Indians, as having one-eighth of Indian blood, applies to an act for the relief of the Miami Indians. In the citing case of Roberts v. M., K. & T. R. R. Co., 43 Kan. 108, 22 Pac. 1008, it is held that a grant of the sixteenth and thirty-sixth sections to the State included those occupied by Indians. In the citing case of Caldwell v. State, 1 Stew. & P. 347, it is held that the State had the right to extend its civil and criminal jurisdiction over any tract of Indian country within its limits, though the Indian title then is not extinguished. In the citing case of Gaines v. Hale, 26 Ark. 184, it was held that though the United States could convey in fee simple lands occupied by Indian tribes before the Indian title was extinguished, yet it was the policy of the government to protect such land, and that the right of pre-emption did not extend to such lands. In the citing case of Veale v. Maynes, 23 Kan. 28, it is held that the treaty of 1846 with the Pottawatomie Indians only recognized their possessory right, but that under the treaties of 1861 and 1867 conveyances were contemplated to adult male heads of families who left the tribe and became citizens and that a patent to a head of a family conveyed title as against an allotment to another member. In Breaux v. Johns, 4 La. Ann. 142, 143, 50 Am. Dec. 557, 558, it is held that Indian tribes in Louisiana to whom lands were allotted by the laws of Spain, were never invested with ownership, but the title was in the United States, who could grant the fee subject to the Indian right of occupancy. In the citing case of Montgomery v. Ives, 13 Sm. & M. 175, it is held that the Indian title not being extinguished in lands reserved under the proclamation of George II., a grant by the royal governor in 1772 had no validity. In the citing case of Utah Mining Co. v. Mining Co., 6 Utah, 196, 21 Pac. 1007, it is held that the government of the United States having succeeded to the title in fee simple of lands occupied by the Indians subject to their right of occupancy, the treaty-making power of the United States by treaty with the Chippewa Indians could confer upon the land department power to dispose of lands to heads of families without the consent or ratification of congress. In the citing case of Veeder v. Guppy, 3 Wis. 526, it is held that the possession of land by Indians did not affect the validity of the government grant, and that the right of Indians to occupancy was not involved in a suit between individuals claiming under the same grant of congress. In re Narragansett Indians, 40 Atl. 368, held a conveyance of lands by Indian sachem, reserving certain lands to himself and heirs forever, did not vest in him a fee in the part reserved.

Eminent domain.— Consists of the power to oblige a citizen to sell and convey, when the public necessities require it, p. 145, opinion of Johnson, J.

This proposition is quoted and applied in Chambers v. C. & G. R. R. Co., 69 Ga. 322; State v. Nemaha Co., 7 Kan. 574; Buller v. Sewer

Commission, 39 N. J. L. 669; Russel v. Mayor, 2 Den. 472, and White v. Nashville, etc., R. R. Co., 7 Heisk. 539.

Feigned case should not be decided, p. 147, opinion of Johnson, J.

In the citing case of Smith v. Brown, 3 Tex. 372, 49 Am. Dec. 749, it is held that a fictitious case brought for the purpose of obtaining the opinion of the court on the matters presented by it, is a contempt of court, and the court will not give an opinion on an abstract question of law, where a case is made up for that purpose. In Am. W. P. Co. v. Heft, 131 U. S. 93, Appx., the opinion of Johnson, J., is referred to as favoring the dismissal of an appeal where it appears that the suit was fictitious and collusive. Cited also in Ward v. Alsup, 100 Tenn. 739, 740, 46 S. W. 574, reviewing authorities upon this point at length, but dismissing appeal on other grounds.

Compromise by State and the United States of controversy as to vacant lands will not now be disturbed, p. 142.

Cited with reference to this statement in Rhode Island v. Massachusetts, 12 Pet. 729, 9 L. 1262; Dred Scott v. Sandford, 19 How. 502, 15 L. 741; Seneca Nation v. Christie, 126 N. Y. 137, 27 N. E. 279, discussing various matters as to territory of United States; In re Narragansett Indians, 40 Atl. 368, as to Rhode Island settlement with Indians.

Miscellaneous citations.— Fletcher v. Peck is cited in Giddings v. San Antonio, 47 Tex. 556, 26 Am. Rep. 326, ascribing the constitutional requirement that the title of an act state its contents, to the frauds under the Yazoo act of Georgia of 1795, out of which Fletcher v. Peck arose; in Van Dolsen v. New York, 17 Fed. 818, 21 Blatchf. 456, as an instance of title traced to royal grant from the crown. Cited also in Montgomery v. Ives, 13 Smedes & M. 173, and In re Turner, 5 Ohio, 543, but not in point.

6 Cr. 148–170, 3 L. 181, MASSIE v. WATTS.

(Affirmed by Kerr v. Watts, 6 Wheat. 557, 558, 560, 5 L. 330, 331.)

Equity Jurisdiction.— In questions of contract, trust and fraud, equity has jurisdiction wherever person is found, though its decree may affect lands without its jurisdiction, p. 158.

The number of citations sufficiently demonstrates the great influence and importance of this case. They cite and apply the doctrine as follows: Pennoyer v. Neff, 95 U. S. 723, 24 L. 569, holding, however, that such exercise of jurisdiction does not interfere with control of property by State of situs; Ager v. Murray, 105 U. S. 131, 26 L. 943, subjecting patent right to payment of judgment against patentee; Hart v. Sansom, 110 U. S. 155, 28 L. 103, 3 S. Ct. 589, holding that decree removing cloud from title to land within State does not bar nonresident defendant, cited by publication, from suing in Circuit Court to recover land; Cole v. Cunningham, 133 U. S. 117, 118, 33 L. 543, 10 S. Ct. 272, 273, holding that equity may

enjoin citizens of one State from prosecuting suits in another; similarly in Cole v. Young, 24 Kan. 438; Hayden v. Yale, 45 La. Ann. 371, 40 Am. St. Rep. 240, 12 So. 637; Dehon v. Foster, 4 Allen, 551, and Williams v. Fitzhugh, 37 N. Y. 450; in Carpenter v. Strange, 141 U. S. 106, 35 L. 647, 11 S. Ct. 966, holding, however, that such decree does not bind courts of State of land's situs; in dissenting opinion to Cherokee Nation v. Georgia, 5 Pet. 79, 8 L. 53, denying injunction against enforcement of certain Georgia laws concerning Cherokee territory; Pierpont v. Fowle, 2 Wood. & M. 39, F. C. 11,152, upholding right of equity in proper case to settle dispute as to title to copyright; Briggs v. French, 1 Sumn. 504, F. C. 1,870, asserting equity jurisdiction over constructive trust though lands to be affected are without its jurisdiction; Northern Indiana R. R. Co. v. Michigan Cent. R. R. Co., 15 How. 243, 14 L. 679, holding, however, that such jurisdiction does not include local actions as to land; Picquet v. Swan, 5 Mason, 42, F. C. 11,134, distinguishing local actions from matters collateral and binding upon conscience; Baker v. Biddle, 1 Bald. 416, F. C. 764, holding that at any stage of equity cause defendant may object that plaintiff has remedy at law; Leland v. The Ship Medora, 2 Wood. & M. 114, F. C. 8,237, holding that equity having jurisdiction for one purpose may act as to incidental legal matters; Cheever v. Wilson, 9 Wall. 121, 19 L. 607, holding that decree may be enforced by proper proceedings in situs rei, if valid; Clark v. Hammett, 27 Fed. 341, holding that decree against nonresident quieting title to lands within jurisdiction does not bar his subsequent action of ejectment; Remer v. McKay, 54 Fed. 434, where suit was to remove cloud cast upon title to Iowa land by void decree of Iowa court against Illinois defendant; Lynde v. Columbus, C. & I. Ry. Co., 57 Fed. 996, holding that equity decree foreclosing mortgage on railroad situate in two States, without execution, does not bar suit in another State between same parties to foreclose same mortgage; Municipal Ins. Co. v. Gardiner, 62 Fed. 956, holding that suit to enforce contract to convey land should be brought where one of the parties resides; Woodbury v. Allegheny & K. R. R. Co., 72 Fed. 374, 375, holding that courts of either State may foreclose mortgage of railroad situated in two States; Guild v. Guild, 16 Ala. 125, holding that court having jurisdiction of husband can decree, to nonresident wife, settlement out of her separate estate; Pillow v. King, 55 Ark. 639, 18 S. W. 765, upholding decree of Tennessee court compelling restoration of deed of Arkansas land, where court had jurisdiction of parties; Rourke v. McLaughlin, 38 Cal. 201, enforcing for nonresident plaintiff against resident defendant, contract to convey California lands; Le Breton v. Superior Court, 66 Cal. 29, 4 Pac. 779, holding that action for settlement of trust in real and personal property need not be brought in county of situs of real property; Smith v. Davis, 90 Cal. 30, 25 Am. St. Rep. 94, 27 Pac. 27, appointing trustees to carry out trust deed of foreign

lands; Winn v. Strickland, 34 Fla. 630, 16 So. 612, holding that such decrees may bind parties in other State as to matters properly determined; Adams v. Lamar, 8 Ga. 94, refusing partition of local lands against nonresident not consenting to court's jurisdiction; Engel v. Scheuerman, 40 Ga. 210; S. C., 2 Am. Rep. 574, restraining resident from collecting, in another State, judgment obtained therein; Kennedy v. Northup, 15 Ill. 153, affirming equity jurisdiction in cases of fraud; Alexander v. Tolleston Club, 110 Ill. 77, enjoining one resident in favor of another from interfering with right of way over lands in another State; Johnson v. Gibson, 116 Ill. 302, 6 N. E. 209, compelling conveyance of lands in foreign jurisdiction in case of fraud; Cloud v. Greasley, 125 Ill. 319, 17 N. E. 828, denying specific performance of contract as to foreign lands because of noncompliance with statute of frauds; Hayes v. O'Brien, 149 Ill. 410, 37 N. E. 74, decreeing specific performance of contract to convey land in another county; McGregor v. MacGregor, 9 Iowa, 78, 80, holding New York decree as to Iowa lands conclusive upon Iowa courts; Gilliland v. Inabnit, 92 Iowa, 50, 51, 60 N. W. 212, 213, holding that Kentucky court may enforce execution of trust in Iowa lands, though title is essential point; Frank v. Peyton, 82 Ky. 153, upholding jurisdiction of Kentucky court to enjoin conveyance of Illinois lands, and to enforce contract to convey; McQuerry v. Gilliland, 89 Ky. 440, 12 S. W. 1038, allowing action in Kentucky to enforce conveyance of lands in Iowa.

Elsewhere citing cases have affirmed and applied the principle as follows: Reed v. Reed, 75 Me. 269, holding that equity may pass upon deed and mortgage of foreign lands; Brown v. Chesapeake, etc., Canal Co., 73 Md. 607, upholding power of Maryland court to sell canal in entirety though partly located outside jurisdiction; Binney's Case, 2 Bland Ch. 145, discussing right of Maryland court to control expenditures of resident corporation in other States where it held property; Brown v. Desmond, 100 Mass. 269, issuing process to enforce Rhode Island decree of specific performance of contract to convey Massachusetts lands; Carver v. Peck, 131 Mass. 292, denying equity's jurisdiction to enforce payment of debt out of property not reachable by execution, where law judgment was not had; Jenkins v. Lester, 131 Mass. 357, refusing, as against resident trustee, enforcement of trust created by decree of foreign court having jurisdiction thereof; Graydon v. Church, 7 Mich. 53, allowing New York assignee for benefit of creditors to file bill to foreclose Michigan mortgage included in assignment; Edson v. Cumings, 52 Mich. 55, 17 N. W. 694, annulling local judgment and enjoining proceedings thereon in Ohio; McKinney v. Curtiss, 60 Mich. 621, 27 N. W. 696, upholding equity's jurisdiction in case of fraud though triable at law; Great Falls Mfg. Co. v. Worster, 23 N. H. 468, enjoining resident defendant from injuring orator's property in Maine; March v. Eastern R. R. Co., 40 N. H. 575, 77 Am. Dec.

744, holding that equity may enforce, in New Hampshire, contract made and to be performed in Massachusetts; Lindley v. O'Reilly, 50 N. J. L. 641, 7 Am. St. Rep. 806, 15 Atl. 382, holding that decree in such suit imposes mere personal obligation, but does not transfer or vest title in foreign jurisdiction; Bullock v. Bullock, 51 N. J. Eq. 446, 447, 27 Atl. 436, affirmed in 52 N. J. Eq. 565, 46 Am. St. Rep. 531, 30 Atl. 677, refusing to execute New York decree ordering execution of mortgage on New Jersey lands as security for alimony; United States v. Maxwell Land Grant Co., 5 N. Mex. 304, 21 Pac. 155, to direct point of principal case; Mitchell v. Bunch, 2 Paige, 616, 22 Am. Dec. 674, holding that equity may compel defendant within jurisdiction to pay debts out of property elsewhere; Sutphen v. Fowler, 9 Paige, 282, ordering resident infant heir to perform ancestor's contract to convey Michigan lands; Shattuck v. Cassidy, 3 Edw. Ch. 153, enforcing contract as to foreign lands, defendants having submitted to jurisdiction; De Klyn v. Watkins, 3 Sandf. Ch. 187, setting aside conveyance of foreign lands and ordering reconveyance; Newton v. Bronson, 13 N. Y. 591, 67 Am. Dec. 91, decreeing specific performance of contract to convey Illinois lands; Gardner v. Ogden, 22 N. Y. 336, 78 Am. Dec. 198, ordering reconveyance of foreign lands; Williams v. Fitzhugh, 37 N. Y. 450, ordering cancellation of Ohio mortgage given to secure New York contract void for usury; in dissenting opinion to Picket v. Johns, 1 Dev. Eq. 135, which held South Carolina decree declaring conveyance of North Carolina lands void, a nullity; Burnley v. Stevenson, 24 Ohio St. 478, 15 Am. Rep. 625, holding Kentucky decree ordering conveyance of Ohio lands, though unexecuted, conclusive upon parties and privies; Johnston v. Wadsworth, 24 Or. 498, 34 Pac. 14, enforcing contract to purchase lands in another county; Robertson v. Auld, 6 Yerg. 410, holding suit by locator for locative interest not necessarily local, may be personal; Pickett v. Ferguson, 86 Tenn. 650, 651, 652, 8 S. W. 388, 389, passing without decision, question as to court's jurisdiction to enforce constructive trust in foreign lands; King v. Pillow, 90 Tenn. 288, 16 S. W. 469, compelling restoration of fraudulently destroyed deed of Arkansas lands; Mosby v. Gisborn, 54 Pac. 127, allowing action to set aside judgment in the county where rendered, though lands elsewhere affected; Dickinson v. Hoomes, 8 Gratt. 411, 413, compelling Virginia heirs to pay ancestor's debts out of lands descended to them in Kentucky; Virginia v. Levy, 23 Gratt. 35, holding conclusive upon Virginia courts, decree of New York court holding charitable devise of Virginia lands by New York resident void; Barger v. Buckland, 28 Gratt. 863, sustaining power of Circuit Court to direct sale of land lying partly in Virginia and partly in West Virginia; Davis v. Morris's Exrs., 76 Va. 30, holding Virginia trustee's estate liable for breach of trust in Mississippi lands, beneficiaries being Virginia residents; Poindexter v. Burwell, 82 Va. 513, approving Virginia process, di-

recting resident trustee to satisfy personally binding contract out of individual interest in trust lands in Texas; State v. Superior Court, 7 Wash. 307, 34 Pac. 1103, holding action to enforce trust and have accounting thereunder transitory; Leach v. Buckner, 19 W. Va. 45, correcting decree of settlement between Ohio court and domiciliary administrator, vitiated by fraud, same person being ancillary administrator in West Virginia; Chapman v. Railroad Co., 26 W. Va. 309, where, Pennsylvania court having directed sale of all title held in West Virginia lands under mortgage, West Virginia court upheld its right to determine what such title was. See also valuable notes in 67 Am. Dec. 96, 97, 98, 100, and 40 Am. Rep. 125.

Distinguished in Jones v. Fletcher, 42 Ark. 446, 447, where Arkansas statute gave equity judgment as to foreign lands, effect of judgment in rem; Blackman v. Wright, 96 Iowa, 551, 65 N. W. 846, holding New York decree ordering conveyance of lands in Iowa not binding upon prior grantees of parties; Mussina v. Alling, 11 La. Ann. 572, refusing to direct conveyance of Texas lands in case of fraud; Worthington v. Lee, 61 Md. 542, holding that Maryland courts cannot decree performance of covenants of renewal as to parties outside jurisdiction, though lands are within it; Texas & Pacific Ry. Co. v. Gay, 86 Tex. 589, 26 S. W. 605, holding Circuit Court of Louisiana could not appoint receiver of Texas property, and confer upon him power to take possession and administer.

Boundaries of entry.— If by any reasonable construction of an entry it can be supported, the courts will support it, p. 165.

Cited in Green v. Neal, 6 Pet. 296, 8 L. 404, holding decisions of State courts upon similar local statutes binding upon Federal courts; McArthur v. Nevill, 3 Ohio, 186, holding that entry should be construed, if possible, according to the intentions of the locator.

Boundaries of entry.— In construing entry, the rectangular form should be preserved in absence of controlling calls directing otherwise, p. 167.

Cited and applied in Doe v. Porter, 3 Ark. 57, 36 Am. Dec. 451, construing boundaries in deed, quantity yielding to distance which yields to objects; White v. Gay, 9 N. H. 131, 31 Am. Dec. 226, holding that of inconsistent boundaries retain those best comporting with prevailing design; Buckley v. Gilmore, 12 Ohio, 78, sustaining ambiguous entry by retaining most important boundaries; Ferguson v. Bloom, 144 Pa. St. 565, 23 Atl. 52, construing location as rectangle by presumptions as to boundaries; Hull v. Fuller, 7 Vt. 105, holding that redundancy of description should not overcome intentions of parties; Smith v. Chapman, 10 Gratt. 474, holding that more material and certain calls should control in case of conflict; McNeel v. Herold, 11 Gratt. 315, discussing disputed boundaries of claims whose calls intersect.

Criticised in Corlies v. Little, 14 N. J. L. 378, as to its holding, in interpreting boundaries in deed.

Trusts —Agency.— Where agent acting for principal surveys land and takes patent in his own name, he becomes trustee for principal, p. 170.

Cited and doctrine applied in Skerrett v. Presbyterian Society, 41 Ohio St. 630, holding that such trust attaches to lands in hands of agent's grantee; Gardner v. Ogden, 22 N. Y. 341, 78 Am. Dec. 202, holding broker's clerk trustee where he purchased under knowledge obtained in his employment; Columbus Co. v. Hurford, 1 Neb. 160, applying rule to agent acting for principal and purchasing in his own name; Rose v. Hayden, 35 Kan. 109, 57 Am. Rep. 147, 10 Pac. 556, applying rule where agent to purchase land bought and took title in his own name; Irvine v. Marshall, 20 How. 565, 15 L. 998, discussing jurisdiction of United States courts to enforce such trusts; Felix v. Patrick, 145 U. S. 327, 36 L. 724, 12 S. Ct. 865, holding as trustee for Indian one who illegally located land taken by fraud from latter; Chaffin v. Hull, 49 Fed. 528, applying rule where agent bought outstanding claim against principal's land which latter wished to contest if he could not acquire by purchase.

Miscellaneous.— Cited also in United States v. Wonson, 1 Gall. 18, F. C. 16,750, as sustaining right of Circuit Court to proceed as appellate court without retrial of cause by jury.

Jurisdiction.— Suit in chancery to try title to land must be tried in district in which land lies, p. 158.

Public lands.— When a given quantity of land is to be laid off on a given base, it shall be included within four lines forming a square, as nearly as may be, unless the form be repugnant to the entry, p. 165.

Public lands.— If a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of entry may be discarded, p. 165.

6 Cr. 171–176, 3 L. 180, UNITED STATES v. HALL.

Embargo bond.— "Dangers of seas" includes stress of weather bringing ship to foreign port, where local authorities land it, p. 175.

Cited to this point in Durousseau v. United States, 6 Cr. 322, 3 L. 237, holding, where party to embargo bond was prevented from relanding goods under similar circumstances, he had good defense; The G. R. Booth, 171 U. S. 453, reviewing cases and holding explosion of part of cargo not a peril of the seas within an exception in a bill of lading. See also note to 41 Am. Dec. 284. Cited in Dixon v. United States, 1 Brock. 183, F. C. 3,934, holding that under embargo act bond made payable to United States is good.

Embargo bond.— Consequence of perils of sea must be ascribed to proximate cause, p. 176.

Cited in Dyer v. Piscataqua F. & M. Ins. Co., 53 Me. 120, in construing policy of marine insurance. Loss must be traceable to peril insured against, as proximate cause.

Miscellaneous.— The following citations respecting ex post facto laws arise from the principles discussed in United States v. Hall, 2 Wash. C. C. 366, F. C. 15,285, affirmed by the principal case: Garvey v. People, 6 Colo. 566, 571, 45 Am. Rep. 537, 540, and Kring v. Missouri, 107 U. S. 229, 27 L. 509, as defining ex post facto law; In re Wright, 3 Wyo. 481, 31 Am. St. Rep. 98, 27 Pac. 566, distinguishing holding of lower court from that in principal case, and to same point in People v. McDonald, 5 Wyo. 534, 42 Pac. 17.

6 Cr. 176–183, CAMPBELL v. GORDON

Naturalization proceedings.— Certificate that proper oath was administered to applicant raises presumption that prerequisites to granting such certificate have been complied with, p. 182.

This holding is affirmed and applied by the following citations: Croesus Mining, etc., Co. v. Colorado Land, etc., Co., 19 Fed. 82, holding that one having taken oath of intention may locate mining claim; In re Bodek, 63 Fed. 814, holding that naturalization proceedings are judicial; United States v. Gleason, 78 Fed. 397, where naturalization by New York Superior Court was in question; Headman v. Rose, 63 Ga. 463, admitting in evidence minutes of City Court of Savannah to show ex parte judgment of naturalization; People v. McGowan, 77 Ill. 647, 20 Am. Rep. 255, holding such presumption conclusive as to recitals in record; Morgan v. Dudley, 18 B. Mon. 719, 68 Am. Dec. 743, sustaining jurisdiction of State courts in exercising powers of naturalization; Andres v. Circuit Judge, 77 Mich. 88, 43 N. W. 858, disallowing attack by showing lack of conformity to previous requirements; Priest v. Cummings, 16 Wend. 625, holding that such proceedings should be liberally construed and every intendment made in their favor; McCarthy v. Marsh, 5 N. Y. 284, as to conclusiveness of judgment of court of competent jurisdiction admitting alien to citizenship; Towle's Cases, 5 Leigh, 746, holding that certificate need not set forth statutory oath as given. See also note to 19 Am. Rep. 150.

Distinguished in Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 245, 23 L. 318, holding that such certificate cannot be introduced in distinct proceeding as proof of age, residence or character of applicant, and passing upon letters of administration as evidence; Charles Green's Son v. Sales, 31 Fed. 110, holding that naturalization cannot be proven by certificate of clerk of court, giving no extract from record; to same effect in Miller v. Reinhart, 18 Ga. 246, in Dryden v. Swinburne, 20 W. Va. 121, 124, 127, 129, holding that presumption does not validate naturalization provable only by parol, no record existing or being given in evidence.

Naturalization of father gives citizenship to minor child within United States at time of passage of act of April 14, 1802, though in foreign country when father was naturalized, p. 183.

Cited to this point and priuciple applied in Boyd v. State, 143 U. S. 177, 36 L. 115, 12 S. Ct. 387, extending statute so as to give it prospective operation; United States v. Kellar, 11 Biss. 318; S. C., 13 Fed. 84, 85, holdiug that marriage of alien widow to naturalized citizen confers citizenship upon her and her son; in dissenting opinion to Amy v. Smith, 1 Litt. (Ky.) 341; Mick v. Mick, 10 Wend. 380, holding that alien widow of natural-born citizen cannot be endowed by reason of her alienism; Young v. Peck, 21 Wend. 391, 393, affirmed by 26 Wend. 624, holding that daughter of American resident before Declaration of Independence is not an alien, though born in Scotland in 1769, living there until 1830, when she came to America, though her father died in America in 1823; Sasportas v. De la Motta, 10 Rich. Eq. 46, applying rule to children born abroad of naturalized parents; State v. Boyd, 31 Neb. 710, 48 N. W. 746, holding, however, that where child is above twenty-one he does not become a citizen; with same qualification in Dryden v. Swinburne, 20 W. Va. 129; Vint v. King, 28 Fed. Cas. 1203, holding that where a man was naturalized in 1787, his children coming from Ireland in 1792 became naturalized.

Distinguished in State v. Andriano, 92 Mo. 76, 77, 79, 4 S. W. 264, 265, 266, giving to statute prospective application applicable to all naturalizations thereunder.

Naturalization.— The oath, prescribed by naturalization act, when taken, confers citizenship, and an order of court, admitting applicant to citizenship, is necessary, p. 182.

6 Cr. 183–187, 3 L. 193, McKNIGHT v. CRAIG'S ADMR.

Pleading.— Upon decease of defendant pendente lite, his administrator can only plead on scire facias, what his intestate might have pleaded, p. 187.

Followed upon same point in Janney v. Mandeville, 2 Cr. C. C. 31, F. C. 7,213, and cited in Borden v. Thorpe, 13 Ired. 302, holding that administrator cannot plead want of assets.

Costs.— In cases of reversal, court below will enter judgmeut with costs of that court, p. 187.

Cited in Burnham v. Rangeley, 2 Wood. & M. 422, F. C. 2,177, holding that costs will not be allowed to party, where he has case dismissed for want of jurisdiction.

Distinguished in Tugman v. National Steamship Co., 24 Blatchf. 309; S. C., 30 Fed. 804, where question as to costs arose upon order of Supreme Court to proceed no farther in matter.

6 Cr. 187–192, 3 L. 194, KENNEDY v. BRENT.

Process.— Marshal must serve process as soon as he reasonably can, p. 191.

Cited to this point in Whitney v. Butterfield, 13 Cal. 340, 73 Am. Dec. 586, holding that sheriff is responsible for failure to do so; in notes in 14 Am. Dec. 457, and 95 Am. Dec. 425; Winter v. Ludlow, 30 Fed. Cas. 340, holding that process issued by Circuit Court for either of two districts in State may be served in other.

Garnishment.— After service of process upon him, garnishee cannot legally part with money, p. 191.

Cited in Pratt v. Burr, 5 Biss. 53, F. C. 11,373, applying rule where maker of note after bill filed against him and assignees thereof to set aside transfer and recover note, pays judgment in favor of assignees; Comstock v. Rayford, 1 S. & M. 442; S. C., 40 Am. Dec. 105, holding that garnishee is liable if he allows property out of his hands after service of subpoena.

Appeal and error.— Writ of error allowed in Supreme Court on judgment in agreed case.

Cited in United States v. Eliason, 16 Pet. 301, 10 L. 972, and Derby v. Jacques, 1 Cliff. 433, F. C. 3,817, as allowing writ of error in Supreme Court to Circuit Court on judgment rendered upon agreed case.

6 Cr. 192–202, 3 L. 195, KORN v. MUTUAL ASSURANCE SOCIETY.

Contract obligations existing between individuals were not affected by separation of Alexandria from Virginia, p. 199.

Cited in Mutual Assurance Soc. v. Watts, 1 Wheat. 282, 4 L. 91, applying holding to liens on Alexandria property for assurance assessments.

Mutual benefit societies.— Members by agreement may be bound by future changes in regulations and by-laws of, p. 201.

Cited to same point in Supreme Commandery v. Ainsworth, 71 Ala. 451, 46 Am. Rep. 341; Hobbs v. Iowa Mut. Benefit Assn., 82 Iowa, 113, 31 Am. St. Rep. 471, 47 N. W. 985, holding that, in absence of enabling stipulations, subsequent changes in by-laws cannot work forfeiture of preissued certificate; Sprigg v. Western Telegraph Co., 46 Md. 78, holding that charter changed by legislature and adopted by majority of members of corporation binds nonconsenting members, unless purpose of corporation is thereby changed; Wist v. Grand Lodge, A. O. U. W., 22 Or. 286, 29 Am. St. Rep. 613, 29 Pac. 614, holding that changed law cannot work forfeiture by retroaction upon member unable, without fault of his own, to perform new conditions created by it; Straus v. Eagle Ins. Co., 5 Ohio St. 63, holding that corporation may make contracts necessary

to purposes of its creation; in Stratton v. Mutual Assurance Soc., 6 Rand. 28, as to general principles applicable to powers of such corporations.

6 Cr. 202, 3 L. 199, ATKINSON v. MUTUAL ASSURANCE SOCIETY.

Mutual benefit societies.— Additional premium upon revaluation of property insured is only upon the excess, p. 202.

No citations.

6 Cr. 203, 3 L. 199, UNITED STATES v. SHIP HELEN.

Penal statute — Expiration.— Vessel having violated law of United States cannot be seized after expiration of such law, p. 203.

Cited and principle applied in Maryland v. Baltimore, etc., R. R. Co., 3 How. 552, 11 L. 722, holding that State has right to remit penalty imposed by law; Daggs v. Ewell, 3 Woods, 348, F. C. 3,537, holding that repeal of law forfeiting interest on usurious contracts does not affect existing contracts; United States v. Van Vliet, 22 Fed. 643, holding that after repeal of law imposing penalty for exacting excessive fee for procuring pension, penalty is remitted as to offenses prior to repeal; State v. President, etc., Tombeckbee Bank, 1 Stew. 349, applying rule to repeal of statute imposing penalty upon banks for failure to pay stock tax; Coles v. County of Madison, Breese, 158, 12 Am. Dec. 165, applying rule so as to remit penalty after verdict, but before judgment; Thompson v. Bassett, 5 Ind. 536, applying rule to penalty for breach of bond to procure liquor license, law requiring such bond being repealed; Keller v. State, 12 Md. 326, 71 Am. Dec. 597, affirming principle where repeal was made pending appeal from judgment, but not brought before court until judgment affirmed; Exeter v. Stratham, 2 N. H. 103, applying principle to repeal of law as to warning and residence of paupers; State v. Tombeckbee Bank, 1 Stew. 349, holding that repeal exonerates all persons against whom final judgment has not been entered before repeal; Peddle v. Hollinshead, 9 S. & R. 283, as to right of legislature which grants stay of execution to withdraw indulgence.

6 Cr. 203–205, 3 L. 199, STEWART v. ANDERSON.

Set-off.— Maker of note may set off against assignee thereof, note of assignor held, though not due, at time of notice of assignment, and payable before first note, p. 205.

Cited in Small v. Strong, 2 Ark. 202, construing Arkansas statute as allowing set-off only of debts mutually subsisting between plaintiff and defendant; Triplet v. Bradley, 6 T. B. Mon. 355, allowing as set-off note assigned to defendant on intermediate assignor while latter owned note sued upon; Smith v. Mosby, 9 Heisk. 505,

holding that in order to offset certificate of deposit against demand of bank's receiver upon note of defendant, latter must prove possession of certificate before filing of petition in insolvency; Stebbins v. Bruce, 80 Va. 398, holding that one sued by assignees of his bond may offset against it debts owing him by assignor before notice to defendant of assignment.

Distinguished in Greene v. Darling, 5 Mason, 206, 215, F. C. 5,765, showing that the principle is limited by fact that it is based upon construction of local statute; Somerville v. Brown, 5 Gill, 413, and refused adherence because of differences in law merchant as to negotiable instruments; Bradley v. Smith's Sons, 98 Mich. 453, 39 Am. St. Rep. 568, 57 N. W. 577, as not applicable where obligation against which set-off is claimed was not due when assigned, being to pay money to be earned in the future; Feazle v. Dillard, 5 Leigh, 35, holding that principle stated in principal case does not preclude equity from allowing as set-off, bond not due when assigned bond is due.

6 Cr. 206–221, 3 L. 200, MARINE INSURANCE CO. v. HODGSON; S. C., 7 Cr. 332, 3 L. 362.

Appeal and error.— Refusal of inferior court to receive additional plea, to amend one already filed, to grant new trial or continuance, is not reviewable by writ of error, pp. 217, 218.

A variety of citing cases affirm and apply this doctrine, as follows: Garland v. Davis, 4 How. 154, 11 L. 918, holding that discretionary decisions are not reviewable; Spencer v. Lapsley, 20 How. 267, 15 L. 904, affirming principle as to refusal to allow plea in abatement; Sparrow v. Strong, 3 Wall. 105, 18 L. 50, refusing to review refusal of new trial, but assuming jurisdiction on another ground; Embry v. Palmer, 107 U. S. 17, 18, 27 L. 351, 2 S. Ct. 37; State v. Hunt, 4 La. Ann. 439, where new trial on ground of newly-discovered evidence was refused; Anderson v. State, 5 Harr. & J. 175; Albert v. Hart, 44 N. J. L. 368, refusing to review refusal of new trial, unless lower court had exceeded jurisdiction or assumed unwarranted powers; in Sims v. Hudley, 6 How. 6, 12 L. 321, overruling exception to refusal to continue case to another term; Davis v. Patrick, 57 Fed. 913, 12 U. S. App. 629, refusing to review refusal of continuance; Gladden v. Florida, 12 Fla. 571, holding similarly, unless discretion is arbitrarily or oppressively exercised; Sealy v. State, 1 Ga. 215, 44 Am. Dec. 642; State v. Brette, 6 La. Ann. 660, holding that in criminal case, appellate court cannot review such discretion except as to matters of law submitted by bill of exceptions or assignment of error; State v. Muldoon, 9 La. Ann. 26, refusing to review such refusal in criminal case; Babcock v. Scott, 1 How. (Miss.) 101, holding similarly in civil case; note to Stevenson v. Sherwood, 74 Am. Dec. 142; in Earnshaw v. United States, 146 U. S. 68, 36 L. 889, 13 S. Ct. 15, holding discretionary

action of persons appointed to reappraise imported goods final; as to allowance of amendments in Buchanan v. Trotter, 4 Fed. Cas. 539, allowing amendment where justice required and no laches of defendant was shown; Mahone v. Williams, 39 Ala. 212, holding irreviewable, imposition of terms upon allowance of amendment to pleadings by trial court; Fuller v. Hampton, 5 Conn. 425, refusing to notice allegation on writ of error that complaint below was improperly amended; Ellicott v. Eustace, 6 Md. 508, Henderson v. Mamer, 5 How. (Miss.) 538, Bruch v. Carter, 32 N. J. L. 558, Davis v. Township of Delaware, 42 N. J. L. 517, holding, similarly, where refusal was of amendment to lower court's records; Hicks v. Lawson, 39 Ala. 94, refusing to review action of trial court in overruling second motion to suppress deposition; Doane v. Cummins, 11 Conn. 158, applying rule as to time and order of admitting testimony in trial of cause; Ringgold's Case, 1 Bland Ch. 9, discussing at length, right of appeal both in law and equity; Dibble v. Rogers, 2 Mich. 407, refusing to review order of Circuit Court remanding cause to County Court for new trial; Romaine v. Norris, 8 N. J. L. 82, holding that whether motion for nonsuit will be heard after regular time is discretionary with trial court; Clason v. Shotwell, 12 Johns. 50, holding that Court of Errors may on writ of error review action of Supreme Court in awarding re-restitution in forcible entry and detainer.

Distinguished, Fuller v. State, 1 Blackf. 64, holding that in some cases appellate court may review such discretion; Vanblaricum v. Ward, 1 Blackf. 50, reversing judgment below for error in refusing continuance; Broussard v. Trahan's Heirs, 4 Mart. (O. S.) 501, affirming that Supreme Court may relieve from improper denial of continuance in District Court; Carr v. Dawes, 46 Mo. App. 601, holding illegal, arbitrary or oppressive exercise of discretion reviewable; Gilliland v. Rappleyea, 15 N. J. L. 143, allowing review of action of lower court where, having non prossed plaintiff out of court, it recurred to verdict previously set aside and entered judgment thereon against him; Welch v. County Court, 29 W. Va. 68, 1 S. E. 340, distinguishing between pure discretion, which is not reviewable, and sound legal discretion, which is, and reviewing refusal of certiorari; Ordroneaux v. Prady, 6 S. & R. 511; Clymer v. Thomas, 7 S. & R. 180; Burk v. Huber, 2 Watts, 312; Fowler v. Colton, 1 Pinn. 337.

Pleading.— Inferior court, after cause remanded to it, may receive additional pleas, or allow amendments, though appellate court held such pleas bad on demurrer, p. 218.

Cited and rule applied in Campbell v Read, 2 Wall. 198, 17 L. 842, reversing judgment and allowing defendants to require proof of certain averments of complaint, though on appeal he had been refused right to object that plaintiff below had not made such proof; In re Sanford, etc., Tool Co., 160 U. S. 259, 40 L. 417, 16 S. Ct. 294, holding that where case is left open, Circuit Court might allow

amendment to pleadings, to get at facts; Hart's Exrs. v. Smith, 20 Fla. 61, holding that after cause remanded, Circuit Court may admit amendments, unless Supreme Court otherwise directs; Lane v. Morris, 8 Ga. 472, holding it improper after judgment on general demurrer to allow demurrer to be withdrawn.

Insurance — Pleading.— In action on policy, where defendant pleads covenants performed, he must confine his evidence to his plea, p. 219.

Cited in Garland v. Davis, 4 How. 148, 11 L. 915, to general rule that evidence must be limited to plea; Cooper v. Watson, 10 Wend. 205, holding where plea in suit for breach of warranty is non est factum, plaintiff need only prove execution of deed to recover.

Equity — Evidence.— Deposition used in libel and condemnation in admiralty not evidence in action on insurance policy, p. 220.

Cited in Tappan v. Beardsley, 10 Wall. 436, 19 L. 976, holding that admission of former proceeding to prove it does not justify use of depositions therein, against different parties not in privity with former parties.

Insurance — Evidence of value.— In suit upon policy, insurers may not contradict valuation given in policy, p. 220.

Cited in Griswold v. Union Mut. Ins. Co., 3 Blatchf. 233, F. C. 5,840, to same effect; Alsop v. Commercial Ins. Co., 1 Sumn. 471, F. C. 262, holding that while fraudulent overvaluation vacates policy, innocent overvaluation will not; Brooke v. Louisiana State Ins. Co., 4 Mart. (N. S.) 643, holding that overvaluation may be used to prove fraud; Whitney v. American Ins. Co., 3 Cow. 219, holding such value conclusive in absence of fraud or imposition; Warner v. Brinton, 29 Fed. Cas. 235, holding that where will is in suit, instructions given draughtsman are not admissible to explain it.

6 Cr. 221–225, 3 L. 205, SLACUM v. POMERY.

Contracts — Lex loci.— Indorsement of bill or note is separate, substantive contract, governed by lex loci contractus, p. 224.

Cited and doctrine applied in Codman v. Vermont & Canada R. R. Co., 16 Blatchf. 176, F. C. 2,935, holding that such contract may be separate from that in note as to interest; De Hass v. Dibert, 70 Fed. 230, 28 U. S. App. 559, holding that one who takes note from payee without indorsement and indorses to third person, is liable on his indorsement; in dissenting opinion to Tevis v. Young, 1 Met. (Ky.) 209; in Helfer v. Alden, 3 Minn. 337, holding promissory note under seal not negotiable instrument; Williams v. Wall, 60 Mo. 321, holding indorsement in payment of gambling debt of valid draft, void under gaming act; Seymour v. Van Slyck, 8 Wend. 422, holding indorser of nonnegotiable instrument liable as on guaranty; Poage v. State, 3 Ohio St. 233, holding indorsement subject of forgery; Leidy v. Tammany, 9 Watts, 357, holding that blank indorser

of nonnegotiable instrument is liable; Lawrence v. Mabry, 2 Dev. L. 475, 21 Am. Dec. 347, holding that indorser of bill in which payee's name is admitted may be held liable; Taylor v. Beck, 3 Rand. 328, allowing indorser as competent witness to prove usurious consideration of note in suit between holder and maker; Greathead v. Walton, 40 Conn. 236, holding indorsement of New York note in Connecticut governed by law of latter State; Cox v. Adams, 2 Ga. 162, 168, holding that remedies upon such contract are those of lex fori; Depau v. Humphreys, 8 Mart. (N. S.) (La.) 16, holding that lex loci governs as to question of usury on note; Trabue v. Short, 18 La. Ann. 258, applying rule where contract indorsed in Kentucky was sued upon in Louisiana; Glidden v. Chamberlain, 167 Mass. 494, 57 Am. St. Rep. 484, 46 N. E. 104, holding New York law as to usury inadmissible evidence in suit upon Massachusetts indorsement of New York note; to direct point in Phipps v. Harding, 70 Fed. 471, 34 U. S. App. 148; Dow v. Rowell, 12 N. H. 51, but holding that indorsement will not be allowed to change original liability of promisor; Aymar v. Sheldon, 12 Wend. 443, 27 Am. Dec. 139, where bill drawn in French West Indies was indorsed in New York; Case v. Heffner, 10 Ohio, 184, allowing recovery of Ohio rate of interest in suit upon Ohio indorsement of New York bill; Lebanon Bank v. Mangan, 28 Pa. St. 458, refusing to recognize rights of indorsee of nonnegotiable certificate of deposit as against creditor of indorser attaching funds in bank before transfer; to direct point in Trabue v. Short, 5 Cold. 296.

The following citations affirm the general principle that contracts are governed by lex loci: Cook v. Moffatt, 5 How. 315, 12 L. 168, holding that discharge of debtor under insolvency laws of Maryland does not affect New York contract; Burrows v. Hannegan, 1 McLean, 316, F. C. 2,206, but holding that lex fori governs as to remedy upon contract; Handrick v. Andrews, 9 Port. 27, where rule was applied as to question of interest; Sherrill v. Hopkins, 1 Cow. 108, holding that rule applies, unless contrary intention of parties appears; Peck v. Hibbard, 26 Vt. 702, 62 Am. Dec. 607, applying rule to bill drawn in Canada payable in no particular place; Nelson v. Fotterall, 7 Leigh, 202, holding that rule obtains, except when contract is made with reference to laws of another State.

Distinguished in Fitch v. Remer, 1 Flip. 16, 1 Biss. 338, F. C. 4,836, holding mortgage usurious in New York, where payable, could be enforced in Michigan, where the mortgaged land was situated.

Appellate procedure.— It is not too late to aver on appeal by writ of error, fault in declaration which should have prevented rendition of judgment, p. 225.

This holding is cited, affirmed and applied as follows: Pomeroy's Lessee v. Bank, 1 Wall. 600, 17 L. 641, holding that writ of error brings up whole record for review; Rogers v. Burlington, 3 Wall.

661, 18 L. 82, holding bill of exceptions unnecessary to point out errors of record; New Orleans R. R. Co. v. Morgan, 10 Wall. 261, 19 L. 893, but holding that error should, in general, appear from record, bill of exceptions, agreed statement, demurrer or special verdict; Barth v. Clise, 12 Wall. 403, 20 L. 394, refusing reversal in favor of plaintiff for error where latter's case was inherently and fatally defective; Insurance Co. v. Piaggio, 16 Wall. 386, 21 L. 359, noticing, from record, error in allowance of insurance, interest, and damages; Garland v. Davis, 4 How. 143, 11 L. 913, noticing error in pleadings not raised by exceptions; Suydam v. Williamson, 20 How. 433, 15 L. 980, holding that writ of error addresses itself to record as entirety; Baltimore, etc., R. R. Co. v. Trustees, 91 U. S. 130, 23 L. 261, holding that error made to appear in any legal manner is revisable; Storm v. United States, 94 U. S. 81, 24 L. 44, but holding that error must appear either from bill or record; Cragin v. Lovell, 109 U. S. 200, 27 L. 906, 3 S. Ct. 135, reversing default judgment for error appearing of record; Kentucky Life, etc., Ins. Co. v. Hamilton, 63 Fed. 99, 22 U. S. App. 386, 548, reviewing sufficiency of pleadings to warrant judgment; Board Comrs. v. Sherwood, 64 Fed. 110, 27 U. S. App. 458, as to when objection to admission of evidence raises question as to sufficiency of complaint; World's Col. Expos. Co. v. Republic of France, 91 Fed. 69, holding facts in record must show a cause of action; Murry v. Burris, 6 Dak. 180, 42 N. W. 29, holding that appellate court may notice jurisdictional matters in record affecting validity of judgment; Sedgwick v. Dawkins, 16 Fla. 201, noticing error in substituting motion for new trial for motion in arrest of judgment after term; Blacklege v. Benedick, 12 Ind. 389, holding objection to sufficiency of complaint good on appeal; Read v. Wheeler, 2 Yerg. 56, reversing judgment on instrument where declaration contained no averment of consideration; Knott v. Hicks, 2 Humph. 163, reversing judgment where declaration on note contained no averment of notice of dishonor to indorser sued; Gautier v. Franklin, 1 Tex. 738, reversing judgment where record showed erroneous failure of court below to notice plea of statute of limitations.

Statutes.— Federal court should follow State court's construction of State statute, pp. 224, 225.

Cited in Austen v. Miller, 5 McLean, 156, F. C. 661, where court refused to follow such construction as to principles of common or mercantile law.

Bills and notes.— In action of debt against indorser of bill of exchange, under Virginia statute, declaration should aver notice of protest for nonpayment, p. 225.

6 Cr. 226–233, 3 L. 207, VASSE v. SMITH.

Infants.— Infancy is no complete bar to action of trover, though possession of goods by infant was under contract, p. 231.

Cited and principle applied in Almy v. Wilbur, 2 Wood. & M. 402, F. C. 256, holding that conversion of goods rightfully held dates from demand and refusal; Howe v. The Lexington, 12 Fed. Cas. 661, holding action on contract proper, where carrier has not performed contract in bill of lading; Oliver v. McClellan, 21 Ala. 678, allowing detinue against infant for goods tortiously held, though rightfully taken; Flexner v. Dickerson, 72 Ala. 322, holding infancy good defense on obligation given for payment of rent, action being commenced before expiration of term, and before infant had come of age; Rice v. Boyer, 108 Ind. 475, 58 Am. Rep. 56, 9 N. E. 422, holding infant liable ex delicto for injury by false representations; Lewis v. Littlefield, 15 Me. 236, holding infancy no defense where defendant holding stakes paid same to winner after notice from loser not to do so; in dissenting opinion to last case, 17 Me. 42, to point that conversion by infant under mistake as to his rights does not render him liable; Hall v. Corcoran, 107 Mass. 255, 9 Am. Rep. 33, holding that person converting horse hired under illegal contract is liable in tort; Woodman v. Hubbard, 25 N. H. 73, 57 Am. Dec. 315; Ferguson v. Bobo, 54 Miss. 131, to general principle; Railway Co. v. Jones, 73 Miss. 122, 55 Am. St. Rep. 492, 19 So. 106, as illustrating rule that mistake as to one's personal rights under law arising from existing facts is one of fact; Conway v. Reed, 66 Mo. 351, 27 Am. Rep. 355, affirming allowance of damages to one shot by minor, accidentally, but negligently; Wirt v. Dinan, 44 Mo. App. 592, allowing recovery against husband and wife for wife's fraudulently inducing contract, void by reason of her coverture, contract being for sale of stolen property; Fetts v. Hall, 9 N. H. 443, 447, holding liable in tort, infant inducing contract by fraudulent representations as to his age who disaffirmed contract and refused to deliver goods; Carr v. Clough, 26 N. H. 294, 59 Am. Dec. 349, affirming that infant wishing to disaffirm horse-trade must offer to return horse received before he can sue for one traded; Campbell v. Stakes, 2 Wend. 144, 19 Am. Dec. 563; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 341, holding infant liable in trover who hires horse to drive to one place and drives elsewhere or beyond; Towne v. Wiley, 23 Vt. 361; 56 Am. Dec. 87; Peigne v. Sutcliffe, 4 McC. 390, 17 Am. Dec. 758, holding infant of age of discretion liable on case for embezzlement of goods intrusted to him; Green v. Sperry, 16 Vt. 393, 42 Am. Dec. 520, holding infant liable in trover where he borrowed one's watch from latter's wife; Cotton v. Sharpstein, 14 Wis. 230, 80 Am. Dec. 777, holding attorney liable for converting property of client placed in his charge and to execution against his body; notes to Humphrey v. Douglass, 33 Am. Dec. 179, 181, 182, 184, and Craig v. Van Bebber, 18 Am. St. Rep. 723.

Distinguished in Wilt v. Walsh, 6 Watts, 12, holding that where substance of action is contract, recovery cannot be had in tort,

as where infant hires horse to drive to one place, drives beyond and horse dies in consequence; West v. Moore, 14 Vt. 447, 39 Am. Dec. 236, holding infant not liable for false and deceitful warranty on sale of horse; Eaton v. Hill, 50 N. H. 239, 9 Am. Rep. 192, excusing infant from liability where, from lack of discretion, he unintentionally over-drove hired horse; Campbell v. Stakes, 2 Wend. 144, 19 Am. Dec. 563.

Appeal and error.— Bill of exceptions ought to state that evidence was offered of facts upon which opinion of court was prayed, p. 232.

Cited in United States v. Morgan, 11 How. 158, 13 L. 645, holding that though bill is imperfect, if court can ascertain, by inference, substance of facts it will give opinion on points presented; Insurance Co. v. Baring, 20 Wall. 162, 22 L. 251, holding that court need not grant prayer for instructions not supported by evidence; United States v. Three Hundred and Thirty-seven Cases of Wine, 1 Woods, 50, F. C. 16,506, refusing to reverse judgment for failure to instruct where bill of exceptions did not conform to cited principle; Peden v. Moore, 1 Stew. & P. 81, 21 Am. Dec. 656, holding, however, that upon objection to instructions given, court may review them as to legal correctness; Proctor v. Hart, 5 Fla. 469, holding that unless bill shows evidence upon which instructions were intended, court will not adjudge them erroneous; Law v. Merrills, 6 Wend. 274; Dunlop v. Patterson, 5 Cow. 246, holding error not to lie for failure to instruct upon evidence not brought to court's notice; Stafford v. Walker, 12 S. & R. 197, refusing reversal for immaterial error.

Infancy is bar to action by owner against his supercargo for breach of instructions, p. 230.

6 Cr. 233–237, 3 L. 209, CURTISS v. GEORGETOWN, ETC., TURNPIKE CO.

Federal courts.— The Supreme Court has jurisdiction to review an order of the Circuit Court for the District of Columbia, quashing an inquisition, p. 235.

Cited in dissenting opinion to Kendall v. United States, 12 Pet. 640, 9 L. 1227, favoring reversal of Circuit Court's judgments for unauthorized issuance of mandamus; Kendall v. United States, 12 Pet. 619, 9 L. 1218, sustaining power of Circuit Court for District of Columbia to mandamus public officer; Railroad Co. v. Church, 19 Wall. 64, 22 L. 97, holding that writ of error lies from Supreme Court to Circuit Court for District of Columbia; Ormsby v. Webb, 134 U. S. 60, 33 L. 811, 10 S. Ct. 483, in case of order of Circuit Court affirming order of Probate Court in admitting writing as will.

Eminent domain.— Record by clerk of an inquisition is merely ministerial act and of itself gives no validity to proceedings, p. 237.

Cited in Bauman v. Ross, 167 U. S. 593, 42 L. 289, 17 S. Ct. 983, holding that estimate of compensation under eminent domain proceedings is not required to be made by jury.

6 Cr. 237, 238, 3 L. 210, LODGE'S LESSEE v. LEE.

Boundaries.— Grant of an island by name in Potomac river, adding courses and distances which do not include whole island, passes whole island, p. 238.

Cited and principle relied upon in United States v. Arredondo, 6 Pet. 739, 8 L. 565, construing Spanish grant of lands in Florida; Sherwood v. Whiting, 54 Conn. 334, 1 Am. St. Rep. 119, 8 Atl. 82, holding that misdescription in deed does not affect it, so long as property conveyed may be identified; Melvin v. Merrimack Locks & Canals, 5 Met. 29, 38 Am. Dec. 388, where conveyance of "estate called C. Farm," same as conveyed by M. to K., was held to pass entire farm, though conveyance mentioned did not; Slater v. Breese, 36 Mich. 82, holding additions of untrue circumstances will not defeat otherwise satisfactory description; Rutherford v. Tracy, 48 Mo. 328, 8 Am. Rep. 106, where conveyance of certain lot described by courses and distances, including less than whole lot, was held to pass entire lot; and similarly in Thomson v. Thomson, 115 Mo. 64, where devise was of "land on which I now reside," with added courses and distances, including less than whole tract; in Ela v. Card, 2 N. H. 178, 9 Am. Dec. 49, under similar facts to same effect; Drew v. Drew, 28 N. H. 503, 512, holding that devise of homestead, all "upon which I now live, same devised to me by my father," passes whole homestead, though part was not so devised; Conover v. Wardell, 22 N. J. Eq. 502, holding that general terms of description, preceded by metes and bounds, are subordinate thereto; Jones v. Smith, 73 N. Y. 210, holding that less certain general description is controlled by more certain particular description following; Trapier v. Wilson, 2 McC. 197, where grant under facts similar to those in principal case was held to pass entire island.

Distinguished in Belden v. Seymour, 8 Conn. 31, where measurements were held to give way to boundaries; in dissenting opinion to Buchanan v. Stewart, 3 Harr. & J. 338, which held that quantity as described should prevail over courses and distances; Woodman v. Lane, 7 N. H. 247, allowing grant of homestead farm to be restricted and restrained by subsequent particular description.

6 Cr. 238–252, 3 L. 211, FINLEY v. LYNN.

Equity — Reformation of bond.— If bond executed in pursuance of agreement depart therefrom, equity will relieve, p. 249.

Cited in Ivinson v. Hutton, 98 U. S. 83, 25 L. 68, ordering correction of papers effecting dissolution of partnership, because

founded on mistake; Hearn v. Equitable Safety Ins. Co., 4 Cliff. 198, F. C. 6,300, reforming insurance policy to conform to original agreement of parties.

Partnership.— Agreement of partners may make debt of individual partner firm debt, pp. 251, 252.

Citèd in Davis v. Dodge, 30 Mich. 270, enforcing similar agreement where dealings were between each firm and partners of other firm.

Appeal.— Court will remand cause to have account taken which complainant is entitled to, but did not ask for, p. 252.

Principle applied in May v. Le Claire, 11 Wall. 227, 20 L. 52, allowing review where record is defective, but shows merits of case; Dupont de Nemours v. Vance, 19 How. 173, 15 L. 588, allowing relief which record, though defective, shows to be proper; Alton v. Gilmanton, 2 N. H. 521, refusing client relief against waiver of notice by his attorney where agreement of waiver was part of court record.

6 Cr. 252, 253, 3 L. 215, DE BUTTS v. BACON.

Usury.— Defense of, allowed in suit to foreclose mortgage, p. 253.

Cited in dissenting opinion to Palmer v. Mead, 7 Conn. 159, maintaining that defense that mortgage was in fraud of creditors should be available on foreclosure, and that defense of title should be similarly available; Cowles v. Woodruff, 8 Conn. 36, to point decided in principal case; Phelps v. Pierson, 1 G. Greene, 127, holding that demurrer will lie to bill to enforce contract usurious on its face. Cited in Spaun v. Baltzell, 1 Fla. 355; S. C., 46 Am. Dec. 356; holding that if creditor offers additional security for less sum than is due, consideration is good.

Disapproved, Palmer v. Mead, 7 Conn. 153, holding that on bill to foreclose, mortgagee's title may not be investigated.

6 Cr. 253–267, 3 L. 215, SHEEHY v. MANDEVILLE AND JAMESSON.

Payment.— Note of debtor or third person may, by agreement, be received, and operate as payment of debt, p. 264.

This is a leading case upon the foregoing proposition and the citing cases show the following various applications: Segrist v. Crabtree, 131 U. S. 289, 33 L. 126, 9 S. Ct. 688, holding, however, that evidence that notes were taken absolutely as payment must be given; Embrey v. Jemison, 131 U. S. 347, 33 L. 176, 9 S. Ct. 779, holding that in suit upon note plea of wager consideration is good; In re Morrill, 2 Sawy. 358, F. C. 9,821, holding that surety may pay debt for which he is contingently liable by giving his note, if it is so accepted; Palmer v. Priest, 1 Sprague, 514, F. C. 10,694, holding note of one debtor received by creditor who receipts account, prima facie

payment thereof; United States v. Williams, 1 Ware, 180, F. C. 16,724, refusing to apply principle to check received by collector of customs in payment of duty, until check is paid; Harris v. Lindsay, 4 Wash. 274, F. C. 6,124, holding that giving of note raises no presumption of payment; Slocumb v. Lurty, Hemp. 433, F. C. 12,949, requiring draft of third person to be received unconditionally as payment, to discharge debt; Wallace v. Agry, 4 Mason, 343, F. C. 12,360, holding that taking bill of exchange is at most only prima facie evidence of payment; The Betsey and Rhoda, 2 Ware, 115, F. C. 1,366, throwing upon debtor burden of proof that note was intended as payment; In re Parker, 6 Sawy. 250, 11 Fed. 399, Estate of Davis v. Desanque, 5 Whart. 537, 34 Am. Dec. 576, Lee's Admrs. v. Fontaine, 10 Ala. 766, 44 Am. Dec. 508, allowing action against original debtor after judgment upon invalid note received as payment; Pope v. Tunstall, 2 Ark. 226, holding that agreement to receive note as payment destroys right of action on original contract; Costar v. Davies, 8 Ark. 217, 46 Am. Dec. 312, holding action on account barred, though note received in payment is unpaid; Brugman v. McGuire, 32 Ark. 740, requiring special agreement to constitute note payment; First National Bank v. Newton, 10 Colo. 171, 172, 14 Pac. 432, 433, holding presumption that note was not received as payment not rebutted by receipt in full; Bill v. Porter, 9 Conn. 30, requiring special agreement to prove receipt as payment; May v. Gamble, 14 Fla. 493; Salomon v. Pioneer Co-op. Co., 21 Fla. 379, as to correctness of pleading as to note received as payment; Wylly v. Collins, 9 Ga. 240, requiring that note be specially accepted as payment; Jewett v. Pleak, 43 Ind. 370, holding note of third person good as payment, if parties so agree; Sneed v. Wiester, 2 A. K. Marsh. 286; Johnson v. Weed, 9 Johns. 311, 6 Am. Dec. 279; Tomlin v. McChord's Admr., 6 J. J. Marsh. 4, holding that one covenant may be annihilated by later covenant variant therefrom and in satisfaction thereof; Steamboat Charlotte v. Hammond, 9 Mo. 63, 43 Am. Dec. 539, requiring special agreement to extinguish original cause of action; Wright v. First Crockeryware Co., 1 N. H. 281, 8 Am. Dec. 69, allowing such agreement that effect, whether note is of principal debtor or third person; Page v. Pendergast, 2 N. H. 235, holding note payment of award, agreement being shown; Elliott v. Sleeper, 2 N. H. 527, where new note given for note secured by mortgage was held not to discharge mortgage.

Other citing cases make the following applications: Morris Canal v. Van Vorst, 21 N. J. L. 119, 126, requiring that to make note effective as payment, agreement must be pleaded and proved; Arnold v. Camp, 12 Johns. 411, 7 Am. Dec. 329, where individual note of partner was taken in exchange for partnership note and held to constitute payment thereof; Day v. Leal, 14 Johns. 405, holding that unsatisfied judgment on collateral security is no bar to suit on original debt; Boyd v. Hitchcock, 20 Johns. 79, 11 Am. Dec.

248, holding that agreement may make note satisfaction of debt greater than note's face value; Muldon v. Whitlock, 1 Cow. 306, 307, 13 Am. Dec. 537, holding original debtor still liable unless he prove agreement to take note of another as payment; Booth v. Smith, 3 Wend. 68, affirming that proof of such agreement bars action on debtor's note for which another's note was substituted; Waydell v. Luer, 5 Hill, 450, refusing to allow creditor, by agreement, to make note of joint debtor satisfy precedent liability of all; S. C., 3 Den. 414, 419, 420, allowing such effect to note given by partner after dissolution of partnership, and accepted as payment of partnership debt; Brown v. Scott, 51 Pa. St. 363, holding that whether note effects payment is one of intention and for the jury; Blair v. Wilson, 28 Gratt. 174; Townsends v. Stevenson, 4 Rich. L. 67, holding that note of individual partner may merge and extinguish claim against partnership; Lepham v. Barnes, 2 Vt. 216, holding that third person giving note, effectual as payment of debt, may sue debtor for money paid to his use; Hutchins v. Olcutt, 4 Vt. 555, 24 Am. Dec. 639, holding that one taking note as payment for labor bestowed upon article loses his lien thereon; Edgell v. Stanford, 6 Vt. 556, holding that usurious and void note taken in exchange for valid note does not, upon being declared void, render suit on original debt impossible; Torrey v. Baxter, 13 Vt. 457, holding, however, that note will not amount to payment even with agreement, if it prove unproductive; Hard v. Burton, 62 Vt. 322, 20 Atl. 272, holding that unperformed agreement of one joint debtor to settle account does not release other debtor, where agreement was to accept performance; Poole v. Rice, 9 W. Va. 77, refusing to allow agreement effect where secured by fraud; Feamster v. Withrow, 9 W. Va. 326, holding that taking new security from one joint debtor will only release others where creditor so agrees; Bowyer v. Knapp, 15 W. Va. 296, and Bantz v. Basnett, 12 W. Va. 792, 836, where, part of debt being paid before due, new note executed for residue, and old note surrendered, latter was held extinguished as basis for action; Hoeflinger v. Wells, 47 Wis. 631, 632, 3 N. W. 591, 592, holding that partner's note will not extinguish partnership debt in absence of agreement, where such note was taken for loan at time of loan. Cited also in dissenting opinion, Winship v. United States Bank, 5 Pet. 568, 8 L. 230.

Distinguished in Whitbeck v. Van Ness, 11 Johns. 413, 414, 6 Am. Dec. 385, holding that note of third person taken by vendor from purchaser is presumed payment and taken at vendor's risk; Tyson v. Pollock, 1 P. & W. 381, holding that two firms jointly liable cannot, by each giving draft upon third person, merge joint liability into several; McIntyre v. Kennedy, 29 Pa. St. 452, upholding presumption that check of third person taken from debtor is received as conditional payment; Ward v. Motter, 2 Rob. (Va.) 564, 566, holding that one taking specialty of partner loses remedy against later dis-

covered dormant partner; United States Bank v. Daniel, 12 Pet. 57, 9 L. 999, under the facts.

Joint liability.—Judgment against one joint debtor sued severally is not bar as to another in action against both founded on original joint promise, p. 265.

Cited and relied upon in dissenting from holding of United States v. Price, 9 How. 98, 13 L. 62, that after recovery against all obligors jointly on joint and several bonds and subsequent decease of surety, his assets may not be reached in hands of his administrator; United States v. Cushman, 2 Sumn. 438, F. C. 14,908, applying the rule in holding that after joint judgment on joint and several bond against obligors and sureties, there may be recovery out of assets of deceased surety, surviving obligors being insolvent; United States v. Cushman's Admr., 2 Sumn. 313, F. C. 14,907, where question was not raised, suit being at law against administrator of joint judgment debtor; Murray v. Lovejoy, 2 Cliff. 199, F. C. 9,963, holding unsatisfied judgment against one of several tortfeasors no bar to action against others; Sheldon v. Kibbe, 3 Conn. 218, 220, 8 Am. Dec. 179, 181, holding similarly as to cotrespassers; Swett v. Black, 1 Sprague, 583, F. C. 13,690, where the doctrine is approved and followed; Sheldon v. Kibbe, 3 Conn. 222, 8 Am. Dec. 183, holding execution against body of judgment debtor not satisfaction of judgment to bar action against his cotrespassers; Morgan v. Chester, 4 Conn. 389, holding unsatisfied judgment against joint debtor not to bar action against others, obligation being joint and several; Griffin v. Orman, 9 Fla. 52, holding judgment against two of firm not judgment against third member not named in pleading; Kirkpatrick v. Stingley, 2 Ind. 273, holding that on joint and several obligation, judgment against all does not bar subsequent action against one, and vice versa; Sherman v. Christy, 17 Iowa, 326, holding that confession of judgment against firm by one member upon note signed by firm name, but upon which other partner is alone liable, does not bar action against latter; Sayre v. Coleman, 9 Dana, 174, holding judgment against several co-obligors not bar to action against one as to whom former action was abated upon return of not found; Dennett v. Chick, 2 Me. 193, 11 Am. Dec. 61, holding unsatisfied judgment in another State against one joint promisor no bar to suit against other; Farmer v. Stewart, 2 N. H. 99, to point that in actions against joint debtors, judgment binds only those notified; Townsend v. Riddle, 2 N. H. 450, where judgment in favor of one joint and several promisor held no bar to action against another unless founded upon satisfaction or discharge of contract; Collins v. Lemasters, 1 Bailey L. 352, 21 Am. Dec. 473, holding that in action on joint bond, unsatisfied judgment against one codefendant is no bar as to other; Treasurers v. Bates, 2 Bailey L. 382, applying rule where unsatisfied judgment against sheriff was set up in bar of action against sheriff and sureties for same default; Watson v.

Owens, 1 Rich. L. 113, to point of principal case; Union Bank v. Hodges, 11 Rich. L. 483, 484, holding judgment against two partners no bar to suit against all; Nichols v. Cheairs, 4 Sneed, 232, holding unsatisfied judgment against one partner on note given for partnership obligation no bar to suit against other and dormant partner; in dissenting opinion to Ward v. Motter, 2 Rob. (Va.) 554, 559, wherein holding of principal case is interpreted; Oleson v. Merrihew, 45 Wis. 401, in support of holding that former judgment is bar only when parties are same.

Distinguished in Van Ness v. Forrest, 8 Cr. 35, 3 L. 479, allowing one member of commercial company to sue another in his own name on note given him by that other for use of company, though money, when recovered, would belong to company, and noticing principal case as to proper pleadings; Woodworth v. Spafford, 2 McLean, 173, F. C. 18,020, holding that judgment against one joint obligation bars suit against other co-obligors; United States v. Price, 9 How. 93, 13 L. 60, holding joint judgment conclusive and bar to several suits on joint and several bond; Scott v. Colmesnil, 7 J. J. Marsh. 419, 420, and cited as supporting holding that judgment against one upon contract apparently sole does not bar subsequent suit thereon in its true character of joint contract; Ward v. Johnson, 13 Mass. 151, 152, holding that judgment against one on joint promise bars subsequent action thereon against both; Trafton v. United States, 3 Story, 649, 650, 651, F. C. 14,135, holding judgment against one of two joint contractors bars suit against both; Lawrence v. Vernon, 3 Sumn. 25, F. C. 8,146, but cited to point that where claim and parties are same, former judgment is bar though forms of action are different; Fairchild v. Holly, 10 Conn. 479, as questioned authority not involved in case at bar; Palmer v. Gallup, 16 Conn. 566, where it is refused adherence and question is raised whether judgment against three co-obligors, valid only as to one, bars action against other two; Bedell's Admrs. and Heirs v. Keethley, 5 T. B. Mon. 601, holding that judgment against administrators upon joint obligation of them and heirs, though unsatisfied, bars suit against latter; in dissenting opinion to Union Bank v. Hodges, 11 Rich. L. 726, 731, 732, 735, 736, 737; and considered unsound in notes to Speed's Exrs. v. Hann, 15 Am. Dec. 82, and Collins v. Lemasters, 21 Am. Dec. 475.

Denied in Mason v. Eldred, 6 Wall. 236, 237, 238, 18 L. 784, 785, holding that judgment against one person on joint contract merges it and bars further action thereon; similarly, in Sedam v. Williams, 4 McLean, 52, F. C. 12,609, where obligation was of partnership; United States v. Ames, 24 Fed. Cas. 783, where action was held barred, though against dormant partner not discovered until after judgment; Ferrall v. Bradford, 2 Fla. 515, 516, 50 Am. Dec. 296, 298, though former judgment was unsatisfied; Wann v. McNulty, 2 Gilm. 359, 43 Am. Dec. 60, where obligation was of partnership;

Taylor v. Claypool, 5 Blackf. 558, obligation being joint note; Crosby v. Jeroloman, 37 Ind. 274, where obligation was mortgage; Robertson v. Smith, 18 Johns. 482, 483, 484, 9 Am. Dec. 232, 233, 234, 235, where former judgment was unsatisfied; Pierce v. Kearney, 5 Hill, 94; Sloo v. Lea, 18 Ohio, 306, where obligation was of partnership; Smith v. Black, 9 S. & R. 143, 144, 11 Am. Dec. 687, 688, where action barred was against dormant partner discovered after former judgment; Anderson v. Levan, 1 W. & S. 339; Stearns v. Aguirre, 6 Cal. 180, holding one's election of remedies conclusive upon him when, holding joint and several obligation, he sues either jointly or severally; Brown's Admr. v. Johnson, 13 Gratt. 650, holding that defeat of remedy against one joint obligor on ground not personal to him bars recovery against all; How v. Kane, 2 Pinn. 551, 54 Am. Dec. 158, holding that while one who gets judgment against ostensible partner cannot thereafter get personal judgment against dormant partner, he may make him discover partnership assets in his possession.

Appellate practice.— Supreme Court will not, upon remanding cause, direct amendments in court below, amendments being discretionary with latter court, p. 267.

Cited and relied on in Chapman v. Barney, 129 U. S. 681, 32 L. 801, 9 S. Ct. 427, refusing to review amendment allowed by lower court substituting new party plaintiff; State v. Raiford, 2 Dev. 215, refusing to direct amendment in lower court; Fowler v. Colton, 1 Pinn. 337, refusing to review discretion of lower court.

6 Cr. 267, 268, 3 L. 220, SKILLERN v. MAY.

Federal courts.— After cause sent back by mandate to Circuit Court, it is too late to question that court's jurisdiction, p. 268.

Rule affirmed and applied by the following citing cases: McCormick v. Sullivant, 10 Wheat. 199, 6 L. 302, holding that decrees of inferior United States courts in proceedings of which jurisdiction is not alleged, are erroneous, not void; Ex parte Watkins, 3 Pet. 206, 7 L. 654, and McNutt v. Bland, 2 How. 22, 25, 11 L. 164, 165, holding that such decrees may be reversed by proper authority; in the following: Bank of United States v. Moss, 6 How. 39, 40, 12 L. 335; Kennedy v. Georgia State Bank, 8 How. 611, 12 L. 1219; Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 557, 31 L. 204, 8 S. Ct. 219, to same effect, though want of jurisdiction is apparent on face of proceedings; in Dowell v. Applegate, 152 U. S. 338, 38 L. 467, 14 S. Ct. 615, holding such decrees not liable to collateral attack; Evers v. Watson, 156 U. S. 533, 39 L. 522, 15 S. Ct. 432, and Brown v. Noyes, 2 Wood. & M. 89, F. C. 2,023, holding that such decrees cannot be vacated on motion by same court; In re Eaton, 51 Fed. 804, applying holding to order of injunction in Circuit Court; Ex parte Lennon, 64 Fed. 322, 22 U. S. App. 561, doubting if judgment

of Circuit Court under such circumstances may be collaterally attacked; Dexter v. Sayward, 84 Fed. 302, 304, supporting negative of last proposition, as to decree of Circuit Court of Appeals; Pearce v. Winter Iron Works, 32 Ala. 72, where decree was of District Court and lacked jurisdiction owing to residence of parties; Binney v. Chesapeake, etc., Canal Co., 8 Pet. 219, 8 L. 923, affirming it to be duty of Supreme Court to affirm judgments of Circuit Court which in point of law should be affirmed; Ex parte Story, 12 Pet. 343, 9 L. 1110, sustaining refusal of District Court to receive supplemental pleadings after mandate and decree by Supreme Court; Washington Bridge Co. v. Stewart, 3 How. 425, 11 L. 664, holding that upon second appeal it cannot be urged that Supreme Court had no jurisdiction of first appeal upon which case was tried on merits and mandate issued to Circuit Court; Bank of United States v. Moss, 6 How. 39, 40, 12 L. 335, holding that judgments of Supreme Court cannot be changed at subsequent term in matters of law; Noonan v. Bradley, 12 Wall. 129, 20 L. 281, and Cook v. Burnley, 11 Wall. 674, 20 L. 85, refusing writ of error to review action of lower court in carrying out mandate of Supreme Court; Tyler v. Maguire, 17 Wall. 283, 21 L. 583, affirming that lower court must carry out mandate of Supreme Court and may not question jurisdiction thereof where decision was on merits; Williams v. Bruffy, 102 U. S. 255, 26 L. 137, and Insurance Co. v. Boon, 95 U. S. 143, 24 L. 403, holding that after expiration of term of rendition of judgment court below cannot supply special findings of fact, execution having issued on judgment; Gaines v. Rugg, 148 U. S. 241, 37 L. 436, 13 S. Ct. 616, issuing mandamus to inferior court to execute mandate of Supreme Court without proceedings to construe its meaning and intent; Aspen Mining, etc., Co. v. Billings, 150 U. S. 37, 37 L. 988, 14 S. Ct. 6, refusing appeal to Supreme Court from decree of Circuit Court entered according to mandate of Circuit Court of Appeals; Galpin v. Page, 1 Sawy. 340, F. C. 5,205, discussing validity of decree as to parties before court, where rendered without objection in absence of essential party, unreversed and sale had thereunder; Nesmith v. Calvert, 1 Wood. & M. 38, F. C. 10,123, holding objection to jurisdiction too late when made after answers to merits, replications and publication of evidence; Fisher v. Rutherford, 1 Bald. 193, F. C. 4,823, allowing amendment showing jurisdiction within reasonable time after question is raised; John Hancock Mut. Life Ins. Co. v. Manning, 7 Fed. 300, holding that Circuit Court, after mandate from Supreme Court, cannot entertain motion for new trial because of newly-discovered evidence; Holmes v. Oregon, etc., R. R. Co., 7 Sawy. 392, 9 Fed. 237, affirming that judgment based upon allegations showing jurisdiction cannot be collaterally attacked for want of jurisdiction; Moore v. Town of Edgefield, 32 Fed. 501, holding impervious to collateral attack, judgment based upon jurisdiction of person or subject-matter; Kimberly v. Arms, 40 Fed. 551, holding

that Circuit Court may not review its decree in pursuance of Supreme Court's mandate, without leave of latter court; Billings v. Aspen Mining, etc., Co., 53 Fed. 561, holding that Circuit Court can exercise no discretion concerning mandate of Supreme Court, but must simply execute it; Thatcher v. Gottlieb, 59 Fed. 873, 19 U. S. App. 469, holding decision on appeal, law of case upon subsequent new trial or appeal, evidence in two cases being same.

Cited also and relied upon in Davidson v. Dallas, 15 Cal. 83, and Dodge v. Gaylord, 53 Ind. 368, holding that on second appeal only proceedings had subsequent to first appeal may be reviewed; Davenport v. Kleinschmidt, 8 Mont. 480, 20 Pac. 826; Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 318, 19 U. S. App. 576, discussing conclusiveness of final judgments on collateral attack; Board of Commissioners v. Platt, 79 Fed. 571, 49 U. S. App. 222, holding judgment based upon jurisdiction not subject to collateral attack, because obtained by fraud or collusion; United States v. Peralta, 27 Fed. Cas. 497, allowing District Court to examine Supreme Court's affirmance of former court's confirmation decree to ascertain if both judgments are in accord with title papers upon which they are based; Nims v. Sturdevant, 36 Ala. 641, refusing to allow question of jurisdiction to be raised on second appeal; Fortenberry v. Frazier, 5 Ark. 202, 39 Am. Dec. 374, holding that though error is apparent on face of mandate of appellate court, inferior court can only execute it; Cunningham v. Ashley, 13 Ark. 671; Borden v. State, 11 Ark. 539, 54 Am. Dec. 230, considering judgments of Probate Court when collaterally attacked for lack of jurisdiction; Ashley v. Cunningham, 16 Ark. 174, holding that after cause remanded by Supreme Court for further proceedings, parties may not question correctness of mandate; Roberts v. Haggart, 4 Dak. 212, 29 N. W. 656, holding that rehearing cannot be granted after final judgment and adjournment of term; Wadham v. Gay, 83 Ill. 253, holding that where cause is remanded with direction to dismiss bill for want of equity, it is error to allow complainant to dismiss it without prejudice; Lynn v. Lynn, 160 Ill. 318, 43 N. E. 485, holding that where mandate and decree settle title, further proceedings in lower court questioning title are not allowable; Wright v. Marsh, 2 G. Greene, 114, disallowing collateral attack of judgment, record of which showed jurisdiction; Jameson v. Moseley, 4 T. B. Mon. 415, holding mandate and decree upon appeal from interlocutory order final, and not to be changed by either court; Ward v. Cozzens, 3 Mich. 258, allowing protection to person acting under order of court of superior jurisdiction erroneous but not void; Werz v. Werz, 11 Mo. App. 36, wherein doctrine of presumptions in support of jurisdiction is considered at length; Morse v. Presby, 25 N. H. 302, to point that powers of District Court as to bankruptcy are special and summary, and jurisdiction must be shown; Milam Co. v. Robertson, 47 Tex. 238, to direct point of principal case; Renick v. Ludington, 20 W. Va.

537, holding decision on prior appeal, though erroneous, res judicata on subsequent appeal; State v. Waupaca County Bank, 20 Wis. 643, holding that final judgment of court of last resort is conclusive and binding, though court in similar cases had held that it had no jurisdiction; Poole v. Nixon, 19 Fed. Cas. 995, discussing bills of review.

Distinguished in Kingsbury v. Buckner, 134 U. S. 675, 33 L. 1057, 10 S. Ct. 646, where principal case is held not to support position that decree in pursuance of mandate may be attacked because infant party was not before court where action was originally brought; Kenney v. Greer, 13 Ill. 444, 452, 54 Am. Dec. 442, holding that want of jurisdiction of United States Circuit Court is presumed where pleadings fail to show jurisdiction; City of Hastings v. Foxworthy, 45 Neb. 692, 63 N. W. 960, maintaining right of court to review its decision on former appeal, and overrule it where plainly erroneous.

6 Cr. 268–273, 3 L. 220, CHESAPEAKE INS. CO. v. STARK.

Insurance.—Agent who effected insurance is competent to abandon vessel to underwriters, p. 272.

Cited to this point in Cassedy v. Louisiana State Ins. Co., 6 Mart. (La.) (N. S.) 423, where agent held policy.

Insurance.— Upon abandonment, property vests at once in underwriters. Deed is not essential, p. 272.

Cited in Copeland v. Phœnix Ins. Co., Woolw. 286, F. C. 3,210, where equivocal words are held not to constitute abandonment, and assent thereto, not to constitute acceptance; Mutual Safety Ins. Co. v. Cargo of Brig George, Olcott, 95, F. C. 9,981, holding that upon abandonment insurers succeed to insured's rights and may sue thereon in their own names; Cincinnati Ins. Co. v. Bakewell, 4 B. Mon. 544, holding that insurers having accepted abandonment, become liable for total loss; Mellon v. Bucks, 5 Mart. (La.) (N. S.) 375, holding that, after abandonment, insured cannot sue owners of vessel for failure to deliver abandoned property; Northwestern Transportation Co. v. Thames & Mersey Ins. Co., 59 Mich. 229, 26 N. W. 341, where sufficiency of written notice under policy is passed upon, and it is held that insured cannot exercise rights antagonistic to those conveyed after acceptance of abandonment; Radcliff v. Coster, 1 Hoff. Ch. 108, where right of indemnity under French treaty is held to vest in insurers upon abandonment and payment; Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 205, 67 Am. Dec. 341, holding abandonment to transfer only interest covered by policy.

Distinguished in Clark v. Wilson, 103 Mass. 227, 4 Am. Rep. 538, holding that even when abandonment is followed by payment of total loss, action may be brought in insured's name for conversion of property before abandonment.

Insurance.— Revocation of abandonment may result from subsequent acts of ownership of insured, p. 272.

Cited in Gloucester Ins. Co. v. Younger, 2 Curt. 337, F. C. 5,487, holding that acceptance of abandonment may be implied from acts of insurer; Catlett v. Pacific Ins. Co., 1 Wend. 574, to direct point, though holding that when such acts were performed by insured as agent of insurer, revocation is not effected.

Distinguished in Columbian Ins. Co. v. Ashby, 4 Pet. 144, 7 L. 810, holding that in some cases such acts may not amount to revocation.

Insurance.— Abandonment must be within reasonable time, which is question for jury under directions of court, p. 273.

Cited in Norton v. Lexington Fire, etc., Ins. Co., 16 Ill. 254, holding that right to abandon when lost by delay is not revived by delay of insurers in paying or repairing; Haskins v. Hamilton Mut. Ins. Co., 5 Gray, 438, where question whether insurers repaired machinery within reasonable time was left to jury; Brown v. Phœnix Ins. Co., 4 Binn. 475, refusing to require abandonment within reasonable time where impossible.

Appeal and error.— Venire de novo awarded where special verdict fails to find as to essential facts, p. 273.

Cited in Saltonstall v. Birtwell, 150 U. S. 419, 37 L. 1129, 14 S. Ct. 170, applying rule directly where action was to recover import duties paid under protest; Ward v. Cochran, 150 U. S. 608, 37 L. 1198, 14 S. Ct. 233, holding judgment erroneous where based upon such defective verdict; United States v. Sawyer, 1 Gall. 103, F. C. 16,227, holding that Circuit Court upon reversal of District Court's judgment may direct venire de novo triable at bar of Circuit Court; Holt v. Van Eps, 1 Dak. 212, 46 N. W. 691, to direct point.

Distinguished in Prentice v. Zane's Admr., 8 How. 484, 12 L. 1166, holding that upon waiver of defect in verdict by parties, venire de novo will not be awarded. Cited in dissenting opinion, p. 487, 12 L. 1167.

Insurance.— Abandonment, if legal, puts underwriters in place of assured, p. 272.

Miscellaneous.— Miscited in Bollinger v. Gallagher, 170, Pa. St. 94, on question of proof of foreign laws, decided by Livingston v. Maryland Ins. Co., 6 Cr. 274, infra.

6 Cr. 274–281, 3 L. 222, LIVINGSTON v. MARYLAND INS. CO.

Appeal.— Venire de novo awarded because of defective special verdict, p. 278.

Precedent relied on, in dissenting opinion to Prentice v. Zane's Admr., 8 How. 487, 12 L. 1167, favoring venire de novo, because

special verdict found evidence, not facts; United States v. Sawyer, 1 Gall. 103, F. C. 16,227, ordering venire de novo for defective special verdict, same to be tried by jury at bar of Circuit Court.

Insurance.— Warranty of neutrality in insurance policy is satisfied if one of joint owners of cargo, whose interest is insured, is neutral, p. 278.

Cited in note to The May and Susan, 1 Wheat. 55, 4 L. 35, holding similar warranty satisfied by residence of insured as merchant in neutral country; American Ins. Co. v. Dunham, 15 Wend. 17, holding that warranty against illicit trade can only be broken by insured, not by master or marines.

Insurance.— Effect of misrepresentation or concealment upon policy depends upon its materiality, which is question for jury, p. 279.

Cited in Clark v. Manufacturers' Ins. Co., 8 How. 248, 250, 12 L. 1066, 1067, avoiding policy for misrepresentation as to use of lamps in picking-room of cotton factory; S. C., 2 Wood. & M. 492, F. C. 2,829, holding that material misrepresentation, whether from fraud or neglect, avoids policy; Nicoll v. American Ins. Co., 3 Wood. & M. 536, F. C. 10,259; S. C., 7 Cr. 506, 3 L. 421, holding that best criterion as to materiality of misrepresentation is whether or not it increases risk; Sayles v. Northwestern Ins. Co., 2 Curt. 613, F. C. 12,422, holding that warranty of force-pump in mill includes warranty of power to work it, but not that fire may not disable it; Fidelity & Casualty Co. v. Alpert, 67 Fed. 463, 28 U. S. App. 393, where materiality of statements in application was in question; New York Fireman's Ins. Co. v. Walden, 12 Johns. 516, 7 Am. Dec. 343, ordering venire de novo where lower court instructed jury that representations were material.

Evidence — Proof of foreign laws not shown to be in writing may be by parol, p. 280.

Cited and rule applied in McNeil v. Arnold, 17 Ark. 167, to same effect as to customs, usage and practice of another State; Franklin v. Twogood, 25 Iowa, 528, 96 Am. Dec. 78, holding adjudications of other States upon questions of common law admissible in evidence; Charlotte v. Chouteau, 25 Mo. 473, holding that foreign written laws must be proven by copies; Hill v. Packard, 5 Wend. 389, where commercial law of Havana was in question and query is raised whether foreign code is provable by parol; Dougherty v. Snyder, 15 S. & R. 87, 16 Am. Dec. 524, allowing parol proof of Louisiana law not alleged to be written; Bollinger v. Gallagher, 170 Pa. St. 94, 32 Atl. 573, ruling inadmissible, opinion of witness as to how courts of another State would apply given law to given facts; Tunstall v. Pollard's Admr., 11 Leigh, 28, upholding court's right to inquire into English law as to administration of foreign assets.

Insurance.— The assured are understood to warrant only the part of cargo insured to be neutral, p. 278.

Insurance — Abandonment.— Right to abandon may be kept in suspense by mutual consent, p. 280.

6 Cr. 281–285, 3 L. 224, HUDSON v. QUESTIER.

Admiralty.— Foreign decree of condemnation for breach of municipal regulations cannot be collaterally attacked for lack of jurisdiction, p. 285.

Cited and doctrine relied on, in Williams v. Armroyd, 7 Cr. 432, 3 L. 395, refusing to interfere with unjust decree of French court, because co-ordinate courts cannot review each other's decrees; Rhode Island v. Massachusetts, 12 Pet. 738, 9 L. 1266, holding that prize courts of admiralty jurisdiction are strictly judicial and their decrees conclusive of property rights; The Rio Grande, 23 Wall. 465, 23 L. 159, as to conclusiveness of admiralty decree; In re Cooper, 143 U. S. 509, 36 L. 244, 12 S. Ct. 463, holding that United States District Courts sitting in admiralty are courts of superior jurisdiction and every intendment is in favor of their decrees; Noble v. Union River Logging R. R. Co., 147 U. S. 174, 37 L. 127, 13 S. Ct. 274, as illustrating class of quasi-jurisdictional facts as to which finding of court cannot be collaterally attacked; in re Lennon, 166 U. S. 553, 41 L. 1112, 17 S. Ct. 660, holding that jurisdictional averments cannot be questioned on habeas corpus, except as to false recital, concerning parties to collateral proceedings; The Invincible, 2 Gall. 40, F. C. 7,054, holding that trial of prizes belongs exclusively to courts of country of capture, and jurisdiction is not destroyed by recapture. Other courts cannot interfere; The Arabella and the Madeira, 2 Gall. 370, F. C. 501, holding that prize courts of belligerents may adjudicate upon prize property lying in neutral port; Bradstreet v. Neptune Ins. Co., 3 Sumn. 605, F. C. 1,793, refusing to recognize distinction between such foreign decree and like one pronounced by Municipal Court in rem, concerning conclusiveness as to facts or title; The Trenton, 4 Fed. 662, holding sale of vessel under Canadian decree to extinguish all liens thereon and vest full title in purchaser; Reinach v. Atlantic & G. W. R. R. Co., 58 Fed. 43, as illustrating class of quasi-jurisdictional facts as to which judgments cannot be collaterally questioned; In re McKibben, 16 Fed. Cas. 212, 12 Bank. Reg. 101; Page v. Lenox, 15 Johns. 174, raising query whether or not prize court in belligerent country could proceed against prize lying within territory of neutral power; Frances v. Ocean Ins. Co., 6 Cow. 425, applying holding to same point as to certain British trade and navigation laws; Abraham v. Plestoro, 3 Wend. 554, 20 Am. Dec. 746, dissenting opinion, maintaining that British assignment in bankruptcy is effectual to transfer to assignee personal property of bankrupt in latter's possession on high seas.

Distinguished in Slocum v. Wheeler, 1 Conn. 439, 457, holding State court competent to examine into United States Admiralty Court's jurisdiction in particular case coming up also and later in State court.

New trial.— Upon reversal in favor of plaintiff on bill of exceptions to instructions, court below must award new trial, p. 285.

Cited in United States v. Sawyer, 1 Gall. 103, F. C. 16,227, maintaining authority of Circuit Court to award venire de novo triable at bar of court, upon reversal of judgment.

6 Cr. 286–307, 3 L. 225, SMITH v. STATE OF MARYLAND.

Admiralty.— Jurisdiction of French courts as to seizures is not confined to seizures made within two leagues of the coast, p. 284.

Jurisdiction.— Construction of treaty is deemed to be drawn in questions for purposes of Federal jurisdiction where the issue as to title to land is whether a certain State statute of confiscation effected a complete confiscation within the meaning of a treaty, pp. 304, 305.

Cited and principle applied in Martin v. Hunter, 1 Wheat. 359, 370, 4 L. 111, 113, affirming right of court on writ of error to examine decision of highest court of State where is drawn in question treaty or statute of United States; note to Matthews v. Zane, 7 Wheat, 208, 5 L. 436, n., upon direct point; in dissenting opinion to Gill v. Oliver's Exrs., 11 How. 549, 13 L. 808, to the contention that court might review, by writ of error, judgment of Maryland Court of Appeals, awarding money to claimant under Mexican treaty; Craig v. Missouri, 4 Pet. 429, 7 L. 910, holding that Supreme Court may review judgment of Missouri Supreme Court involving constitutionality of State law under United States Constitution; Crowell v. Randell, 10 Pet. 393, 9 L. 468, dismissing writ of error for want of jurisdiction and reviewing cases construing twenty-fifth section of judiciary act.

Distinguished in Williams v. Oliver, 12 How. 124, 13 L. 921, directly following Gill v. Oliver's Exrs., 11 How. 549, 13 L. 808, supra, of which case it was a branch, and dismissing case for want of jurisdiction.

Confiscation acts of Maryland divested equitable interests and vested them in State without entry or office found, p. 307.

Cited and applied in United States v. Repentigny, 5 Wall. 268, 18 L. 646, holding legislative act directing appropriation and possession of land equivalent to office found; Atlantic & Pac. R. R. Co. v. Mingus, 165 U. S. 431, 41 L. 778, 17 S. Ct. 352, holding that where United States grants land on conditions subsequent, right of re-entry for breach thereof may be exercised by legislation; Schenck v. Peay, 21 Fed. Cas. 683, upholding power of United States to declare immediate forfeiture of land for nonpayment of taxes, to take effect

without further proceedings; Smith v. State, 2 Harr. & J. 472, affirmed by principal case; Kershaw v. Kelsey, 100 Mass. 574, 97 Am. Dec. 136, as supporting right of State to confiscate land within its territory belonging to subjects of enemy; Atherton v. Johnson, 2 N. H. 35, holding New Hampshire confiscation acts, passed during Revolution, binding and valid; Thompson v. Carr, 5 N. H. 515, holding that New Hampshire confiscation act of 1778 vested in State, property of persons named in act; Heirs of Holliman v. Peebles, 1 Tex. 709, affirming that no proceeding of office found was necessary to revest in Mexico, lands granted colonist and later abandoned by him; Willow River Club v. Wade, 76 N. W. 274, holding title to public lands vested in State on breaking out of Revolution.

Distinguished, Society for Propagation of Gospel v. New Haven, 8 Wheat. 492, 5 L. 669, holding that property of British corporations in this country was protected by treaty of 1783, and title confirmed by that of 1794, and could not be forfeited by intermediate legislation.

6 Cr. 307–324, 3 L. 232, DUROUSSEAU v. UNITED STATES.

Appellate jurisdiction of Supreme Court is given by Constitution and limited by congress in judiciary act, affirmative description in which implies negation of cases not enumerated, p. 314.

This holding of the principal case is affirmed and applied in the following citing cases: Ex parte Crane, 5 Pet. 203, 204, 205, 8 L. 97, 98, holding that such act expressly confers superintendence of inferior courts upon Supreme Court, which may mandamus Circuit Court to sign bill of exceptions in case before it; also in dissenting opinion, p. 219, 8 L. 103; In re Kaine, 14 How. 120, 14 L. 352, refusing to grant habeas corpus to inquire into commitment of prisoner by commissioner under treaty of 1842 between Great Britain and United States; Ex parte Vallandingham, 1 Wall. 251, 17 L. 593, refusing to review by certiorari proceedings of military commission of United States army; Daniels v. Railroad Co., 3 Wall. 254, 18 L. 225, refusing to review questions of mixed law and fact certified to it upon disagreement of circuit judges by consent of parties; United States v. Circuit Judge, 3 Wall. 678, 18 L. 114, in dissenting opinion, case holding that appeal lay from decree in Circuit Court in proceeding settling land claims in California and transferred to it from District Court; in dissenting opinion to Ex parte Bradley, 7 Wall. 384, 19 L. 221, holding that mandamus would issue from Circuit Court to Supreme Court of District of Columbia to restore attorney disbarred without jurisdiction; Merrill v. Petty, 16 Wall. 346, 21 L. 501, refusing to entertain appeal on account of defect as to jurisdictional amount; in dissenting opinion to Ex parte Lange, 18 Wall. 185, 205, 21 L. 882, 888, holding that court may, by habeas corpus, review decision of Circuit Court imprisoning person in criminal trial where question of jurisdiction was fairly raised by

petition; Ex parte McCardle, 7 Wall. 513, 19 L. 265, to direct point; Baker v. Biddle, 1 Bald. 406, F. C. 764, dismissing case for want of jurisdiction under judiciary act; Murdock v. City of Memphis, 20 Wall. 620, 22 L. 439, discussing effect of act of February 5, 1867, second section, as amendment of judiciary act of 1789; United States v. Young, 94 U. S. 259, 24 L. 153, denying jurisdiction of court to use writ of certiorari to compel Court of Claims to send to it proceedings in latter court had in case subsequent to appeal thereof to Supreme Court; Railroad Co. v. Grant, 98 U. S. 401, 251 L. 232, holding that party to suit has no vested right to an appeal, and that repeal of law conferring appellate jurisdiction, unless containing saving clause as to pending cases, brings all such within it; in dissenting opinion to Tennessee v. Davis, 100 U. S. 290, 25 L. 659, where case held that case could be transferred to Federal courts where charge of murder was placed against Federal officer, crime being committed in discharge of his duties; The Francis Wright, 105 U. S. 385, 26 L. 1101, declaring constitutional chapter 77, act of February 16, 1875, limiting appellate jurisdiction of court in admiralty cases to questions of law arising on record; National Bank of Baltimore v. Peters, 144 U. S. 572, 36 L. 546, 12 S. Ct. 768, dismissing appeal as filed too late under statute repealing former ones as to certain appeals, saving those taken before given date; American Construction Co. v. Jacksonville Ry. Co., 148 U. S. 378, 37 L. 489, 13 S. Ct. 761, denying mandamus to Circuit Court of Appeals and to Circuit Court and refusing to review decree of former by certiorari; United States v. American Bell Tel. Co., 159 U. S. 549, 40 L. 256, 16 S. Ct. 70, holding that court has appellate jurisdiction of judgment of Circuit Court of Appeals in suit brought by United States to cancel patent of invention; United States v. Plumer, 3 Cliff. 26, F. C. 16,055, holding that writ of error does not lie from Supreme to Circuit Court in criminal case; Pueblo Case, 4 Sawy. 579, F. C. 12,316, refusing to allow appeal from decision of Circuit Court upon appeal from decision of commission appointed to settle California land titles; In re Cilley, 58 Fed. 988, denying to Circuit Court appellate jurisdiction in probate matters; in dissenting opinion to Ex parte Banks, 28 Ala. 45, 46, where court held that granting the change of venue was discretionary with trial judge and not revisable by mandamus or otherwise.

Cited and relied upon by analogy in the following citing State cases: Thompson v. Lea, 28 Ala. 459, overruling motion to dismiss appeal for lack of statutory bond and security, because latter were waived by joinder in error; also in dissenting opinion to same, pp. 464, 466; Sanders v. Cabaniss, 43 Ala. 190, refusing to remand cause pending an appeal in Supreme Court; Warner v. Steamer Uncle Sam, 9 Cal. 736, holding, however, that failure by congress to provide for appeal from State courts in civil admiralty cases cannot affect question as to their original concurrent jurisdiction under

United States Constitution; Farrell v. Winchester Ave. R. R. Co., 61 Conn. 130, 23 Atl. 758, holding that corporation can only exercise powers enumerated in charter; Harris Mfg. Co. v. Walsh, 2 Dak. Ter. 43, 3 N. W. 309, applying same rule of construction to statutory authority conferred upon Supreme Court of territory to review judgments of District Courts; Fleming v. Clark, 12 Allen, 195, refusing to discharge, on habeas corpus, prisoner convicted of crime in Superior Court, though writ of error has issued from single justice of Supreme Court of United States to Superior Court; Jim v. State, 3 Mo. 149, holding that court cannot refuse to entertain matter within jurisdiction conferred upon it by Constitution or statute; Yarbrough v. State, 2 Tex. 527, dismissing appeal from judgment of inferior court refusing bail to prisoner before court on habeas corpus; State v. Dougherty, 5 Tex. 3, 4, dismissing, as outside court's jurisdiction, appeal in criminal case in behalf of State; Irrigation Co. v. Canal Co., 14 Utah, 163, 167, 46 Pac. 826, 827, refusing to entertain appeal from order of District Court granting injunction pendente lite, where Constitution gave appeal to Supreme Court from final judgments of District Court; Eastman v. Gurrey, 14 Utah, 171, 46 Pac. 828, refusing for same reason to entertain appeal from decree of latter court setting aside judgment in ejectment and ordering new trial; Barnett v. Meredith, 10 Gratt. 655, holding that under Constitution and statutes, Supreme Court cannot mandamus Circuit Court to try cause before it.

Distinguished, Gresham v. Ewell, 84 Va. 788, 6 S. E. 136, holding that Virginia Constitution does not ex proprio vigore confer jurisdiction upon Supreme Court, but empowers legislature to do so, and in absence of legislative authority, court may not issue writ of prohibition to County Court.

Statutory construction.— Statute should be construed according to its spirit and intention, even if some implication be necessary, p. 314.

Cited, and this principle relied on and applied in Baring v. Erdman, 2 Fed. Cas. 788, applying rule in construing Pennsylvania road and canal statutes, though result is apparently contrary to letter of statute; Montgomery, etc., Ry. Co. v. Sayre, 72 Ala. 450, construing statute giving appeal from assessment of damages by commissioners where land is condemned for railroad right of way; Hedrick v. Kramer, 43 Ind. 365, holding that under act providing for organization of Superior Courts, same rules as to costs prevail therein as obtain in Circuit Court; Roland Park Co. v. State, 80 Md. 451, 31 Atl. 299, construing statute imposing bonus tax on new corporations; Brien v. Williamson, 7 How. (Miss.) 19, construing State Constitution and legislation as avoiding contracts in pursuance of slave traffic, because opposed to public policy; Smiley v. Sampson, 1 Neb. 90, construing statute concerning filing statement of intention to pre-empt land; Tafoza v. Garcia, 1 N. Mex. 483,

holding that revised statutes of Territory, adopted 1864-5, repeal by implication all previous statutes omitted therefrom; Vermont Loan & T. Co. v. Whithed, 2 N. Dak. 101, construing statute as excepting transactions between building and loan associations and their stockholders from the operation of general usury law; State v. Delesdenier, 7 Tex. 106, construing statute establishing general land office as repealing all previous acts relating thereto; Gas Co. v. Wheeling, 8 W. Va. 358, construing charter of Wheeling Gas Co.; especially as to its provisions for purchase of properties of company by city of Wheeling.

Jurisdiction.— Statute establishing District Court of New Orleans construed as subjecting decisions of such court to same supervision by Supreme Court as District Court of Kentucky decisions, p. 318.

Cited in In re Cooper, 143 U. S. 512, 36 L. 245, 12 S. Ct. 464, applying similar construction to statute giving Supreme Court jurisdiction of appeals from Alaska District Court, holding such jurisdiction to apply to decrees of latter court in admiralty.

6 Cr. 324–327, 3 L. 237, TYLER v. TUEL.

Patents.— Assignee of part of patent-right cannot sue at law for violation thereof, p. 327.

Cited in Moore v. Marsh, 7 Wall. 521, 19 L. 39, allowing action on case by original owner of patent for infringement committed during time he was owner, though he subsequently assigned half interest; Potter v. Holland, 4 Blatchf. 210, F. C. 11,329, defining assignment, assignee, grant and grantee as used in patent law of July 4, 1836; Bryan v. Stevens, 4 Fed. Cas. 510, allowing trustees of license to use patent in certain territory, to enjoin violation, without joining beneficiaries; Meyer v. Bailey, 17 Fed. Cas. 245, holding that transferee of exclusive right as to patent within Pennsylvania is not assignee of patent, whose consent to its reissue is essential; Valentine v. Marshal, 28 Fed. Cas. 869, holding that partial owner of patent-right cannot sue alone for its infringement; Holden v. Curtis, 2 N. H. 63, holding unrecorded assignment of patent valid except as to creditors and subsequent purchasers from patentee without notice.

Distinguished in Whittemore v. Cutler, 1 Gall. 430, 431, F. C. 17,600, allowing joint action for violation of patent by patentee and assignee of right thereto.

6 Cr. 327–329, 3 L. 238, THE SCHOONER JULIANA v. UNITED STATES; and THE SHIP ALLIGATOR v. UNITED STATES.

No citations.

6 Cr. 329–330, 3 L. 239, THE SCHOONER RACHEL v. UNITED STATES.

Statutes — Expiration.— Sentence of condemnation will not be affirmed if law under which forfeiture accrued has expired, though money had been paid over before such expiration, p. 329.

Cited and principle affirmed and relied on in dissenting opinion to Steamship Co. v. Joliffe, 2 Wall. 465, 17 L. 809, where case held that repeal of statute pending appeal as to claim thereunder did not affect right of court to review judgment; Assessor v. Osbornes, 9 Wall. 575, 19 L. 751, holding that where jurisdiction of case or class of cases depends entirely upon statute, suits already brought fall with its repeal; State v. Baltimore, etc., R. R. Co., 3 How. 552, 11 L. 722, refusing to allow recovery of penalty under repealed statute, for failure to locate railroad as provided by law; Ex parte Hull, 12 Fed. Cas. 854, holding that debt contracted before passage of bankruptcy act may be used to support adverse decree of bankruptcy thereunder; Pope v. Lewis, 4 Ala. 489, holding that no judgment can be rendered in action founded upon penal statute after its repeal; First Nat. Bank v. Henderson, 101 Cal. 310, 35 Pac. 900, holding that appeal must follow law existing when decision thereon is rendered; Cook v. Gray, 2 Houst. (Del.) 475, 81 Am. Dec. 193, distinguishing between obligation of and remedy upon contracts as to the extent to which legislation may interfere with each; Higginbotham v. State, 19 Fla. 560, holding that repeal of statute, in absence of saving clause, terminates all proceedings to enforce penalties thereunder; Bank of St. Marys v. State, 12 Ga. 492, holding that vested right to forfeiture under penal statute is only acquired by final judgment, and no such judgment can be rendered under repealed statute; Robinson v. Beall, 26 Ga. 87, holding that expiration of bank charter extinguishes right of plaintiff to pursue stockholders upon their stockholders' liability, where suit was to recover penalty incurred by issuing change bills in contravention of statute since repealed; Coles v. County of Madison, Breese, 158, 12 Am. Dec. 165, holding that repeal of statute remits penalty upon which verdict, but not judgment, had been had; Thompson v. Bassett, 5 Ind. 536, holding repeal of liquor laws to terminate prosecutions on penal bonds executed under prior repealed laws; Kennon v. Shull, 9 Ind. 156, dismissing appeal where statute had been passed depriving court of jurisdiction; State v. Edward, 5 Mart. (O. S.) 475, applying rule where act imposing forfeiture for illegal importation of slaves was repealed; Musgrove v. Vicksburg, etc., R. R. Co., 50 Miss. 682, holding that though original judgment was void under then existing laws, if such laws are repealed pending appeal therefrom, court will not reverse; Johnson v. Hahn, 4 Neb. 147, holding that upon repeal of statute, penalties thereunder, even as to pending prosecutions, are gone; Exeter v. Stratham, 2 N. H. 104, holding that warning out of pauper, defectively begun

under existing law, may be validated by change of law and proper completion under new law; in dissenting opinion to Rich v. Flanders, 39 N. H. 388, discussing retrospective statutes as to remedy and obligation of contracts; Butler v. Palmer, 1 Hill, 330, applying construction where statute altered right of redemption from mortgage sale; Palmer v. Conly, 4 Den. 377, in note, to direct point; People v. Townsey, 5 Den. 72, where, however, repealed liquor law was not one under which defendant was indicted; Curtis v. Leavitt, 15 N. Y. 229, holding that after repeal of usury statute, no defense of usury based thereon, can be interposed; Hartung v. People, 22 N. Y. 101, holding that repeal of penal statute arrests judgment thereunder; Commonwealth v. Standard Oil Co., 101 Pa. St. 150, refusing to impose penalty upon corporation for failure to make report, where statute fixing such penalty had been repealed.

Distinguished, United States v. Four Cases of Lastings, 10 Bened. 373, F. C. 15,145, where forfeiture declared under law later repealed was affirmed, court relying under general saving clause as to pending appeals in revised statutes, section 13; Hargroves v. Chambers, 30 Ga. 602, holding that expiration of bank charter does not extinguish bank's debts nor liability of directors imposed by charter; State v. Cole, 2 McCord (S. C.), 4, where act relied upon as repeal of former acts was merely re-enactment of them and fine imposed under them was allowed to be collected.

6 Cr. 330–332, 3 L. 239, THE BRIGANTINE AMIABLE LUCY v. UNITED STATES.

Law prohibiting importation of slaves into certain States does not apply to the Territory of Orleans.

No citations.

6 Cr. 332–338, 3 L. 240, SERE v. PITOT.

Assignment for benefit of creditors — Suit by assignee.— Assignee of insolvent cannot sue in Federal courts if his assignor could not, p. 336.

In the following citing cases this principle is affirmed and applied: Smith v. Railroad Co., 99 U. S. 400, 25 L. 438, refusing relief demanded by creditor's bill, where there had been no assignment of claim sued upon to plaintiff; Smith v. Commrs. of Bourbon Co., 43 Kan. 621, 23 Pac. 643, and Corbin v. County of Black Hawk, 105 U. S. 666, 26 L. 1138, refusing to allow suit for specific performance of contract by assignee thereof for like reason; Mexican Nat. R. R. Co. v. Davidson, 157 U. S. 205, 39 L. 674, 15 S. Ct. 564, holding that Circuit Court has no jurisdiction of suit by assignee of claim removed to it from State court, unless it could have been brought in Circuit Court in first instance; Ballard v. Bell, 1 Mason, 251, F. C. 2,121, where suit was not founded upon assign-

ment, but original parties were before court; Clarke v. City of Janesville, 1 Biss. 102, F. C. 2,854, holding that bond given by city to railroad company located in same State cannot be sued upon in Federal court by assignee; Hill v. Winne, 1 Biss. 277, 278, F. C. 6,503, refusing to allow suit in Federal courts by assignee of mortgage, parties to which were residents of one State; Wilkinson v. Wilkinson, 2 Curt. 583, F. C. 17,677, applying rule directly; Bradford v. Jenks, 2 McL. 134, F. C. 1,769, holding that receiver of bank, to sue in Federal courts, must show that same suit could have been maintained by bank; Mayer v. Foulkrod, 4 Wash. 352, F. C. 9,341, holding an executor or administrator not an assignee under section 14 of judiciary act; Wilson v. Fisher's Exrs., 1 Bald. 136, F. C. 17,803, allowing assignee of judgment in favor of New York citizen against Pennsylvania citizen to sue thereon regardless of intermediate assignment to citizen of latter State; Cronin v. Patrick Co., 4 Hughes, 532, 89 Fed. 83, holding that assignee of nonnegotiable instrument takes subject to all equities which arose prior to assignment; Hampton v. Truckee Canal Co., 9 Sawy. 383, 19 Fed. 3, dismissing suit by assignee of mechanic's lien because of no allegation showing that such suit could have been brought by assignors; Dimmock v. Doolittle, 29 Fed. 545, holding that in suit by assignor of nonnegotiable contract for use of his assignee, citizenship of former determines question as to removal of cause from State to Circuit Court; Simons v. Ypsilanti, 33 Fed. 194, 195, applying principle to suit by assignee of oral contract to purchase goods; United States Bank v. McNair, 56 Fed. 326, holding that in absence of showing that court would have had jurisdiction of suit by assignor, it will refuse jurisdiction of same suit by assignee; Jackson & Sharp Co. v. Pearson, 60 Fed. 117, refusing jurisdiction of suit by assignee of railroad company against trustee of county's subscription to railroad bonds, both company and trustee being citizens of same State. Cited Cronin v. Patrick Co., 89 Fed. 83, to point that assignee of chose in action takes subject to equities against prior holder. See also notes in 90 Am. Dec. 291, and 36 Am. Rep. 569.

Distinguished in Halsted v. Lyon, 2 McL. 229, F. C. 5,968, allowing suit by assignee of promissory note payable to bearer, though maker and payee of note were citizens of one State; Dodge's Exrs. v. Perkins, 4 Mason, 438, F. C. 3,954, holding that suit cannot be maintained by administrator against citizen of same State with him, though his intestate was citizen of another State. Criticised in Bushnell v. Kennedy, 9 Wall. 393, 19 L. 739, holding that provisions of judiciary act construed in principal case apply only to contracts having contents, and not to mere rights of action founded upon tort or negligence; Dundas v. Bowler, 3 McL. 208, F. C. 4,140, allowing suit by assignee to foreclose mortgage, though court would have had no jurisdiction of same suit brought by plaintiff's assignor.

Constitutional law.— Power to acquire and hold territory includes power to govern it, p. 336.

Cited in dissenting opinion to Dred Scott v. Sandford, 19 How. 611, 613, 15 L. 786, 787, as sustaining power of United States to acquire and govern territory.

Federal courts.— Citizens of territory of Orleans may sue and be sued in that court in same cases in which citizens of Kentucky may sue and be sued in court of Kentucky, p. 338.

6 Cr. 338–340, 3 L. 242, MARYLAND INS. CO. v. RUDEN'S ADMINISTRATOR.

Insurance.— Operation of concealment on policy depends upon its materiality to risk, which is question for jury, p. 340.

Cited in McLanahan v. Universal Ins. Co., 1 Pet. 191, 7 L. 108, where question was as to materiality of time of sailing of ship; Clark v. Manufacturers' Ins. Co., 8 How. 248, 12 L. 1066, 2 Wood. & M. 492, F. C. 2,829; Fidelity & Casualty Co. v. Alpert, 67 Fed. 463, 28 U. S. App. 393, where concealment was as to age of insured; Penn. Mut. Life Ins. Co. v. Mechanics' Savings Bank, etc., Co., 72 Fed. 432, 37 U. S. App. 692, where concealment was of temporary ailments insured had suffered, he being required to disclose diseases he had had; New York Firemen's Ins. Co. v. Walden, 12 Johns. 516, 7 Am. Dec. 344, where concealment was as to character of master of insured vessel.

Evidence.— Bill of lading is not conclusive as to ownership of property covered, but may be contradicted, p. 340.

Cited in Jones v. Sims, 6 Port. 162, to direct point; Harrison v. Hixson, 4 Blackf. 228, holding that such bill may be introduced as evidence of delivery to carrier, and qualified by other evidence as to ownership; Witzler v. Collins, 70 Me. 301, 35 Am. Rep. 333, holding similarly as to statement in bill of lading concerning condition of goods when received; Ellis v. Willard, 9 N. Y. 531; Alton v. Gilmanton, 2 N. H. 521, holding that agreement of attorney waiving notice to his client, made after entering of action, and become part of court files, is conclusive as to facts recited therein; Barney v. Bliss, 2 Aik. 63, holding that receipts may be varied by parol evidence.

Insurance — Abandonment.— What is reasonable time for, is question for jury under direction of court, p. 339.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1812, AND FEBRUARY TERM, 1813.

VOL. VII.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. I.

JUDGES

DURING THE TIME OF THESE REPORTS.

Honorable JOHN MARSHALL, CHIEF JUSTICE.

Honorable BUSHROD WASHINGTON,
Honorable WILLIAM JOHNSON,
Honorable BROCKHOLST LIVINGSTON,
Honorable THOMAS TODD,
Honorable GABRIEL DUVALL,
Honorable JOSEPH STORY,

JUSTICES.

Supreme Court of the United States.

FEBRUARY TERM, 1812

1*] *HUDSON & SMITH
v.
GUESTIER.

[1] *Judges Present.*—WASHINGTON, LIVINGSTON, TODD, DUVALL AND STORY.

This court will not rehear a cause after the term in which it was decided.

ON the first day of the term, *Harper* moved for, and obtained a rule to show cause why this case, which was decided at February term 1810, should not be reheard. The motion was grounded upon a statement of facts which was filed.

March 12th. When this rule was mentioned again by *Harper* he was informed

BY THE COURT, that the case could not be reheard after the term in which it had been decided.

GENERAL RULE.

February 10th. *Winder* requested information from the court whether the general rule which directs that only two counselors should be heard on each side of any cause in this court, was intended to prevent the division of a cause into distinct points, and the hearing of two counsellors on each point.

WASHINGTON, *Justice*, (The Chief Justice being absent), informed the bar that the court considered the rule as inflexible, whatever may be the number of points or parties in the cause.

Cited—17 Wall. 283; 12 Otto, 107.

2*] *FITZSIMMONS AND OTHERS
v.
OGDEN AND OTHERS.

Present.—JUDGES WASHINGTON, LIVINGSTON, TODD, DUVALL AND STORY.

He who has equal equity, may acquire the legal estate, if he can, so as to protect his equity.

THIS was an appeal from the decree of the Circuit Court for the District of New York, sitting in chancery, entered by consent *pro forma* to bring the case before this court.

The material facts as stated by Washington, Justice, in delivering the opinion of the court, were as follows:

For the purpose of securing certain of his creditors, Robert Morris, on the 14th of February, 1798, conveyed to the appellants, as trustees for those creditors, a certain tract of land lying in Ontario county, in the state of New York, containing 500,000 acres, described by certain bounds. Previous to this, he had made conveyances to sundry persons of considerable portions of this tract, and amongst others to the defendants, S. Ogden, J. B. Church and to G. Cottringer, under whom the heirs of Sir William Pulteney claims, of which the appellants had full notice. He had also, by different conveyances, granted to the Holland Company more than three millions of acres of land, purchased (as this tract of 500,000 acres had been) from the state of Massachusetts, all in the same county and adjoining the land in question,

On the 8th of June, 1797, a judgment, at the suit of Talbot and Allum against Robert Morris, was dockcted in the Supreme Court of the state of New York; which, being prior in date to the conveyance made to the appellants, bound all the land which passed by it to the appellants. The bill states that Robert Morris, being confined in the jail at Philadelphia, in order to prevent any improper *use from being made [*3 of the above judgment, and on condition that the title to the land conveyed to the trustees should in no wise be impaired by it, procured Gouverneur Morris to advance the money for such judgment, from motives of friendship; that the said judgment was assigned to Adam Hoops, the mutual friend and agent of the parties, which was done to prevent it from being used injuriously against the trustees and the creditors for whom they acted, and also to preserve to Robert Morris the right of redemption in 1,500,000 acres which he had conveyed to the Holland Company, in nature of a mortgage as he supposed. That A. Hoops afterwards assigned the said judgment to Gouverneur Morris, and on the 15th of September, 1799, Robert Morris confirmed the said trust deed (of which it is worthy of remark, no mention had been made in the previous parts of the bill), and further agreed that any other land he might have in that county, which had not been previously conveyed, should be applied to pay that judgment in the first place, and the said last mentioned lands were to be sold upon an execution and to be purchased by A. Hoops, under Talbot and Allum's judgment, for the trustees, to which G. Morris assented, the trustees agreeing to mortgage the land to be purchased, to repay G. Morris the sum advanced for the purchase of the judgment.

It appears by the evidence, that, previous to the promise thus charged in the bill to have

1. The Chief Justice did not attend until Thursday, February 13. He received an injury by the over-setting of the stage coach on his journey from Richmond.

been made by G. Morris to R. Morris, the judgment of Talbot and Allum had been conditionally purchased by R. Morris, Jun., one of the appellants, avowedly for his individual use, from Cotes, Titford and Brooks, who then held it by assignment. That when this purpose was effected, it was agreed that the assignment should be made to A. Hoops, though in reality for the use of R. Morris, Jun., and should remain in the hands of a third person as an escrow to take effect on the payment of a note given by the said R. Morris, Jun., for the purchase of the judgment, and that the same should belong to Thomas Cooper, who indorsed the said note, in case he should be compelled to discharge the same.

R. Morris, about the time when this note would become due, found himself unable to [4*] take it up, and, on *this account, G. Morris had been solicited by R. Morris, and consented to pay the money and to retain the judgment to secure the advance. G. Morris, in his answer, expressly denies that any communication was made to him by R. Morris of his motives for asking his assistance in procuring an assignment of the judgment, or that he had ever heard or knew of the claim of the trustees to any part of this 500,000 acre tract, or that the same would, in any manner, be affected by the judgment of Talbot and Allum, until some time after he had paid for the judgment, when it was accidentally communicated to him by A. Hoops, who held the assignment of the same for A. Morris, Jun., as before mentioned. Upon receiving this information, G. Morris, with the assistance of his counsel, Thomas Cooper, projected a plan for protecting the interests of the trustees from being sacrificed by a sale under the execution which might issue on that judgment. Articles of agreement were accordingly drawn and executed by G. Morris and A. Hoops on the 29th of August, 1799, by which it was stipulated that the whole of the lands in the county of Ontario, purchased by R. Morris from the state of Massachusetts, amounting to upwards of four millions of acres, should be sold under the judgment, and should be purchased by A. Hoops, who should convey a certain part thereof to G. Morris, and should also mortgage that part of the said land which then belonged to the trustees to the said G. Morris, for securing the advance made by him on the purchase of the said judgment. Although this large tract of country was, by this arrangement, to be sold under the above judgment, yet that judgment being posterior to the conveyances made to the Holland Company, as well as to the other defendants below, they were consequently not bound by the judgment, nor could the title of the grantees have been affected by a sale under it. The object of this agreement, however, in relation to those lands, was to secure to G. Morris a supposed, but totally unfounded claim which R. Morris had asserted to an equity of redemption in one of the large tracts sold by him to the Holland Company, and also an imaginary quantity of surplus land presumed by R. Morris to be somewhere within the bounds of this great tract of country which was to be sold, which surplus, as it afterwards turned out, [5*] had no *real existence. As to the land belonging to the trustees, which it is admitted was bound by this judgment, G. Morris was contented to receive a mortgage of that to secure his advance for the judgment.

A draft of an agreement was also made by Thomas Cooper, by the directions of G. Morris and delivered to A. Hoops to be carried to Philadelphia, and to be proposed to R. Morris and the trustees; but the terms of that agreement do not appear in any part of this record, although it is fairly to be presumed that it did not vary materially from the above agreement between G. Morris and A. Hoops. This draft was not altogether approved by the parties in Philadelphia, and another agreement was accordingly drawn and executed by R. Morris, the trustees and A. Hoops, bearing date the 16th of September, 1799, which did not materially differ from the agreement of the 29th of August preceding, except, that, by the latter, the surplus land, if there should be any, was to be mortgaged to the trustees as a security for reimbursing the whole or such part of the aforesaid judgment as the trustees might be obliged to pay for the discharge of the mortgage to be given by A. Hoops for securing the advance made by G. Morris for the purchase of the judgment.

This agreement was afterwards shown to G. Morris, who expressed some displeasure at its departure from the plan which he had himself arranged; but he admits in his answer that he never communicated his disapprobation either to R. Morris or to the trustees.

It appears in evidence that there was a stay of execution on the judgment of Talbot and Allum for three years from the time it was entered, which, of course, would not have expired before the 8th of June, 1800. This stay was released by R. Morris at some period subsequent to the interview which took place at the jail between R. Morris and G. Morris; but the particular time when it was executed does not appear from the record. It is not, however, improbable that it was not long subsequent to the second of May, 1799, since it appears that, on that day, R. Morris, Jun., in a letter addressed to T. Cooper, directing him to assign the said *judgment to G. Morris, requested him also [*6 to forward to him the form of a release to be executed by his father.

In pursuance of the arrangement which had been agreed upon between these parties as above mentioned, all the lands which R. Morris had purchased from the state of Massachusetts in the county of Ontario were advertised to be sold under the said judgment, on the 6th of February, 1800. Hoops, as it had been agreed, attended on the day of sale and bid for the land; but being overbid and not having the means to pay for the same in case it should be struck off to him, he prevailed upon the sheriff to adjourn the sale to the 13th of May following, upon his engaging to pay the sheriff his poundage, which undertaking G. Morris, soon afterwards, on application, furnished him with the means of discharging.

On the 22d of April, 1800, G. Morris, without having communicated to R. Morris or to the trustees the slightest intimation that he had come to such a determination, assigned over the said judgment to the Holland Company for a full consideration paid therefor, and without notice, as they, the Holland Company, expressly allege in their answer, of the claim

of the trustees or of the equity stated in their bill.

The same day articles of agreement were entered into between Thomas L. Ogden—the Holland Company—and G. Morris, by which it was stipulated that the sale of all the lands by the execution on the aforesaid judgment, should take place, and should be purchased by the said Ogden in trust to convey to the Holland Company the several tracts of land which had been granted to them by R. Morris and to the several persons to whom conveyances had been made within the limits of the 500,000 acre tract prior to the deed to the trustees, the tracts to which they were respectively entitled, or such parts thereof as three persons, Hamilton, Cooper and Ogden, should direct; and as to the residue of the said 500,000, in trust to convey the same to such persons, in such parcels and upon such terms as the said Hamilton and others should direct. In execution of this agreement, Ogden attended the sale on the 13th **7***] of May, *and purchased the whole of the lands taken in execution under the said judgment, for the sum of $5,200, and received a sheriff's deed for the same. Hamilton, Cooper and Ogden, in virtue of the powers vested in them, directed conveyances to be made by Ogden to the Holland Company according to the bounds expressed in the several conveyances to them by R. Morris, except so far as such bounds would interfere with Watson, Cragie and Greenleaf. In order to compensate the defendants, Samuel Ogden, Sir William Pulteney and John B. Church, for the land taken on the westward of their tracts, by fixing the true meridian line of the Holland Company to the east, the eastern line of those persons is made to run in upon the lands claimed by the trustees, so far as to give the former the full quantity of land mentioned in their respective conveyances. The direction, or award as it is called, then proceeds to allot to the trustees 58,570 acres (not half the quantity they claimed) upon certain conditions, one of which is to pay to the said trustee, for the use of the Holland Company, $5,623 with interest from the 22d of January, 1800. This sum, together with others charged upon such of the grantees as were benefitted by this arrangement, were intended to reimburse the Holland Company, the sums they had advanced, not only for the purchase of Talbot and Allum's judgment, but of another, which, being posterior to the conveyance to the trustees, created, of course, no lien upon any part of the 500,000 acre tract.

The prayer of the bill is for a conveyance by Thomas L. Ogden of all the land to which the trustees are entitled according to its real boundaries, upon the trustees paying such proportion of the money due by Talbot and Allum's judgment as is fairly chargeable on their land, and for general relief.

This cause was argued at great length in February, 1810, by *Pendleton* and *Lewis* for the complainants, and by *Edwards* and for the defendants; and again at this term by *Joseph R. Ingersoll*, *E. Tilghman*, *P. B. Key* and *Lewis* for the complainants, and by *D. B. Ogden* and *Stockton* for the defendants.

For the complainants it was contended,

8*] *That Thomas L. Ogden, who purchased the land at the sheriff's sale under Talbot and Allum's judgment, was, under all the circumstances of the case, to be considered in equity as a trustee for the complainants, to the extent of their legal title before that sale; or, in other words, that the sale was void as to the complainants, and ought to be set aside upon the complainants paying their proportion of the amount due upon the judgment, which was a lien upon two smaller tracts, as well as upon that which was claimed by the complainants.

Thomas L. Ogden was the agent of the Holland Company to whom Gouverneur Morris had assigned the judgment. This assignment having passed, not a legal, but an equitable right to a chose in action, was subject to the same equity in the hands of the Holland Company as it was in the hands of Gouverneur Morris, whether the Holland Company had actual notice of that equity or not; because nothing but the equitable right of Gouverneur Morris passed by the assignment. The Holland Company had no right to use it in any other way than he could have used it. They could make no use of it which he could not have made with a good conscience. They were bound by the same conscientious principles towards Robert Morris the elder and the complainants, which ought to have guided Gouverneur Morris. Their agent, T. L. Ogden, could not give a better estate under the sale than G. Morris himself could, if he had continued to hold the judgment and had become the purchaser. The only equity which he had was to the extent of the security necessary to reimburse the money which he had advanced, at the request and for the use and benefit of Robert Morris. He merely became a creditor of Robert Morris with a lien upon the lands to the extent of the debt; which lien he held under a trust, a confidence, a plighted faith, that it should not be enforced to the injury of Robert Morris, or his assignees; and even that it should be used for the benefit of R. Morris or his assignees, as far as it could be used consistent with G. Morris's security as to the amount paid for the judgment. Indeed, as the only interest or equity which G. Morris had in the judgment was merely as a security *sub modo* for the amount due upon the judgment, the judgment as to every other use which could be made of it, consistent with the security of G. Morris, belonged *to R. Morris; and G. Morris [*9 was bound in conscience and good faith to use it in such manner as R. Morris should direct. If, therefore, Gouverneur Morris, instead of T. L. Ogden, had purchased the land under the judgment, he would have holden it merely as an indemnity, and as to every other purpose would have been a trustee for R. Morris or his assigns.

The facts, so far as the conscience of G. Morris was concerned in the case, are simply these: Robert Morris, the elder, knowing that the judgment threatened the validity of the deed of trust which he had made to the complainants, who represented a class of creditors to whom he felt himself under peculiar obligations, entered into an engagement, through the agency of his son R. Morris, Jun., to purchase the judgment for the purpose of holding it as a shield for the protection of the conveyance to the complainants. Being unable to comply with the terms of the purchase, he requested Gouverneur Morris to advance the money due on the judg-

ment, saying that he would thereby render him an essential service, and would be safe, as the judgment was a lien upon a very large tract of land. To this G. Morris assented, from motives of friendship, and to render his friend an essential service. How it was to have that effect was not, perhaps, at that time explained; but the natural inference was that the judgment was to be subject to the control of R. Morris, as to every disposition of it consistent with the security and indemnity of G. Morris; who was bound in conscience, in honor, and in friendship, to have submitted it to his control. The disposition which he did make of it was in violation of all these obligations, and therefore ought in equity to be set aside.

The complainants had a right to tender the amount due upon the judgment to G. Morris at any time. They knew that the judgment was a lien upon their lands, but they knew that there was a stay of execution until the 8th of June, 1800. Until that period they were safe, and Mr. R. Morris himself could not in equity release that stay so as to effect those lands without giving notice to the complainants. It would have been a fraud if he had. They knew that the judgment had been assigned to G. Morris. They knew the circumstances under which that assignment was made. They knew **10***] the understanding, *the friendship, the confidence which subsisted between Gouverneur Morris and Robert Morris, the elder. They had a right to rely upon it and to consider themselves as safe. They had a right to believe that no use would be made of the judgment without their knowledge. They knew of the release of the stay of execution, and that the release was made for their benefit. They were parties to the agreement under which it was made, they knew that this agreement had been made known to G. Morris and that he had acquiesced, if not assented. But neither his acquiescence nor assent was necessary, except as to the provision made for his indemnity; for so far only was he interested. They knew that a sale for their benefit had been attempted under the judgment, but was postponed to a future day. They knew that the failure of this attempt and the postponement of the sale were known to G. Morris, and that he had even paid the poundage demanded by the sheriff upon the postponement. He knew that all these things were so understood by the complainants, and that they had this confidence in him, and were lulled into security. At this moment, without any notice or intimation to the complainants, he assigned over the judgment to the Holland Company, for purposes which he knew to be repugnant to the interest of the complainants. It is this of which the plaintiffs complain as unconscientious and injurious; and the consequences of which they seek to avoid.

It is true that G. Morris himself cannot properly be charged as a trustee, because an equity cannot, with propriety, be said to be the subject of a trust, or to be holden in trust; for the equity will always be in the *cestui que trust*, and not in the trustee. But if G. Morris, under all these circumstances, had himself acquired the legal estate to the lands conveyed to the complainants, he would have been a trustee for them, upon their paying or tendering him the money due by the judgment. He had no other equity to protect, and could not have protected his legal title under the equity of others. Nor had the Holland Company any equity to protect. There were no interfering lines, nor any other cause of dispute between them and the complainants. Their agent, Thomas L. Ogden, even after the sheriff's sale, was in no better situation than G. Morris would have been in if he had been the purchaser. He had no right to claim *protection under the [***11** equity of any third person. He had full notice from the complainants before he made any conveyance under what is called the award of Hamilton, Ogden and Cooper. He therefore is to be considered merely as the agent of the Holland Company, who took only the equity of G. Morris; and having acquired the legal estate with full knowledge that the complainants were entitled to every possible benefit under that judgment beyond the interest of Gouverneur Morris, whose right extended only to indemnity for the advance he had made, he is to be considered as a trustee for the complainants for all beyond that indemnity; and upon receiving the amount due upon the judgment, ought to be decreed to convey to the complainants all the lands which he purchased at the sheriff's sale which lie within the tract conveyed to them by R. Morris, by the deed of the 14th of February, 1798.

It was also contended by the counsel for the complainants, that inasmuch as Mr. R. Morris had agreed to release the stay of execution for one purpose only, the execution could not legally be issued for another purpose, and therefore the sale was void at law. But whatever intrinsic force this argument might have had, it could not be considered by the court, because it was expressly admitted upon the record that the execution was regularly issued.

It was further said in behalf of the complainants, that although, at the time when G. Morris agreed to purchase the judgment, it was not stated in what manner the judgment should be used so as to be of service to his friend R. Morris, yet as G. Morris varied the conversation, he must be considered as having agreed that R. Morris should direct in what manner it should be used; and that as R. Morris, by his agreement of the 16th of September, 1799, did direct how it should be used (to which agreement G. Morris did not object), he was in equity bound to suffer that agreement to be carried into effect; and therefore his assignment of the judgment to the Holland Company with a view to defeat the purpose of that agreement was against conscience, and affected all the subsequent proceedings under that assignment.

The conveyances made by T. L. Ogden to Church and others, being made after notice given to him by the complainants, *can- [***12** not injure their rights. He is liable to them at all events, and must look to those to whom he has conveyed the lands for his indemnity—an indemnity which he has taken care to secure.

The counsel for the complainants, to show that by the assignment of the judgment nothing but an equitable interest passed, and that the assignee held it liable to the same equity to which it had been liable in the hands of the as-

signor, cited 1 Vez., 123, *Hill* v. *Caillovel;* 2 Vern., 765, *Turton* v. *Benson;* Pree. in Chancery, 524, S. C.

To show that a purchaser without notice is not protected, if he has notice before he pays the purchase money and gets a deed, they cited 1 Atkins, 384, *Wigg* v. *Wigg;* 2 Atk., 630, 631, *Story* v. *Lord Windsor;* 2 Eq. ca. ab. 685, pl. 9, *Jones* v. *Stanly;* 3 P. Wms., 307, *Tourville* v. *Naish.*

To support the position that where the assignment passes only an equity, notice is not necessary, and that if no legal estate passes, *qui prior est in tempore, potior est in jure,* they cited 3 P. Wms., 308, *Tourville* v. *Naish;* 3 Brown C. C., 264, *Williams* v. *Lambe.*

To show that a trustee is liable for a breach of trust, they cited 1 P. Wms., 128, *Pye* v. *George;* 2 P. Wms., 610, *Mansell* v. *Mansell;* 2 Salk., 680, *Pye* v. *George,* and *Gilbert's Forum Romanum.*

To show that where a recital in a deed leads to notice, there notice shall be presumed, they cited 1 ca. in ch., 291, *Bisco* v. *Earl of Banbury;* 2 ca. in ch., 246, *Moore* v. *Bennett* § Ambler, 311, 312; 1 Atkins, 490, *Smith* v. *Law;* Vernon, 385, *Ferrars* v. *Cherry.*

And to show what will raise an implied trust, they cited 1 Vezey, 289, *Barnesly* v. *Powell;* 1 Vernon, 276, *Palmer* v. *Young;* 1 P. Wms., *Brown* v. *Litton;* 1 Atk., 383, 384, *Wigg* v. *Wigg;* 1 Br. C. C., 81, *Sonley* v. *Clockmakers' Company,* and the case of *Slocum and wife* v. *Marshal and others,* in the Circuit Court of the United States, for the District of Pennsylvania.

On behalf of the appellees, it was said,

13*] *1st. That there was no trust for the benefit of the complainants; and consequently they have no equity.

2d. That if there was originally a trust for their benefit, yet as the defendants have acquired the legal title (without notice of the equity of the complainants), they, the defendants, have equity enough to support the legal estate they have thus acquired, to the extent of the number of acres intended originally to have been conveyed to them by R. Morris, the elder.

1st. There was no trust for the benefit of the complainants.

The complainants set forth the trust in Gouverneur Morris to be to prevent the judgment from being used injuriously to them, and to preserve to Robert Morris his right of redemption in that part of the lands which was supposed to be mortgaged to the Holland Company. No consideration flowed from the complainants whereby to raise an implied trust in their favor. The consideration was merely personal between Gouverneur Morris and Robert Morris; it was a matter of confidence; and if the former violated that trust of confidence, he was liable only to Robert Morris.

At law, no man can support an action upon an agreement unless he is a party, or some consideration flowed from him. (Cro. El., 369, *Jordan* v. *Jordan;* 1 Str., 592, *Crow* v. *Rogers;* 1 Vent., 6, *Bourne* v. *Mason.*) It is true there are some modern cases in which it has been holden that the person to whose use the promise was made may maintain an action in his own name, but it must be in a case where the whole use and benefit are to accrue to the plaintiff. But here, even as stated in the bill, the trust was in part for the benefit of Robert Morris.

If the complainants would not have a right to enforce the agreement at law, neither can they compel its execution in equity.

This bill is in the nature of a bill for the specific performance of the agreement between Robert Morris and Gouverneur Morris, charging the Holland Company with notice.

*A court of chancery decrees a specific [***14** execution of a contract because a suit at law would not give a complete remedy; but a court of chancery will not decree a specific performance unless the party would have a right to recover damages in a court of law. Here was no right at law, and therefore this court cannot decree a specific performance of the agreement. (1 Vez., 444, *Penn* v. *Lord Baltimore;* Scholles and Lefroy, 552, *Harvey* v. *Yielding.*)

It is an universal principle in chancery, that the complainant must show himself entitled by his bill. (Mitford 43 [15], *Barton's suit in equity,* 36, 37.) He must recover according to his allegations and his proofs. Proofs without allegations are not sufficient, even if his proofs should show a good title to relief. The only allegation like an averment of a trust is that G. Morris agreed that he would not use the judgment to the injury of the complainants, nor to bar R. Morris's right of redemption. As to the latter part of the supposed trust the complainants cannot recover, and R. Morris is no party to the suit. On this account the bill is defective. (2 Atk., 510, *Darwent* v. *Walton.*) But even the allegation in the bill, imperfect as it is, is not supported by the evidence. G. Morris, in his answer, denies that R. Morris communicated to him his motives for wishing him to purchase the judgment, and most expressly denies any agreement on his part not to use it to the prejudice of the complainants. This answer, being directly responsive to the allegation of the bill, is conclusive evidence, unless contradicted by more than one witness. But it is confirmed by the deposition of R. Morris, as far as it relates to that interview. G. Morris states that he was induced to become the purchaser by motives of personal friendship towards R. Morris. It was the duty, therefore, of R. Morris to have explained to his friend in what manner the purchase was to be made serviceable to him, and who were the parties really to be benefited thereby. If he did not do it, and intended that others should derive the benefit, it was a fraud upon the feelings of friendship. But it is clear that R. Morris did not request it with a view principally to the security of the complainants. He states in his deposition that his objects were, 1. The equity of redemption, 2. The surplus tract which it was supposed remained unconveyed, *and [***15** 3. To prevent injury to the complainants. The visit of R. Morris, Jun., to New York, was to prevent the effect of certain attachments, and to secure the surplus lands so as to make a provision for his mother. Hoops, in his deposition, says that the security of the complainants was not an object in the first purchase of the judgment.

There was neither equity of redemption nor surplus land. How, then, was G. Morris to be secured for the amount of the judgment, unless by the lands of the complainants? And yet

they say that the judgment was not to effect those lands. It would be absurd to suppose such a trust. The agreement of 16th of September, 1799, shows that there was no such trust. And the answer of G. Morris, not being contradicted, is conclusive evidence that the trust did not exist. (Pre. ch., 19, *Kingdome* v. *Boakes;* 2 Atk., 140, *Janson* v. *Rany;* 3 Atk., 407, *Only* v. *Walker;* 1 Br. C. C., 52, *Pember* v. *Mathers.*)

No equity arose from the release of the stay of execution. If there did, it was an equity in R. Morris, and not in the complainants.

The time and place of sale were fixed by the agent of the complainants, and therefore they cannot complain, nor allege the want of notice.

The inadequacy of price is by no means so great as the complainants pretend; but if it was it cannot affect the equity of the defendants' case. If they obtained the legal title they have equity enough to support it, even if it cost them much less than 5,000 dollars. But a sheriff's sale fairly and publicly made has never been set aside for inadequacy of price. If there be no trust, the inadequacy of the price is immaterial.

There must be in every trust, a subject of the trust, a trustee, and a *cestui que trust.* But here is no subject—the proceeds of the judgment were not for the complainants. They were the absolute property of G. Morris. He never held the land. But what sort of a trust was it? Not a resulting trust, for that can only be raised in favor of the person from whom the **16***] consideration moved. *And that it was not an express trust is admitted. If it was neither an implied nor an express trust, G. Morris was the absolute owner of the judgment.

A man cannot be made a trustee unless the extent of his trust be fully explained to him. (10 Vez., Jun., 511, *Lench* v. *Lench.*)

The fact of the trust is to be found by the court from the evidence as a jury would find it.

Secret trusts are dangerous. Since the statute of frauds nothing is left of the whole fabric of parol trust but a resulting trust, which is a trust arising by implication, from the fact that the purchase money was paid by, or the consideration moved from, the party who claims the benefit of the trust. (2 Atk., 384, *Parteriche* v. *Powlet;* 3 Br. C. C., 577, *Fordyce* v. *Willis.*) And it is only lately parol evidence has been admitted to prove the facts from which a trust, as to lands, would result. (Cruise's Digest, 472; 1 Vern., 366, *Gascoigne* v. *Thwing;* 10 Vez., Jun., 366, *Rider* v. *Kidder.*)

In the case of *Lloyd and Johnson* v. *Spillett and others,* in 2 Atk., 150, Lord Hardwicke said, "I am now bound down by the statutes "of frauds and perjuries, to construe nothing "a resulting trust, but what are there called "trusts by operation of law; and what are "those? Why, first, when an estate is pur- "chased in the name of one person, but the "money or consideration is given by another; "or secondly, where a trust is declared only as "to part, and nothing said as to the rest, what "remains, undisposed of, results to the heir at "law, and they cannot be said to be trustees "for the residue. I do not know any other "instance where this court have declared re- "sulting trusts by operation of law, unless in "cases of fraud and where transactions have "been carried on *mala fide.*"

Lord Hardwicke was not perfectly correct as to the extent of the doctrine. Later cases have added the cases of a failure of the consideration, and where the consideration is merely nominal. (1 Cruise Dig., 471, § 29, &c.) A purchaser for full value has never been adjudged to be a trustee for another. (7 Br. Parl. ca., *526, *Pilkinton* v. *Bailey;* 1 Cruize, 485, [***17** § 60, S. C. abridged, 4 Bur., 2255.)

2d. But if there had been a trust, and although the assignment by G. Morris to the Holland Company was an assignment of an equitable right only, and therefore not protected by want of notice, yet the agent of the Holland Company having obtained the legal title without notice of the trust either by himself or the Holland Company, he has a right to hold against a mere legal claim on the part of the complainants. For the mistake as to the boundary, being a mistake to the prejudice of the defendants, can create no equity in favor of the complainants. It was a mistake by which the complainants would have gained, and the defendants would have lost, more than one thousand acres of land. If Gouverneur Morris had purchased the judgment with a full knowledge of this mistake of the boundaries, and with a view to secure the benefit thereof for the complainants, and to do this injustice to the defendants, no court of equity would have aided him in accomplishing the purpose; and even if he had acquired the legal title to the land under such circumstances, it is more than probable that a court of equity would have granted relief to the defendants.

A court of equity will never interfere against a *bona fide* purchaser, for a valuable consideration, without notice, but will permit him to save himself by any legal plank which he can lay hold on. (1 Eq. ca. ab., 353, 322.) And in the case of *Jerrad* v. *Sanders* (2 Vez., Jun., 457), Lord Loughborough said that in such a case a court of equity has no jurisdiction.

Inasmuch, therefore, as the complainants who seek to gain by the loss of the defendants have no equity arising from the mistake of the boundaries, and as the defendants have the legal title supported by a strong case in equity, the complainants are not entitled to the aid of a court of equity.

Feb. 20.[1] WASHINGTON, *J.*, after stating the facts of the case, delivered the opinion of the court as follows:

*The first point made by the counsel [***18** for the appellants is, that G. Morris ought to be considered as a trustee of Talbot and Allum's judgment for the trustees. On this point it is contended that, although in the first instance, G. Morris might have had no other inducement in purchasing that judgment than to perform a friendly service to R. Morris, yet he afterwards charged himself with the interests of the trustees by an express declaration contained in the agreement of the 29th of August, 1799, connected with the subsequent agreement of the 16th of September, 1799, which, notwithstanding his disapprobation of some parts of it, he adopted by his silence and subsequent conduct. The trust being thus established, it is then contended that the Holland

1.—Absent, MARSHALL, *Ch. J.*, and Livingston, *J.*; the other five present.

Company—the purchasers of this judgment from G. Morris—took the same clothed with all the equitable rights of the trustees, which were attached to it in the hands of G. Morris upon the ground that a judgment is a chose in action, and the assignment passes no more than an equitable interest to the debt of which it is the evidence. Having arrived at this point, the title of the trustees is placed upon the well-known principle which governs a Court of Chancery, that between merely equitable claimants, each having equal equity with the other, he who hath the precedency in time, has the advantage in right.

If the cause rested upon this state of the case, it would be incumbent on the court to examine these principles and their application to the respective pretensions of the trustees and of the Holland Company. Whether an equity arising to a third person who claims the chose in action, and whose title depends upon a secret trust and confidence between him and the ostensible assignee, has equal equity with the person who afterwards purchases the judgment *bona fide* and without notice of a fact not disclosed by the previous assignments, is a question which the court deems it unnecessary to decide, because, though the equity of the trustees and the Holland Company should be admitted to be equal, yet the latter have acquired another title to the subject in controversy which a court of equity will never disturb. They, or rather their trustee, have got the fruits of their execution, and have obtained the legal estate in the land on which the judgment gave them only a lien. Having at least equal equity with the trustees, it was perfectly justifiable in them to obtain a superiority by buying in the legal estate.

19*] *Aware of this difficulty, one of the counsel for the appellants found it necessary to contend that the sale on the 13th of May was absolutely void, the execution having been taken out before it could lawfully issue in consequence of the stay on record which prevented its emanation prior to the 8th of June following. This, however, is arguing against the fact; because we find that long prior to the sale and assignment of the judgment to the Holland Company, the *testatum fi. fa.* had issued by the consent of R. Morris as well as of the trustees, who, on the 6th of Feb., 1800, had endeavored to render it effectual by a sale attempted on that day. The release of the stay is not spread on the record so that the terms of it, or its date, might be examined. But since the execution could not legally issue without a regular release filed in the court where the judgment was of record, and since the form of such a release was applied for by one of the trustees so early as the 2d of May, 1799, it must be presumed, against the trustees and in favor of the regularity of the proceedings, that the release was in due form, and bore date prior at least to the emanation of the execution.

But it is contended that the consideration for this release was the trust declared by G. Morris in August, 1799, or acquiesced in by him under the agreement of the 16th Sept. and that his breach of trust in selling the judgment to the Holland Company, with a view to the intended purchase of the lands in dispute by them, did away the effect of the release previously executed by R. Morris. That this was a legal consequence of the alleged breach of trust can scarcely be maintained. The release being once regularly executed and delivered could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given. It could extend no further than to charge G. Morris with a breach of contract for which he might be personally liable to the party aggrieved. But as to third persons claiming fairly under him, without notice of the alleged breach of trust, the legal effect of the release would remain unimpaired.

It is very obvious, however, that the whole of this argument is founded on an assumption of facts which are not proved, and which cannot and ought not to be presumed. It does not appear from the evidence in the *cause [**20** that the trust assumed by G. Morris was the consideration of that release, and yet if the trustees would avail themselves of that circumstance to invalidate the sale, and to deprive the Holland Company of the shield by which they have protected their equitable interest, such proof should be clearly made out. On the contrary, the court must consider the fact as established (since it is asserted on oath by G. Morris in answer to a charge in the bill, that the object of G. Morris in purchasing the judgment, was to confer a personal benefit on R. Morris only) that, in consequence of this undertaking, made with the knowledge of one of the trustees, and for the purpose of giving effect to this intention, the release was made, and it is fairly to be presumed that it was executed long prior to the arrangement made by G. Morris and the trustees in August and September, 1799, because, as has been before observed, the form of a release was applied for as early as the 2d of May preceding. If the date of the release was contemporaneous with, or subsequent to the agreements of August and September, it was in the power of the trustees fully to have established the fact. Being essential to their argument, their having omitted to furnish the proof affords a strong presumption against them.

It is contended that the Holland Company ought to be considered in the light of purchasers of the judgment with notice of the trust, because, knowing, as they were bound to do, that the execution could not issue before the 8th of June, 1800, they were necessarily led to inquire into the right which they assumed of taking out execution at a prior day, and in making this inquiry they must have come to a knowledge of the trust. But the previous issue of the execution, fortified by the circumstance of the sale under it attempted in February and continued by adjournment to the 13th of May, rendered all inquiries into the cause of the release unnecessary. It was enough for them that the impediment to the issuing of the execution was removed at the time they purchased the judgment.

The cause appears to the court to be so clearly in favor of the Holland Company and those claiming under them, upon the point which has been examined, that it seems almost unnecessary to notice those circumstances which detract from the equitable title of the trustees.

21*] *But it is obvious that the injury of which they complain has arisen in a great measure from the want of energy in themselves, and a kind of helpless dependence upon others, even after they were fully apprized of the steps which were taking and which finally led to the loss from which they now seek to extricate themselves. Mr. Fitzsimmons was informed by A. Hoops, prior to the 22d of April, 1800, that the agent of the Holland Company had gone on to New York, and the intention of this visit was most probably communicated to him, as Mr. Hoops, at the same time, advised him to have an understanding with G. Morris. If he received from this advice nothing further than a hint of possible mischief, it was sufficient to put them upon inquiry and exertion.

An attempt was made, though not much pressed, to charge G. Morris with a breach of trust, and with the legal consequences thereof. That his declining to communicate to the trustees his intended sale of Talbot and Allum's judgment to the Holland Company upon terms which might seriously affect the interest of the former, was unkind, and a departure from the friendly conduct he had manifested towards them, may be admitted. But since it must be taken as a fact in the cause that no promise of any kind had been made by G. Morris in favor of the trustees, or to his knowledge, in reference to their interests, prior to the agreement of the 29th of August, 1799, (and even this agreement, or the draft made by Cooper and forwarded by Hoops to R. Morris and the trustees for their signature, is not alleged in the bill with any degree of certainty as a ground on which the trust is founded) and since the arrangement proposed by G. Morris in that agreement and draught was rejected by those parties and another substituted in their stead to which G. Morris was no party, it would be going too far for a court of equity, in such a case, and in favor of persons who would do nothing for themselves, to make G. Morris a trustee by implication for the purpose of charging him with a breach of trust. It is true that G. Morris might have communicated to the trustees his disapprobation of the change they had made in his arrangement, and his refusal to abide by that which they had proposed as a substitute, so as to have afforded them an opportunity to retrace their steps. But surely he was not, in point of law, as much bound to 22*] make such a *communication as the trustees were to obtain a certain knowledge of his assent to the agreement of the 16th September. He had gratuitously offered to do a favor to the trustees upon certain conditions. They reject the offer as made and propose other conditions. It was incumbent on them to obtain his assent to the new proposal if they meant to consider him in the light of a trustee.

The opinion given upon these points renders it unnecessary to consider the question of boundaries.

Decree affirmed without prejudice.

Cited—10 Pet., 210, 211.

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BRIG JAMES WELLS
v.
THE UNITED STATES.

Absent—MARSHALL, *Chief Justice.*

In cases of admiralty jurisdiction, new evidence will be admitted in this court; and for that purpose a commission may issue.

The evidence of that necessity which will excuse a violation of the embargo laws, must be very clear and positive.

THIS was an appeal from a sentence of the Circuit Court which affirmed that of the District Court of Connecticut, restoring the cargo but condemning the brig James Wells, an American registered vessel, for a violation of the 3d section of the embargo act of January 9th, 1808, in making a voyage to St. Bartholomews, under a clearance for the port of St. Mary's, in the state of Georgia. The excuse suggested by the claimant of the vessel was stress of weather. He stated in his claim and answer, that the vessel, laden with 1272 barrels of flour, sailed from New York on the 26th of February, 1808, cleared and bound for St. Mary's, with a *bona fide* intention of going there, and without any intent of going to any foreign place. But that by contrary winds and stress of weather and the leaky condition of the vessel, he was compelled against his will (he being owner and supercargo) and against the will of the captain and crew, to go to, and enter the port of Gustavia, in the island of St. Bartholomews, in the West Indies, where he was obliged by the leaky and shattered condition of the vessel, to unlade the cargo, which was greatly damaged, and he could not afterwards obtain permission to carry it away again, but was compelled to sell it there.

*The evidence on the part of the claim- [*23
ant tended to prove that after the vessel got to sea, and the weather was rough, she leaked considerably in her upper works, so that in bad weather they had to keep two pumps going at the rate of three or four hundred strokes every half hour; that after being six days at sea, it was judged "best for the preservation of their "lives as well as for the safety of vessel and "cargo, to bear away for any of the West "India Islands;" that when they arrived at St. Bartholomews, part of the flour was damaged, and they were obliged to unlade the vessel to have her surveyed and repaired. That the Governor of the island had prohibited the exportation of provisions and would not permit them to take away their cargo.

New evidence which had been taken under a commission issued from this court, was offered.

Pinkney, Attorney-General, stated that he could not consent to admit it, but wished the objection might be saved.

He supposed that a distinction ought to be taken between cases of admiralty and cases of maritime jurisdiction, and by the act of Congress, new evidence is admissible in this court in cases of admiralty only.

On the next day, however, he said that he was induced by the particular circumstances of this case to waive his objection; especially as the question would be made in another case at this term.

Harper and *Pitkin*, for the appellant, cited the cases of the *Betsy and Charlotte* v. *U. S.* (Ante vol. 4, p. 443), and *Yeaton* v. *U. S.* (Ante vol. 5, p. 281).

The court said that the admission of the evidence in this case, being by consent, would not prejudice the question if it should afterwards arise in another case.

Pitkin and *Harper* for the appellant.

The plea of necessity by stress of weather has been heretofore admitted as an excuse for violating the positive law of the embargo; and **24***] the only question in this *case is whether the necessity was so urgent as to justify the bearing away for a port of safety. We contend that reasonable apprehensions of loss by persisting in the voyage to St. Mary's was a sufficient justification.

Fraud is not to be presumed. The fact is incontestable that the vessel leaked very much, and the weather was very bad. Such an apprehension of loss as would have justified a deviation under a policy of insurance is a sufficient justification in the present case. And in such case it is sufficient to justify a deviation that the captain has acted fairly and *bona fide*, and according to the best of his judgment for the benefit of all parties concerned, and has no other view but to conduct the ship and cargo by the safest and shortest course to her port of destination. (Marshall on insurance, 408, 409, 410, 411.)

By the original embargo act of December 22d, 1807, the master is to give a bond in double the value of the vessel and cargo, to reland the goods in the United States, "danger of the seas excepted." That act being *in pari materia*, the exception of the dangers of the seas ought to be considered as extending to the present case.

WASHINGTON, *J.* There is no doubt as to the law; the only question is whether this case be within the exception.

Pitkin. It is strong evidence that the master thought he was doing right, that he returned directly to the United States and subjected himself at once to the penalty of his bond, and that in fact he obtained only 12 dollars per barrel for his flour at St. Bartholomews.

Dallas, contra.

It was the duty of the owner to have a vessel fit for the voyage and the season of the year. This vessel was badly built; her condition upon the former voyage was given in evidence and was known to the owner when she sailed. He knew she would leak, and probably he intended she should leak. He knew the leak was in her upper works only, and that therefore the lives of those on board were not in danger. He did **25***] not have the proper *repairs made at home which he knew were wanting. Nothing was done to her at St. Bartholomews, except caulking, and she brought home her cargo in excellent order. When they found that she leaked she might have returned. The wind which was contrary to St. Mary's would have been fair to bring her back; other vessels arrived about the same time with fair winds.

Nothing but imminent danger to the lives of those on board could justify their going to the West Indies contrary to law. The safety of the vessel and cargo was a matter of no consideration, as a justification. There is therefore no analogy to the case of deviation.

Feb. 20. All the judges being present, WASHINGTON, *J.*, delivered the opinion of the court as follows:

That the law under which this prosecution is founded has been, *prima facie*, violated, is admitted; and it becomes absolutely necessary for the defendant, if he would excuse the breach, to bring himself within the exception made for his benefit, not by doubtful testimony, but by such as shall leave no reasonable doubt of the sincerity of his exertions to proceed to some port in the United States, and the danger or apparent impossibility of doing so.

That the vessel, shortly after leaving New York, leaked considerably is proved; but it is also proved that the leak was in her upper works; that she could be freed, and, by great exertions, was kept free of water.

It is clearly proved that, after a sail of six days, she bore away for the West Indies, and the danger of continuing on the coast is indirectly stated, though nowhere positively affirmed.

But it is not proved by a single witness that an exertion was made to gain a port of the United States, or that the attempt, if it had been made, would, in the opinion of one person on board, have failed or been attended with danger. Nor are the state of the winds, or the latitude *and longitude of the vessel when [***26** she bore away, given in evidence so as to enable the court to judge. In short, had the original destination been to the West Indies, and this known to the crew, it would be difficult to fix perjury upon any one of those who have given evidence in this cause.

In such a case, where no presumption can, or ought to be made in favor of the owner of the vessel, and with so strong a temptation as he had to violate the law, her condemnation is inevitable.

Sentence affirmed with costs.

MARYLAND INSURANCE COMPANY,

v.

LE ROY, BAYARD & M'EVERS.

Absent—MARSHALL, *Chief Justice.*

The discharge of underwriters from their liability, in case of taking on board an additional cargo, not authorized by the policy, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance.

The consequences of such a violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters; and the law attaches no importance to the degree, in cases of voluntary deviation. Necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the *vis major* producing it.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant brought by Le Roy and others, against the Maryland Insurance Company, upon a policy of insurance upon the ship John, from New York to five ports on the coast of "Africa, be-"tween Castle D'Elmina and Cape Lopez, in-"cluding those ports, and at and from them, or "either of them, back to New York with liber-"ties as per order of insurance."

The order of insurance was as follows, viz.: "At what rate will you insure three thousand "five hundred dollars upon freight of the ship "John, of New York, valued at that sum, at "and from New York to Castle D'Elmina, on "the gold coast of Africa, with liberty for the "vessel to touch at the Cape de Verd Islands "for the purchase of stock, such as hogs, goats "and poultry, and taking in water?

27*] *"Also, nine thousand dollars on the "American ship John, valued at this sum; and "eleven thousand eight hundred dollars on "cargo by said ship, consisting of wine, rum, "beef, geneva, dry goods, tobacco, molasses, "&c., at and from New York to five ports on "the coast of Africa, between Castle D'Elmina "and Cape Lopez, including those ports, with "liberty of touching and trading at all, or any "of said ports, backwards and forwards, and "at and from her last port on the coast, to "New York, with liberty of touching at the "Cape de Verds on her return passage, for "stock and take in water. It is understood "that the captain returning to one or more "ports that he had touched and traded at be-"fore, shall not be considered a deviation. "The John was ready and expected to sail the "13th inst. There are no contraband goods on "board, and the ship is armed with eight car-"riage guns, with ammunition in proportion, "and is an excellent vessel, and Captain Law-"rence, who commands her, is a native of "New York, well acquainted on the coast of "Africa, and has been at most of the places it "is intended the vessel is to stop at, and is a "careful, experienced seaman."

The declaration was for a total loss by the perils of the sea. The cause was tried upon the issue of *non infregit conventionem*, and the verdict and judgment were for the plaintiffs with 5476 dollars damages.

Upon the trial of this issue the defendants (the plaintiffs in error) took twelve bills of exceptions, but as the opinion of this court was given upon the 7th only, it is deemed unnecessary to state the others.

1. The first bill of exceptions stated not only the facts which the plaintiffs and defendants offered to prove, but detailed at great length the testimony, and circumstances tending to prove those facts, or from which they might be inferred. Among other facts it stated that the ship, in the prosecution of her voyage arrived at the island of Fogo, one of the Cape de Verd Islands, on the 7th of May, 1805, where the captain received on board four bullocks and four jackasses, besides water and other provisions, and unstowed the dry goods and broke **28*]** open two *bales and took out 40 pieces of each for trade. That the ship remained there until the 24th of May. That the time generally employed by a vessel in taking in stock and water at the Cape de Verd Islands is from two to three days unless the weather should be very unfavorable; that the weather was good; and that the bullocks and jackasses incumbered the deck much more than small stock would have done.

7. The 7th bill of exceptions stated that the defendants gave in evidence all the facts detailed in the preceding bills of exceptions, and thereupon prayed the court to direct the jury, that if they believe the same, then the taking the said jackasses on board the said ship John, while she lay at the Island of Fogo, was not within the privilege allowed to the plaintiffs in this cause to touch at the Cape de Verd Islands in the performance of the voyage insured for the purchase of stock and to take in water, and therefore vitiates the policy, which direction the court refused to give; but the court was of opinion, and accordingly directed the jury, that the taking in the four jackasses at the Isle of Fogo as aforesaid, did not avoid the policy, unless the risk was thereby increased; whereupon the counsel for the defendants excepted.

Martin, for plaintiffs in error,

As to the 7th exception, contended, that the liberty to touch at the Cape de Verds to purchase stock and take in water, did not authorize the taking the jackasses on board. The natural tendency was to increase the risk, and it was immaterial whether the risk was in fact increased.

Winder, contra.

The question upon the 7th bill of exceptions is only whether the court did right in leaving it to the jury to decide whether the risk was increased by taking in the jackasses. It is like the case of *Livingston and al.* v. *The Maryland Insurance Company* (6 Cranch, 274), where this court decided that the question whether a fact was material to the risk was a question to be decided by a jury under the direction of a court.

Harper, on the same side, [***29**

As to the 7th bill of exceptions, contended, that it was a question of fact to be decided by the jury, whether the taking in the jackasses increased the risk. This court has so decided in the case already alluded to of *Livingston* v. *The Maryland Insurance Company*. The principle of the case of *Rayne* v. *Bell* is, that there was no increase of risk and no delay. The case of *Sheriff* v. *Potts* is overruled by that of *Rayne* v. *Bell*. But the license to take in stock included jackasses.

Pinkney, Attorney-General, in reply.

The 7th bill of exceptions states in effect that the court refused to say that the taking in of the jackasses discharged the underwriters, although it might produce delay. It is not stated that it did not produce delay; and the evidence shows that it did. The principle of deviation is not increase of risk, but delay. If, therefore, here was any delay, the policy was void from that time.

But it is said they had license to take in jackasses, because they were stock. But the order for insurance upon the vessel refers to the preceding order for insurance on the freight, which was written on the same paper, and connected by the word "also." In the order for insurance upon the freight, the stock is particularly stated to be "such as hogs, goats and poultry." They could no more take jackasses under this license than they could take plows, horses, carts, or goods and merchandise, which are also stock.

The ship had a special license to touch for a special purpose, and *Expressio unius est exclusio alterius*. The contract of insurance is upon a voyage specific as to its nature, destination, &c. If the act done be calculated to tend to increase the risk, it is immaterial whether the risk be actually increased. The case of *Rayne* and *Bell*, in 9 East, 195, in some respects is not

law, but in this respect it is good law and supported by analogy. It goes on the ground of delay or risk. The case of *Sheriff* and *Potts*, cited in the late edition of Marshall, is not overruled by *Rayne* and *Bell*, although *Stitt* and *Wardell* is.

30*] *Feb. 22. All the judges being present, JOHNSON, *J.*, delivered the opinion of the court as follows:

In deciding on this cause the court will confine itself to the case made out on the 7th exception. Its decision on the point presented by that exception disposes of the case finally.

The opinion prayed for was, that, by taking in, at Fogo, an additional cargo, not sanctioned by the contract of insurance, the insurers were discharged from their liability under the policy. The charge, delivered by the court, was, that the subsequent liability of the underwriters must depend upon the question whether any increase of risk resulted from the shipping of that additional cargo.

In this charge, this court are of opinion that the court below erred.

The discharge of the underwriters from their liability in such cases, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation; necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the *vis major* producing it. The case of *Rayne* and *Bell* has been cited as supporting a contrary doctrine.

Without being understood to acquiesce in the correctness of that decision, it may be remarked that the question was not, in that case, whether the lading, taken in at Gibraltar, was within the terms of the policy, as in the present, but what acts were lawful to be done during the delay occasioned by a justifiable cause of deviation. On the contrary, the case of *Sheriff* and *Potts* was a case of voluntary departure from the stipulations of the policy, and the decision supports the opinion we now give.

31*] *It may also be remarked, that, in the case of *Rayne* and *Bell* the notice which Lord Ellenborough takes of the case of *Sheriff* and *Potts*, virtually admits the doctrine upon which this court founds its decision.

The terms of this policy so far as connected with this decision, are, "with liberty of touching at the Cape de Verd Islands, on her outward passage, for stock, and to take in water." Touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case. Construing the license according to the subject matter, and in its necessary connection with the offer on the freight, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape de Verds.

It might, indeed, admit of a doubt whether any of the larger animals used for food were included within the policy. The words of the first offer certainly were intended to confine the permission to the smaller animals. Stock is a term of the most general import. In its present extended application, it would include a great variety of subjects that never could have entered into contemplation of the parties.

In what sense was the term used? is the question to be decided; not what uses it might have been applied to in other contracts, or between other parties. The general want of precision in the language of maritime contracts is an endless source of litigation among mercantile men. Courts of justice are therefore obliged to resort to such reasons as the nature, object and terms of the contract present, to determine the precise extent of the obligation of the parties.

We feel no inclination to add to the number of causes which vitiate a policy; but the amount of the premium depends upon such a variety of considerations (as often suggested by caprice as by judgment), that the contract, whatever it is, must be substantially adhered to.

Judgment reversed.

Distinguished—3 Wheat. 165, 166.

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*THE UNITED STATES [*32
v.
HUDSON AND GOODWIN.

Absent—WASHINGTON, *Justice.*

The courts of the United States have no common law jurisdiction in cases of libel against the government of the United States. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders, &c.

THIS was a case certified from the Circuit Court for the District of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the President and Congress of the United States, contained in the *Connecticut Currant*, of the 7th of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the Circuit Court of the United States had a common law jurisdiction in cases of libel.

Pinkney, Attorney-General, in behalf of the United States, and *Dana* for the defendants, declined arguing the case.

THE COURT, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by JOHNSON, *J.:*

The only question which this case presents is, whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows

the prevalence of opinion in favor of the negative of the proposition.

33*] *The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several states; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.

And such is the opinion of a majority of this court. For, the power which Congress possess to create courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction—much more extended; in its nature very indefinite; applicable to a great variety of subjects; varying in every state in the Union—and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without **34***] *examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, inforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases, we are of opinion, is not within their implied powers.

Cited—1 Wheat. 416; 5 Pet. 204, 210; 6 Wall. 488; 2 Otto, 216; 8 Otto, 345; 10 Otto, 215; 1 Gall. 495; 1 Bald. 403, 406; 3 Blatchf. 438; 1 Brown, 264; 2 Dill. 234; Hemp. 412; 1 Abb. U. S. 324; 1 Wood. & M. 435, 438, 440, 448; McAll. 201; 3 Cliff. 55.

ALEXANDER SHIRRAS, JOHN BLACK, WILLIAM MILLIGAN, WILLIAM BLACKLOCK, AND JOSEPH VERREES.

v.

JOHN CAIG AND ROBERT MITCHEL.

Absent—WASHINGTON, *Justice*,

A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal right, although he had a power, from the person who held the residue of the legal, but not of the equitable estate in the land, to sell and convey his right also; the mortgageor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power.

A plat referred to in the deed as being annexed to it, but which was never in fact annexed, and was not recorded with the deed, affords no evidence in aid of the description of the property mentioned in the deed. A person cannot be charged with fraudulently secreting a deed who places it upon record as soon as the law requires.

It is not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure; but it shall stand as a security for the real equitable claims of the mortgagees, whether they existed at the date of the mortgage or arose afterwards upon the faith of the mortgage, before notice of the defendant's equity.

ERROR to the Circuit Court for the District of Georgia, by Shirras and others, original complainants, *against Caig and Mitchel, [***35** original defendants, in a suit in equity to foreclose a mortgage of a lot, houses and wharf in Savannah, called Gairdner's wharf, which were in the possession of the defendants.

The mortgage was made on the 1st of December, 1801, by Edwin Gairdner, in his own name, and also as attorney for the defendant, Caig (but without any authority from Caig so to do), to secure the payment of £30, 000 sterling, for which E. Gairdner had, on the same day, executed a bond for himself and Caig.

In the year 1796, this property had been purchased by James Gairdner, Edwin Gairdner, and Robert Mitchel as joint tenants, who took a conveyance from Levi Sheftall to themselves, by the description of James Gairdner, Edwin

Gairdner and Robert Mitchell, merchants and copartners of the city of Savannah. The name of the firm was Gairdners & Mitchell. In 1799 this firm was dissolved, and the business was carried on in Charleston by Edwin Gairdner alone under the firm of Edwin Gairdner & Co.; and by mutual consent, in December, 1799, an entry was made in the books of Gairdners & Mitchel, by James Gairdner, charging this property, to the account of Edwin Gairdner & Co., at the price of 20,000 dollars. In 1800, Edwin Gairdner entered into partnership with John Caig, the defendant, at Savannah under the firm of Edwin Gairdner & Co., under which name he continued to carry on business alone at Charleston; and upon his books at that place, made an entry charging this property to the Savannah house (consisting of himself and Caig) at an agreed price; and the Savannah house by an entry on their books credited the same on the account of the Charleston house, consisting of Edwin Gairdner alone.

On the 7th of January, 1802, Edwin Gairdner and John Caig dissolved their partnership at Savannah, and a new firm was established consisting of Edwin Gairdner, John Caig and the defendant, Robert Mitchel, under the name of Gairdner, Caig & Mitchel, who, by their articles of copartnership under seal, agreed to take the property in question, at a valuation, and hold it as their joint property.

36*] *Previous to this, viz., in March, 1800, Mitchel had by deed conveyed his third part of this property to Edwin Gairdner and John Caig, as joint tenants; and at the time of executing the mortgage (viz., December 1, 1801,) Edwin Gairdner had full power and authority from James Gairdner to sell and convey his share of the property.

Subsequent to the mortgage, viz., on the 27th of July, 1802, Edwin Gairdner, as attorney for James Gairdner, by deed conveyed to Mitchel one-third of the property, and by his own deed of the same date he conveyed one-sixth of the property to Caig, who had before received a conveyance of one other sixth from Mitchel.

These two last deeds were proved and recorded on the 14th of September, 1802.

The mortgage was proved on the 10th and recorded on the 17th of September, 1802.

By the law of Georgia, deeds of bargain and sale are to be recorded in 12 months, and by a law of 1768, every mortgage and deed recorded within ten days after its execution, shall have preference of other deeds and mortgages, not recorded within that period.

At the time of executing the mortgage, therefore, the legal title of three-sixths of the property was in Edwin Gairdner, and according to the book entries of the several copartnerships he was also equitably entitled to the same. The legal title of two-sixths was in James Gairdner, and of the other sixth in Caig, who, according to the book entries, was equitably entitled to three-sixths; so that although Edwin Gairdner had a legal power to sell and transfer James Gairdner's two-sixths, yet he was bound in equity to transfer them to Caig.

The complainants in their bill claim the whole. They state that Edwin Gairdner was the real *bona fide* owner of the property; that the book entries were made only to give a credit to the Savannah house, and were without consideration; that the Savannah house was only to hold it in trust for Edwin Gairdner during the copartnership. That Edwin Gairdner became bankrupt on the 3d of November, 1802, has received his certificate of discharge, *and that two of the complainants, [***37** Blacklock and Verrees, were duly appointed his assignees. That Caig and Mitchel, and the firm in which they are partners, are still largely indebted to Edwin Gairdner, who is also very largely indebted to the complainants. And they pray that all conveyances, under which Caig and Mitchel claim to hold possession of the property, may be declared void and may be cancelled; that the property may be sold and the proceeds applied towards payment of the debts due to the complainants; and for general relief.

The answers of Caig and Mitchell, the defendants, do not admit that anything was due by E. Gairdner to the complainants on the 1st of December, 1801, the date of the mortgage, and suggest that if anything was due it has since been paid off or otherwise settled. That Caig was made a party to the bond and mortgage without his authority and consent. That the bond and mortgage were carefully kept secret until the 13th of September, 1802. That it was not a regular transaction and ought not to avail against the defendants, who are *bona fide* purchasers.

They set forth the several copartnerships and entries in the books and aver that they and all the parties considered them as good transfers of the property which was always holden and considered as stock in trade. They deny all private, secret, or confidential trust for the benefit of E. Gairdner. They aver, that they believe, that at the date of the mortgage the Charleston house was indebted to the Savannah house, after allowing credit for the property in question.

In this state of the cause, the defendants, Caig and Mitchel, filed a cross bill against the complainants, Shirras and others, alleging secret transactions between them and E. Gairdner, and praying a discovery. They charge that the execution of the bond and mortgage was an act of hurry and despair, in the confusion and embarrassment of entangled circumstances, and at the eve of one of the greatest and most distressing bankruptcies. That the deeds were not signed until some weeks or months after their date. That no title papers were shown to the mortgagees (they being all in the hands *of Caig at Savannah), nor [***38** any authority from Caig to convey his interest. That the mortgage was taken without reflection or previous contemplation as to the security intended to be given, but as the last hope of saving or securing something from a person on the eve of insolvency. That the bond and mortgage were not executed for advances made, or money lent on the security, or hope of security arising from the mortgage, but with the intent to indemnify the mortgagees for indorsements at the banks in South Carolina for E. Gairdner, and for other collateral securities entered into for him; all which were settled and discharged by the exertions of E. Gairdner, and the resources he was then enabled to bring into activity. That there is no money due on the bond, or on the consideration for which the

bond was given. That all the obligees have been fully paid, satisfied and indemnified, without having recourse to the mortgaged premises, and that the mortgage is kept up for speculating purposes, and to oppress Caig and Mitchel, or to cover some transaction between E. Gairdner and one of the obligees, subsequent to the execution of the mortgage and which has no relation to the same. That the mortgage was concealed from Caig and Mitchel for fear of injuring E. Gardner's credit, and was not delivered to the mortgagees till some time before it was recorded; and was not recorded until Caig and Mitchel had paid a valuable consideration for two-thirds of the property and were in the quiet possession thereof, with the knowledge of the mortgagees. They claim title to two-thirds of the property under the various book entries of the several firms.

The bill then seeks a discovery of the day and consideration on which the bond and mortgage were really executed; and whether the mortgagees had not notice of the claim of Caig and Mitchel. Whether the mortgagees gave notice of the mortgage to them, and requires Shirras and others to disclose the real debts, together with the particulars thereof, actually due from E. Gairdner to each of them, at the date of the mortgage. It prays that the mortgage may be decreed to be fraudulent and void as to Caig and Mitchel, and for general relief.

The separate answers of the several defendants, Shirras and others, to the cross bill, set **39***] forth minutely *their several claims against E. Gairdner, and aver that the moneys loaned and responsibilities incurred were upon the faith of the mortgage; except Wm. Blacklock, who did not know that he was included in the mortgage till some time after its date. Black in his answer produces on oath the plat referred to in the mortgage, which he says had remained with him ever since the execution of the mortgage.

They all admit that Caig and Mitchel were not notified of the mortgage, and that they knew of no authority from Caig to E. Gairdner to incumber his share of the property. They admit they did not see any title papers, and that they did not require them, having a perfect confidence in the representations and character of Edwin Gairdner. They deny that they had any knowledge of any transfer to Caig and Mitchel, except that E. Gairdner stated that Caig held one-sixth. They admit that the mortgage was kept secret until the 10th September, 1802, lest it should injure the credit of the mortgageors. They aver that it was executed on the day of its date or within a very few days afterwards, and was not retained by E. Gairdner, but immediately delivered to the defendant, Black. The testimony in the cause related merely to the authentication of the instruments; and the entries upon the books, and to the balance of the accounts between the Charleston and the Savannah house, and tending to prove that the Savannah house was considerably indebted to the Charleston house at the date of the mortgage.

In May, 1807, the Circuit Court, consisting of Judges Johnson and Stevens, gave the following opinion:

"In the great confusion of legal and equitable interests which exist in this case, the mind can resort to no other means of making a just discrimination but that of recurring to the original state of the interests of the several parties and following their respective portions through the several changes of property which resulted from subsequent transactions.

"By the conveyance from Levi Sheftall to James Gairdner, Edwin Gairdner and Robert Mitchel, each acquired a fee-simple in one-third of the property in question.

"*In legal language they were each [***40** seized *per my and per tout* of a third part in joint tenancy. The third part of James Gairdner never was legally conveyed, until the deed of July, 1802, by Edwin, attorney for James Gairdner, conveying it to Robert Mitchel. With regard, therefore, to that third, and the one sixth conveyed by Mitchel and Caig, making up a moiety of the whole, there can be no doubt that the complainants are not entitled to recover. Both law and equity are on the side of the defendants. The only difficulties that exist arise in relation to the one-sixth conveyed by Mitchel to Edwin Gairdner and by him conveyed to Caig, and the remaining third originally vested in Edwin Gardiner.

"With regard to these propositions the complainants are in possession of the legal right, and the question is, how far are the defendants relieved in equity?

"It is contended that this court ought not to aid the complainants, on several grounds.

"1. Because this property ought to be considered as a part of the copartnership funds of the first firm of Gairdner, Caig & Mitchel, and of E. Gairdner & Co., and neither copartner is at liberty to alienate his share until the debts of those concerns are discharged, and their balances adjusted.

"2. Because the amounts claimed by the several mortgagees were for loans and assumptions not existing at the time of the mortgage, but incurred afterwards, with a small exception.

"3. Because by the articles of copartnership, the property is legally pledged to the last concern of Gairdner, Caig & Mitchel, and this instrument, as well as the conveyance of one-sixth to Caig from E. Gairdner, are entitled to a preference to the mortgage, in consequence of the mortgagee's having neglected to record their mortgage, and thereby to put others on their guard.

"On the first of these grounds we remark, there are many cases in which real property may be pursued as part of a copartnership stock, but it is only in the hands of legal representatives in cases of descent, bankruptcy, *&c., but not where a legal alienation has [***41** been made, or the property is unaffected by articles of copartnership.

"With regard to the 2d and 3d grounds, we think them of much importance. This court will certainly support a mortgage when there exists no actual debt, if the mortgagee is under any liability or engagement which may ultimately subject him to loss, or the payment of money for the mortgageor; such, for instance, as the indorsement of notes the renewal of notes originally indorsed, or an arbitration or administration bond, or other undertaking from which a debt only may be incurred. But it is evident that some bounds ought to be set to this mode of mortgaging on contingencies, espe-

cially when the mortgagee retains an absolute unrestrained option, whether the mortgageor shall or shall not be his debtor; when he is under no legal or moral obligation to make loans or assume a liability in his behalf. But as we do not mean to found our decree in this case on this ground, we shall not now attempt to draw the line. The subject is a very delicate one.

"On the 3d ground the court feel themselves compelled to decree in favor of the defendants.

"The complainants, by not making known to the world the existence of this mortgage, have lost their right to the aid of this court in obtaining a foreclosure in their behalf. The defendant, Caig, ought not to lose the benefit of the conveyance of the one-sixth executed to him by Gairdner. He was legally proprietor of the one-sixth, and, by book entries, equitably, of another sixth.

"We consider the acknowledgment of interest in him by Gairdner upon the face of the mortgage as sufficient notice, to complainants, of his interest both legal and equitable. This alone would be sufficient to entitle him to the favor of this court, independently of his having become purchaser afterwards of the legal title without notice of the mortgage. With regard to the remaining third, we consider the articles of copartnership, accompanied with the payment of the consideration, as a covenant to stand seized to the use of the firm, and entitled to a precedence to the mortgage because of the latter's not having been recorded.

42*] *"The copartners, therefore, will be entitled to a preference as to Gairdner's third, both as to payment of creditors of the last house of G. C. & M., and for the satisfaction of any demand which the copartnership may have upon him. Subject to their claims the complainants will be entitled to relief."

In May, 1808, the Circuit Court made the following final decree:

"The court, referring to the interlocutory decree of May term, 1807, order, adjudge and decree, that the bill be dismissed with costs as against the defendants, John Caig and Robert Mitchel, as to the two-third parts of the mortgaged premises; and that the bill be sustained as to one-third of the mortgaged premises, reserving a preference on the said third part of the premises, both as to the payment of the creditors of the late house of Gairdner, Caig & Mitchel, and for the satisfaction of any demand which the copartnership may have upon him, said Gairdner."

To reverse this decree, the present writ of error was sued out by Shirras and others.

C. Lee, for plaintiffs in error.[1]

The mortgage ought to avail the mortgagees to the extent of the power and interest of the mortgageor.

Edwin Gairdner had the legal estate of three-sixths in himself, and had full power and authority from James Gairdner to dispose of, sell and convey the two-sixths, whereof the legal estate remained in him. So that Edwin Gairdner's power and interest extended to five-sixths. It is true he omitted to refer to his power of attorney in making the mortgage; but this defect may *be supplied in a court [***43** of equity. (10 Mod., 36, *Sir Edward Cleer's* case, cited by Ch. J. Parker; 6 Co., 17 [b] S. C.; 3 Levinz., 372; 2 P. Will., 490; *Tollet* v. *Tollet*, 2 P. Will., 623; 1 Ca. in Chancery, 263; *Smith* v. *Ashton*, 1 Br. C. C. 368; *Wade* v. *Paget*, 2 P. Will., 222; *Coventry* v. *Coventry*, 1 Str., 596, 604, S. C. 4, Br. C. C., 462; *Jackson* v. *Jackson*, Ambler, 640, 684; Hob., 165, 4 Vez., Jun., 631; 7 Vez., 567; 10 Vez., 246; 6 East., 105; Carth., 427.)

There was no obligation upon the mortgagees to prove or record the deed sooner than they did. The law allows twelve months. Neither of the deeds was recorded within ten days after its date, and therefore neither can claim a preference under that law.

It is no objection that the mortgage was made to indemnify against future indorsements. (3 Cranch, 73, *U. S.* v. *Hooe.*)

If the power from James had been given to a third person, he would have conveyed to Edwin, but the power being to Edwin, he could not convey to himself, and the law will consider the equitable title, united with the power, as a legal conveyance to him.

The creditors of Edwin, who are the mortgagees, are superior in equity to Caig or Mitchel, who never paid anything for the property, and who are indebted to Edwin at this time; and who, if so indebted, would, if necessary, be decreed, in equity, trustees for the mortgagees, rather than they should lose their debts.

The entries on the books conveyed no legal title to the property; but if it is to be considered as stock in trade and therefore liable to be transferred by book entry, E. Gairdner, being a partner, had a right to sell and dispose of the whole partnership effects.

Harper, contra.

It is admitted that the mortgage transferred all the legal and equitable estate of Edwin Gairdner, but not of James Gairdner. If an attorney means to convey the rights of his constituent, he must speak in the name of *his principal; Edwin had only one- [***44** half; the other half belonged to Caig and Mitchel.

The plat not having been recorded with the deed, the description of the property is imperfect; it can convey at most, only Gairdner's wharf, and not the lot which lies at a distance on the other side of the street.

The articles of copartnership between E. Gairdner, Caig and Mitchel, being under seal, operate as a conveyance by way of covenant to stand seized. Each party covenants to stand seized to the use of the firm.

The complainants admit that they concealed the mortgage, and held it up, to prevent injury to the credit of Edwin Gairdner, and they contend they had a right so to do.

Although they may have such a right at law, yet they have not in equity. Where the mortgagee does anything to induce a belief that the mortgageor has still a right to encumber the property—such as suffering him to retain the title papers whereby he gains a false credit—the first mortgagee shall be postponed to the second, who is deceived thereby. So in this case the

1—When this case was called, and before it was opened, C. Lee suggested that it would be desirable to wait for a fuller court, as the Judge who rendered the decree might think proper to retire from the bench.

Livingston, *J.* That practice has been abandoned.

Johnson, *J.* We have agreed among ourselves not to excuse the judge who passed the decree.

deeds to Caig and Mitchel are to be preferred to the mortgage which was thus concealed. (1 Fonb., 153.)

Besides, the mortgage untruly recites the whole transaction. The bond was altogether fictitious.

It was calculated to impose upon the world. The mortgage was in truth made only to cover future contingent responsibilities.

This property is to be considered as part of the joint funds of Gairdner, Caig & Mitchel, and liable in the first place to the debts of that firm. The separate creditors of Edwin Gairdner can only claim his share after payment of all the joint debts.

P. B. Key, in reply.

It cannot be denied that, at the date of the mortgage, Edwin Gairdner had a legal estate in one-half of the mortgaged premises.

45*] *The mortgage, therefore, to that extent, is good, unless it wants some formality, or unless the defendants have a prior title at law, or some prior equity of which the complainants had notice previously to the mortgage.

No want of formality, nor prior legal estate are suggested; nor can it be contended that Mitchel or Caig had any prior equity as to one-half the property. Mitchel in his answer expressly disclaims any interest prior to the mortgage.

It is indeed suggested that this real estate is to be considered as part of the joint stock in trade of the firm of Edwin Gairdner & Co., of Savannah, consisting of E. Gairdner and John Caig; and one partner cannot dispose of any part of the joint funds to his own use without the consent of the other partner.

But neither at law nor in equity will real estate be considered as stock in trade, so as to alter the nature of the estate, unless there be some express agreement for that purpose. (3 Br., C. C., 199, 200, *Thornton* v. *Dixon*.) In the present case there were no articles of copartnership prior to the mortgage, nor any agreement that the real estate should be converted into stock in trade. (5 Vez., 189, *Smith* v. *Smith*.) In order to make partnership stock of real estate, it must be purchased with partnership funds, or there must be an agreement at the time of purchasing that it shall be used and invested as partnership stock.

But in the present case nothing was paid by the firm of E. Gairdner & Co., of Savannah, for this property, nor was there any agreement converting it into stock.

The firm of Gairdner, Caig & Mitchel was formed after the mortgage, and therefore whatever interest they took in this property was subject to the mortgage.

There can be no doubt that the mortgagees had a right, under such a mortgage, to recover in equity all advances made upon the credit of the mortgage subsequent to its date, and before notice of junior incumbrances; and recording the subsequent incumbrance is not of itself notice. (Powell on Mort., 229, 230, 285.)

46*] *As to the objection that one of the mortgagees was not a creditor at the date of the mortgage, and did not become a creditor upon the faith of the mortgage, it is laid down in Powell on Mort., 275, that if one purchase in the name of another without any authority to do so, yet if he afterwards agree to it, he makes the former his agent *ab initio*.

The complainants therefore, are entitled to a decree for a foreclosure of one-half of the property described in the mortgage, and for the recovery of all sums advanced on the faith of the mortgage before the mortgagees had notice of the second incumbrance.

Feb. 17. *All the judges* (*except* WASHINGTON, *J.*)[1] *being present*,

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is an appeal from a decree rendered by the Circuit Court for the District of Georgia.

Shirras and others, the appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the first of December, 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance, as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was.

It appears that, on the 17th May, 1796, the premises were conveyed to James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and copartners of the city of Savannah.

In 1799, this partnership was dissolved; and, in December in the same year, James Gairdner made an entry *on the books of the com- [***47** pany charging this property to Edwin Gairdner & Co., of Charleston, at the price of 20,000 dollars. This firm consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney authorizing Edwin Gairdner to sell and convey his interest in this and other real property.

In March, 1801, a partnership was formed between Edwin Gairdner and John Caig to carry on trade in Savannah, under the firm of Edwin Gairdner & Co.; and in the same month, Robert Mitchel conveyed his one-third of the lots in question to Edwin Gairdner and John Caig.

About the same time it was agreed between the house at Charleston and that in Savannah to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner & Co., of Savannah.

Such was the state of title in December, 1801, when the deed of mortgage bears date.

The plaintiffs claim the whole property, or, if not the whole, five-sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the court is of opinion that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner; he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently the power of attorney may

1.—JUDGE WASHINGTON was prevented by indisposition from attending on the 13th, 14th, 15th, 17th and 18th of February.

be put out of the case, and the conveyance could only operate on his own legal or equitable interest.

In law, he was seized under the original deed, and the deed from Robert Mitchel of one undivided moiety of the property.

Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest.

48*] In the law and equity he held one *moiety of the premises in question. The other moiety was in John Caig. To one-sixth Caig was legally entitled by the conveyance from Robert Mitchel, and to two-sixths he was equitably entitled by the agreement with Edwin Gairdner and the consequent entries on the books.

Of the equitable interest of John Caig the mortgagees were bound to take notice, because the purchaser of an equitable interest, purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property.

The mortgage deed of December, 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed respecting the extent of the property comprehended in it. The plaintiff's contend that both lots are within the description; the defendants that only the wharf lot is conveyed.

The property conveyed is thus described: "All that lot of land, houses and wharfs in the "city of Savannah as is particularly described "by the annexed plat, and is generally known "by the name of Gairdner's Wharf."

The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of part of the town of Savannah, including the lot on which Gairdner's Wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected.

The words descriptive of the property intended to be conveyed do not appear to the court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe that lot No. 6 was "generally known by the "name of Gairdner's Wharf." The court, therefore, cannot consider that lot as comprehended within the conveyance.

49*] *The mortgaged property is in possession of the defendants, Caig and Mitchel, who derive their title thereto in the following manner:

On the 7th of January, 1802, a new partnership was formed between Gairdner, Caig and Mitchel, and, by the articles of copartnery, which are under seal, the Savannah property is declared to be stock in trade, and an entry was made on the books of the old firm transferring this property to the new concern. On the 12th of the same month, the copartnership of Gairdner & Caig was dissolved.

On the 27th of July, 1802, by deeds properly executed, one-third of the property became vested in John Caig, and one other third in Robert Mitchel.

On the 3d of November, 1802, Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because, they say:

1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy.

2d. That the transaction is not *bona fide*, there being no real debt, nor any money actually advanced by the mortgagees.

3d. That the mortgage was kept secret, instead of being committed to record.

4th. That the whole transaction is totally variant from that stated in the deed.

They therefore claim the property for the creditors of Gairdner, Caig & Mitchel.

1st. From the testimony in the cause it appears that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent.

*2d. It appears, also, that the mortgage [***50** was executed, in part, to secure the payment of money actually due at the time, and, in part, to secure sums to be advanced, and to indemnify some of the mortgagees for liabilities to be incurred.

3d. The mortgage is dated the 1st of December, 1801, and was recorded in September, 1802.

By the laws of Georgia, a deed is valid if recorded within twelve months; but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or previously, on the record.

It appears to the court, that neither negligence nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the dispatch which the law requires. If subsequent purchasers, without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition.

In this case the subsequent purchasers might have proceeded to record their deeds within ten days and have thereby obtained the preference they claim, but they have failed to do so. They are themselves chargeable with the very negligence which they ascribe to their adversaries; and, were they to be preferred, the court would invert the well-established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

4th. It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of 30,000*l.* sterling due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a *rigorous [***51** examination. It is, certainly, always advisable fairly and plainly to state the truth.

But if, upon investigation, the real transaction

shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.

That cannot have happened in the present case.

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgageor himself, and executed without being inspected by them, so far as appears in the case.

It is, then, the opinion of the court that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot, or parcel of ground, commonly known by the name Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the Circuit Court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

The following is the decree of this court:

This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the deed of mortgage in the proceedings mentioned, and dated on the 1st of December, 1801, is, in law, a valid conveyance of one moiety of that lot of land, houses and wharves in the City of Savannah, which was generally known by the name of Gairdner's Wharf, being the parcel of ground lying between the river and the street, and that the mortgagees in the said deed mentioned are entitled to foreclose the equity of redemption in the said mortgaged property, and to obtain **52***] a sale *thereof, and to apply the proceeds of the said sale to the payment of what remains unsatisfied of their respective debts, which were either due at the date of the mortgage or have been since contracted, either on account of moneys advanced or liabilities incurred prior to their receiving actual notice of the title of the defendants, John Caig and Robert Mitchel. And the decree of the Circuit Court for the District of Georgia, so far as it is inconsistent with this opinion, is reversed and annulled, and in all others things is affirmed; and the cause is remanded to the said Circuit Court for the District of Georgia, that further proceedings may be had therein according to equity.

Cited—6 Pet. 739, 740; 10 Pet. 212; 4 How. 154; 23 How. 27; 11 Otto, 631; 4 Ben. 442; 3 Biss. 201; 7 Bank. Reg. 71; 3 McLean, 604; 4 McLean, 436; 2 Paine, 183; 2 Sawy. 241.

SCHOONER PAULINA'S CARGO
v.
THE UNITED STATES.

Absent—WASHINGTON, *Justice*.

The 3d section of the act of Congress of the 9th of January, 1808, which prohibited the transhipment of goods from one vessel to another, did not include the case of a vessel lading in port by means of river craft, &c.

The 2d section of the act of Congress of the 25th of April, 1808, did not require a permit to lade any vessel, nor authorize the forfeiture and condemnation of the vessel or cargo for lading without the inspection of a revenue officer; the only penalty for such lading being the denial of a clearance.

ERROR to the Circuit Court for the District of Rhode Island.

The schooner Paulina and cargo were seized and libeled by the collector of the port of Newport, alleging that the cargo was laden on board, within the district of Newport, between the 1st of June and the last of July in the year 1808, in the night season, without a permit from the collector, and without the inspection of the proper revenue officers, and contrary to the 2d section of the act of Congress, entitled "An act in addition to the act entitled an act "laying an embargo on all ships and vessels in "the ports and harbors of the United States, "and the several acts supplementary thereto, "and for other purposes," passed the 25th of April, 1808; and contrary to the 50th section of the act to regulate the collection of duties, &c., passed the 2d of March, 1799. In the District Court the vessel and cargo were both ordered to be restored.

Upon the appeal in the Circuit Court, the libellant had leave to amend his libel, by stating that on the waters *of Warwick Bay, in [***53** the District of Rhode Island, at a place called the Fulling Mill in Warwick, and about 120 fathoms from the landing, at sundry times, between the 1st of June and the last of July, in the year 1808, the articles constituting the cargo of the Paulina, were transhipped from a small sloop called the May-flower into the schooner Paulina, without the intervention of any other water craft, or of any intermediate landing, with intent to be transported without the United States, contrary to the 3d section of the act of Congress, entitled "An act supplementary to the act entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," passed on the 9th of January, 1808, whereby the said cargo is forfeited, &c.

The words of the 2d section of the act of 25th of April, 1808, (vol. 9, p. 146), are, "That "during the continuance of the act laying an "embargo on all ships and vessels in the ports and "harbors of the United States, and of the sev- "eral acts supplementary thereto, no ship or "vessel of any description whatever, other than "those described in the next preceding section, "and wherever bound, shall receive a clearance, "unless the lading shall be made hereafter un- "der the inspection of the proper revenue of- "ficers, subject to the same restrictions, regu- "lations, penalties and forfeitures as are pro- "vided by law for the inspection of goods, "wares and merchandise imported into the "United States, upon which duties are imposed, "any law to the contrary notwithstanding."

By the 50th section of the act of 2d of March, 1799, (vol. 4, p. 360), to regulate the collection of duties, &c., it is enacted "that no goods, "wares or merchandise, brought in any ship "or vessel from any foreign port or place, "shall be unladen or delivered from such ship "or vessel within the United States, but in

"open day, that is to say, between the rising "and the setting of the sun, except by special "license from the collector of the port, and "naval officer of the same (where there is one), "for that purpose, nor at any time without a "permit from the collector, and naval officer "(if any), for such unlading or delivery; and if "any goods, wares or merchandise shall be un-"laden or delivered from any such ship or "vessel, contrary to the directions aforesaid, "or any of them, the master," &c., "shall **54***] "*forfeit and pay, each and severally, "the sum of 400 dollars for each offense, and "shall be disabled from holding any office of "trust or profit for a term not exceeding seven "years," "and all goods, wares or merchandise, "so unladen or delivered, shall become for-"feited, and may be seized by any of the of-"ficers of the customs;" and if the value shall exceed 400 dollars, the vessel, &c., shall be subject to like forfeiture and seizure.

By the 3d section of the act of the 9th of January, 1808, (vol. 9, p. 11), it is enacted, "That if any ship or vessel shall, during the "continuance of the act to which this is sup-"plement, depart from any port of the United "States without a clearance or permit, or if "any ship or vessel shall, contrary to the pro-"visions of this act or of the act to which this "is a supplement, proceed to a foreign port or "place, or trade with or put on board of any "other ship or vessel, any goods, wares or "merchandise, of foreign or domestic growth "or manufacture, such ships or vessels, goods, "wares and merchandise, shall be wholly for-"feited;" "and the master or commander of "such ship or vessel, as well as all other per-"sons who shall knowingly be concerned in "such prohibited foreign voyage, shall each "respectively forfeit and pay a sum not ex-"ceeding 20,000 dollars," &c.

The Circuit Court affirmed the sentence of the District Court so far as it decreed the restitution of the vessel, but reversed it so far as it decreed restitution of the cargo, which the Circuit Court condemned.

To reverse this sentence of condemnation the present writ of error was sued out by Simeon Jones, the owner and claimant of the vessel and cargo.

On the 20th of February, 1810, a *dedimus* was issued from the Supreme Court to take depositions in Rhode Island, which was executed and returned on the 14th of March.

The material facts appearing upon these depositions were that the former owners of the Paulina, being prevented by the embargo from **55***] using their vessel, in order *to save expense, took her into Warwick Bay, which was near the residence of one of the owners. Shortly afterwards they sold her to the present claimant, Jones, who caused her to be publicly, and in open day, laden by means of the sloop May-flower, which was a little vessel of 15 tons burthen, whose usual business it was to carry goods from Providence to Warwick and East Greenwich. That he thus caused her to be laden in the expectation that the embargo would be very shortly taken off. There was also some evidence tending to excite suspicion that the intention was to evade the embargo.

Pitkin, for the plaintiff in error.

Neither this vessel nor cargo were liable to forfeiture under either of the laws mentioned in the libel.

1. As to the 2d section of the act of the 25th of April, 1808, (vol. 9, p. 146), it has been uniformerly decided in all the circuit courts, that this section does not impose a forfeiture of either the vessel or cargo. In the present case Judge Cushing condemned the cargo, not under this section, but under the 3d section of the act of the 9th of January, 1808, which prohibits the transhipment. The only penalty for lading the vessel without the inspection of a revenue officer is the refusal of a clearance. The 2d section of the act of the 25th of April does not refer to the 50th section of the collection law, but to the 53d, 54th and 55th sections, which apply to the duties of inspectors, and provide for their due execution by penalties, but they contain no regulation whereby either the vessel or cargo can be forfeited. The construction contended for by the government is contrary to the spirit of the embargo system. Nothing had been before said respecting the lading of a vessel. She might lade as she pleased, and might go to sea upon giving bond, &c. This act is the first which regulates the lading.

The object of the embargo was to prevent foreign voyages. The provision that the lading should be under the inspection of a revenue officer was intended to enable the collector to judge from the nature of the cargo whether it was intended for a foreign voyage; and if he *should be of that opinion, he was, by [***56** the same law, authorized to detain the vessel until the pleasure of the President should be known. The object of the legislature was completely answered by denying a clearance, and thereby preventing the vessel from going to sea, in case she had taken in her ladiug without the inspection of a revenue officer. It was not intended to prevent the owner from using his vessel as a store-house without a permit, or from putting goods on board without the inspection of an officer.

That this was the understanding of the legislature upon the subject is evident from the act of the 9th of January, 1809, usually called the enforcing act, the second section of which (vol. 9, p. 186) requires a permit, and prohibits the lading of any vessel without one, and without the inspection of a revenue officer, all which would have been necessary if the law was the same before.

2. As to the 3d section of the act of the 9th of January, 1808, (vol. 9, p. 11), the supposed violation of which is, by the amendment of the libel, made a ground for the claim of condemnation of the cargo, it does not apply to a lading or transhipment in port.

The objects of this law were three:

1. To prevent a vessel from departing without a clearance.

2. To prevent her, after having obtained a clearance, from going to a foreign port; and,

3. To prevent her, after clearance, from taking in goods at sea.

It does not contemplate an act done in port. The expressiou "such prohibited foreign voyage," shows that the legislature were contemplating foreign voyages only, and not merely the lading of a vessel in port. There were many ports in which a vessel could not be laden but by the

intervention of lighters. It cannot be supposed that the legislature meant to prohibit all lading at those ports. The act of 25th of April has an express exception in favor of all vessels then **57***] laden, without regard *to the manner of their lading; so also has the act of the 9th of January, 1809.

Dallas, Attorney of the United States for the District of Pennsylvania, contra.

Penal laws are to be construed according to their plain intent. No construction ought to be given which would defeat the object of the law.

1. As to the claim of forfeiture under the 2d section of the act of the 25th of April, 1808, and the 50th section of the collection law.

Let us consider what was the previous law, the mischief intended to be remedied, and the remedy intended to be applied.

1. As to the previous law. The first embargo law, of the 22d of December, 1807, (vol. 9, p. 7), required bonds from registered and sea-letter vessels only, conditioned to reland their cargoes in the United States.

The second embargo law, of January 9th, 1808, (vol. 9, p. 10), required vessels, licensed for the coasting trade, to give a similar bond; and those licensed for the fisheries, or whose employment had been uniformly confined to rivers, bays, and sounds, were to give a general bond. It also forfeited the vessel and cargo if she departed without a clearance or permit, or proceeded to a foreign place, or traded with, or put goods on board any other vessel, or if (being a foreign ship) she took in a cargo.

2. The mischief intended to be remedied, was, that there was no provision for compelling vessels which were confined to bays, &c., to take a clearance, and give a manifest of their cargoes, and to produce a certificate of relanding them in the United States. Nor any provision for inspecting the lading of vessels.

3. The remedy provided by the legislature was, to prohibit all bay craft, &c., from departing from a district without having obtained a **58***] clearance, and delivering *a manifest of their cargoes; and to require a certificate of the relanding of the cargo within the bay, &c.

And to prohibit all other vessels from receiving a clearance, unless the lading should be made under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures, as are provided by law for the inspection of goods, wares and merchandise, imported into the United States, upon which duties are imposed.

We are thus referred expressly, in a case of lading for exportation, to the rule of a case of importing to unlade.

There is no case of inspection of lading, but for the benefit of drawback, which is a case of *ex*portation and not *im*portation, and is therefore out of the reference, The penalties and forfeitures apply to a relanding, or to not producing a certificate of relanding, and not to the lading.

We are therefore to adopt the restrictions, regulations, penalties and forfeitures of the import law, *mutatis mutandis*.

Under that law, goods must be unladen in the day-time.

Under this, they must be laden in the day-time.

Under that, there must be a permit to *un*lade.

Under this, there must be a permit to lade.

Under that, the *un*lading must be under the inspection of a revenue officer.

Under this, the lading must be under the like inspection.

Under that, goods *un*laden without permit are forfeited.

Under this, they are forfeited if laden without permit.

*If the legislature meant this, it is well; [***59** if they did not, there is no meaning in the sentence; nothing upon which the reference can operate. That this is the true construction of the act appears from the provisions made by the legislature in *pari materia* in the act of the 9th of January, 1809, (vol. 9, p. 186), where the same ideas are expressed in different language.

2. As to the claim of forfeiture under the 3d section of the act of January 9th, 1808. (Vol. 9, p. 10.)

1. What was the previous law? 1. An embargo had been laid on all American vessels, but no penalty was inflicted. 2. Foreign vessels might sail in ballast and with the goods then on board. 3. Bonds were to be given by registered and sea-letter vessels only, not to violate the embargo.

2. What was the mischief to be remedied? 1. American vessels might slip away without clearance or permit. 2. Registered and sea-letter and licensed vessels might go to foreign places. 3. Or might trade. Or, 4. Might put goods on board another vessel.

3. What was the remedy provided? 1. That licensed and fishing vessels should give bond. 2. That no vessel should sail without a clearance or permit. 3. That no vessel should proceed to a foreign place. 4. That no ship should trade with another; and 5. That no vessel should tranship goods, under the penalty of the forfeiture of the goods.

The fact is not denied that the Paulina took in her lading without a permit, and without the inspection of a revenue officer, and that it was transhipped from the May-flower.

She is then within the letter of the law, and we say she was also within the spirit and meaning.

The circumstances also show that the intention was to violate the embargo; and the provisions of the law were intended to punish that intention when it should be manifested by certain acts.

Pitkin*, in reply. [*60**

The words of the 2d section of the act of the 25th of April are "subject to the same restrictions, &c., as are provided by law for the inspection of goods imported." If we are to be guided by the grammatical construction of the sentence, the revenue officers, being the last antecedent, are to be subject to the same restrictions, regulations, penalties and forfeitures, &c. But if the lading is to be subject to the restrictions, &c., it is only to be subject to the restrictions, &c., respecting the inspection of goods imported. We are not referred to the law respecting the necessity of a permit. And there was no reason for a permit to lade. The permit was evidence that the duties had been paid or secured, upon goods imported. But as there were no duties to be paid upon goods exported, no such evidence was required, and a permit would have been useless.

February 21st. *All the Judges being present,* MARSHALL, *Chief Justice,* delivered the opinion of the court as follows:

The libel in this case, as amended in the Circuit Court for the District of Rhode Island, claims the schooner Paulina and her cargo as forfeit under the 3d section of the act supplementary to the act laying an embargo, and under the 2d section of the act in addition to the original embargo act and its several supplements, and under the 50th section of the act regulating the collection of duties on imposts and tonnage.

In the District Court both vessel and cargo were acquitted; but in the Circuit Court the cargo was condemned.

In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. The legislature has declared its object to be to lay an embargo on the vessels of the United States, and to prevent the transportation of any article whatever from the United States to any foreign **61*]** port or *place; and therefore such transportation is prohibited. To prevent evasions of this law, certain acts which do not in themselves amount to a breach of the embargo, but which may lead to it, have been successively prohibited under such penalties as the wisdom of Congress has prescribed. Those acts become criminal and subject the person to such punishment as the law inflicts. In ascertaining what they are, the court must search for the intent of the legislature, guided by those rules which the wisdom of ages has sanctioned.

But should this court conjecture that some other act, not expressly forbidden, and which is in itself the mere exercise of that power over property which all men possess, might also be a preliminary step to a violation of the law, and ought therefore to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made. It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described, not to some other case which judges may conjecture to be equally dangerous.

The fact made out in the present case is this:

The Paulina, a registered vessel, lying in the common anchorage ground of Warwick Bay, in the District of Rhode Island, about two hundred fathoms from the shore, received her cargo from the May-flower, a small vessel of fifteen tons burthen, accustomed to ply between Providence and Newport. The lading of the Paulina was continued in open day for several weeks, but not under the inspection of a revenue officer. When her cargo was nearly on board, she was seized and libeled as having violated the acts of Congress which have been mentioned.

The question will, it is conceived, be the more clearly understood if we consider the laws in the order in which they were passed, and inquire, first, whether the 3d section of the supplementary act has been violated. *In [***62** pursuing this inquiry, it is essential to examine how far lading a vessel under the circumstances of the Paulina was prohibited by the original and supplementary acts without taking into view any subsequent act of Congress.

The original act, passed on the 22d of December, 1807, lays an embargo on all vessels bound to foreign ports, and directs that no clearance be furnished to such vessel. The 2d section directs that before a registered vessel shall receive a clearance for a port in the United States, a bond shall be given with a condition that the cargo shall be relanded in some port of the United States, dangers of the seas excepted.

This act contains no provision applicable to the lading of any vessel whatever, or to licensed vessels, nor does it inflict any forfeiture or penalty on vessels which should depart without a clearance.

The incompetency of this act to effect its object could not be long unobserved. It was soon perceived that foreign trade might be carried on by licensed vessels, and that further regulations respecting registered vessels would also be necessary.

On the 9th of January, 1808, the supplemental act was passed.

The first section directs that bonds shall be given on the part of vessels licensed for the coasting trade, conditioned not to proceed to any foreign port or place, and to reland the cargo in some port of the United States.

The second section contains a proviso declaring that it shall be sufficient for the owners of vessels of the description of the May-flower, to give bond with a condition not to be employed in any foreign trade.

This review of the prohibitions contained in the original and supplementary embargo acts, was necessary to a complete understanding of the 3d section of the supplemental act, which is the section supposed by the libellants to comprehend the present case.

*That section is in these words: [***63**

"And be it further enacted, That if any ship or vessel shall, during the continuance of the act to which this is a supplement, depart from any port of the United States without a clearance or permit, or if any ship or vessel shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel any goods, wares or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares and merchandise, shall be wholly forfeited."

This section contemplates three distinct transactions:

1. A departure from any port of the United States without a clearance or permit.

2. Contrary to the provisions of the original or supplementary acts to proceed to a foreign port or place; or,

3. To trade with or put on board any other ship or vessel any goods, wares or merchandise.

The offense last described is supposed to have been committed by the Paulina.

Nothing can be more apparent than that the legislature could not have intended to prohibit

any person from putting a cargo on board a vessel of any description.

1. The coasting trade was still lawful, and might be carried on by either registered or licensed vessels; consequently any vessel might be laden for that purpose.

2. There is no direct prohibition to lade a vessel with any articles whatever.

3. There are provisions in subsequent laws on the same subject which regulate the manner of lading vessels in order to entitle them to a clearance; which provisions are entirely incompatible with the idea that all lading was prohibited.

64*] *With a view to this principle the section must be construed.

The first inquiry which presents itself to the mind is this: Do the words "contrary to the provisions of this act or of the act to which this act is a supplement," limit and restrain both the succeeding members of the sentence, or only the first of them? Are they applicable only to "proceeding to a foreign port or place," or also to "trading with or putting on board any other ship or vessel any goods, wares or merchandise."

If the sentence be construed literally and grammatically, the introductory words which have been stated, are attached to all the offenses afterwards described. The departure without a clearance under any circumstances, is an offense. The circumstances of the departure do not affect the case. But to render the facts afterwards enumerated criminal, they must be committed under circumstances described in the law. "If any ship or vessel shall, contrary to the provisions of this act, or of the act to which this is a supplement, proceed to any foreign port or place, or trade with, or put on board of any other ship or vessel," &c., "such ships or vessels, goods, wares and merchandise, shall be wholly forfeited." The connection between the different parts of this sentence is inseparable. There is nothing to disjoin them. The nominative to the verbs, "proceed," "trade with," and "put on board," is the same. It is not repeated, but is to be found in the first part of the sentence, and must be taken in the same sense, and with the same qualifications. The relative "such," in that part of the sentence which inflicts the forfeiture, refers to the ship or vessel, which contrary to the provisions, &c., shall have done any one of the acts described.

If this be the literal construction of the sentence, it is still more apparently its real meaning.

If the words, "trade with, or put on board any other ship or vessel," be not limited by the words "contrary to the provisions of this act, or of the act to which this act is a supplement," they would not only prohibit a vessel from lading, but from unlading in a manner, which is frequent and perfectly innocent. There are **65***] *many ports in the United States whose situation requires that a sea vessel should stop at a considerable distance from the place for which she is destined, and convey part of her cargo in lighters or river craft to the place of destination. Under such circumstances, to load or unload, would amount to a forfeiture. But such was not the intention of the legislature.

Most apparently, then, both the letter and the spirit of the law must be disregarded, or it must be admitted that the "trading with, or putting on board," that is rendered culpable, must be such a trading with, or putting on board, as is "contrary to the provisions" of the original or supplementary act.

The subsequent words of the section imposing a penalty of from one to twenty thousand dollars on the offense, tend still further to illustrate and confirm this construction. They are "the master or commander of such ship or vessel, as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage, shall forfeit and pay," &c.

The master or commander of the "ship or vessel" described in this part of the sentence, would seem to be the master or commander of any ship or vessel which had committed any one of the offenses previously described. If this be true, it is difficult to resist the opinion that the words "as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage" were considered by the legislature as applicable to all the voyages previously prohibited. Consequently the legislature, at the time, supposed themselves to be punishing foreign voyages only.

The Paulina having committed no offense by taking her cargo on board, unless she incurred the penalties of the law by receiving it from the May-flower, the sentence will now be examined with a view to this question. Is the employment in this way of a vessel whose business is confined to the rivers, bays and sounds within the jurisdiction of the United States, a forfeiture of the vessel and cargo?

*The bond given by such vessel is that [***66** she will not be employed in any foreign trade.

This exemption from the necessity of relanding the cargo, proves the intention of the legislature that such craft might be employed in lading vessels. This employment is not contrary to the provisions of either the original or supplemental act.

If, then, the May-flower had transhipped her cargo in the port in which she was laden, it is apparent that no part of the law would have been violated.

The section under consideration inflicts forfeiture on any ship or vessel which shall depart from any port of the United States without a clearance or permit.

If by law this would produce a forfeiture of the cargo when on board the Paulina, it is to be inquired whether, under this libel, the fact of her having passed out of one port into another without a clearance or permit, is examinable.

The libel charges the simple fact of transhipment, without alleging the only circumstance which could render such transhipment criminal. The question, then, of a departure from the port of Providence into that of Newport is not brought before the court. It does indeed appear in the evidence that, in consequence of an opinion among the revenue officers, as well as others, a clearance in such a case was not requisite, the May-flower carried a considerable part of her cargo to the Paulina without having obtained permits. But the court cannot notice this fact unless the prosecution had, in some degree, been founded upon it.

It is, then, the opinion of the majority of the court that, as this case stands, the sentence can-

not be sustained under the 3d section of the act of January, 1808. No opinion is given on the construction of that act in a case of transhipment from a vessel which has actually passed from one district to another without a clearance.

The libel also claims a forfeiture under the **67***] 50th section *of the collection law, and under the 2d section of the act commonly called the additional act.

It has been very truly observed that the collection law is in itself totally inapplicable to the case, and can only be relied on for the purpose of explaining the 2d section of the additional act which refers to the collection law.

The operative words of the 2d section are: "No ship or vessel shall receive a clearance unless the lading shall be made hereafter under the inspection of the proper revenue officers subject to the same restrictions, regulations, penalties and forfeitures as are provided by law for the inspection of goods, wares and merchandise imported into the United States upon which duties are imposed."

Had the sentence terminated with the word "officers," it is admitted that its only operation would have been to exclude from a right to a clearance a vessel laden in a different manner from that which the act prescribes. The doubt grows out of the residue of the sentence.

This section does not, in terms, refer to the 50th section of the collection law. Whether, in strict grammatical construction, the adjective "subject" agree with and refers to the words "lading," "inspection," or "officers," still the "restrictions, regulations, penalties and forfeitures" which are inflicted, are those which are provided by law for the inspection of goods, not those which are provided by law for unlading them. The word inspection is the governing word which explains the meaning of the sentence; and the provisions for the inspection of goods contain restrictions, regulations, penalties and forfeitures; but they do not affect the cargo.

It is difficult to read the sentence without being impressed with the opinion that the sole penalty intended by the legislature was the denial of a clearance. This will strike any person as the principal object of the clause. What follows is expressed with some confusion and would not seem to constitute the most essential part of the sentence. It cannot be believed **68***] that the legislature *could intend to inflict so heavy a forfeiture under such cloudy and ambiguous terms. The natural as well as usual course would be to inflict the forfeiture in direct and substantive terms, not by way of loose uncertain reference.

But if this section be construed as the libelants construe it, then, if the value of $400 be put on board a vessel, not only the goods so put on board, but the vessel itself shall be forfeited. For what purpose, then, direct that she shall not receive a clearance? The legislature can scarcely be suspected of making a solemn regulation which, in terms, forbids its officers to grant a clearance to a vessel, which vessel is, by the same sentence, confiscated.

It is the decided opinion of the court, that no forfeiture is incurred under this section of the act.

The majority of the court is of opinion that the sentence of the Circuit Court, condemning the cargo of the Paulina, is erroneous, and ought to be reversed.

The court certified that there was probable cause of seizure.

The Chief Justice observed that three of the judges who had heard the argument in the present case, and one who did not hear it, but who had heard the points argued in another case, concurred in this opinion, and that the other judges concurred in the result of the opinion.

JOHNSON, *Justice*, observed that he dissented from the opinion just delivered by the Chief Justice upon one ground only.

He was of opinion that the transhipment, if with intent to prosecute a foreign voyage, in violation of the embargo, subjected the goods to forfeiture. But as the evidence of that intent was doubtful, he was of opinion that the cargo should be acquitted; and two other judges concurred with him in opinion.

Sentence reversed.

Cited—2 Abb. U. S. 540; 7 Bank. Reg. 18; 1 Gall. 110, 111.

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*NATHANIEL RUSSELL [*69
v.
JOHN I. CLARK'S (*a*) EXECUTORS AND OTHERS.

Absent—WASHINGTON, *Justice*.

The construction of a letter of credit, or of guaranty, must be the same in a court of equity as in a court of law; and any facts which might be introduced into one court, to explain the transaction, may be introduced into the other. On the question of fraud also, the remedy at law is complete. Where the only ground of equitable jurisdiction is the discovery of facts solely within the knowledge of the defendant, and the defendant by his answer discloses no such facts, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the plaintiff should be dismissed from the Court of Chancery and permitted to assert his rights in a court of law. To charge one person with the debt of another, the undertaking must be clear and explicit. It is the duty of him who gives credit to another upon the responsibility or undertaking of a third person, immediately to give notice to the latter of the extent of his engagements. A fraudulent recommendation will subject the person giving it to the damages sustained by the person trusting to it. An answer, responsive to the bill, is evidence in favor of the defendant. A misrepresentation of the solidity of a mercantile house, made under a mistake of the fact, without any interest or fraudulent intention, will not sustain an action, although the plaintiff may have suffered damage by reason of such misrepresentation. A merchant who indorses the bills of another upon the faith of the guaranty of a third, cannot (upon the insolvency of the principal debtor and of the guaranty) resort to a trust fund created by the principal debtor for the indemnity of the guaranty for the amount which the guaranty should pay. But the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity to have it paid directly to himself. When the guaranty is insolvent, a court of equity will not decree the money (raised for his indemnity) to be paid to him without security that the debt to the principal creditor should be satisfied. This court will not make a final decree upon the merits of the case, unless all persons who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court.

ERROR to the Circuit Court for the District of Rhode Island, in a suit in equity, brought

(*a*) NOTE. This name is variously spelled Clark, Clarke and Clerk. See 3 Dall., 415.

by Russell, against Clark in his life-time, as surviving partner of the firm of Clark & Nightingale, to recover from him the amount of sundry bills of exchange, drawn by one Jonathan Russell, for the use of Robert Murray & Co., whose agent he was, upon James B. Murray, in London, and indorsed by the complainant, Nathaniel Russell, upon the faith of two letters written to him by Clark & Nightingale, in the following words:

PROVIDENCE, 20th January, 1796.

"NATHANIEL RUSSELL, Esq., DEAR SIR,—Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice, and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introductiou to our friend; in consequence of which we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost dependence may be placed. They will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you. The friendship we have for these gentlemen, induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual beuefit.

We are, with sentiments of esteem,
Dear Sir,
Your most obedient servants,
CLARK & NIGHTINGALE."

70*] *PROVIDENCE, 21st January, 1796.

"NATHANIEL RUSSELL, Esq., DEAR SIR,—We wrote you yesterday a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power. Also that you will, immediately on the receipt of this, vest the whole of what funds you have of ours in your hands in rice, on the best terms you can. If you are not in cash for the sales of the China and Nankins, perhaps you may be able to raise the money from the bank, until due; or purchase the rice upon a credit, till such time as you are to be in cash for them; the truth is, we expect rice will rise, and we want to improve the amount of what property we can muster in Charleston, vested in that article, at the current price; our Mr. Nightingale is now at Newport, where it is probable he will write you on the subject.

We are, dear sir,
Your most obedient servants,
CLARK & NIGHTINGALE."

The bill stated that in February, 1796, Jonathan Russell arrived in Charleston, from New York, bringing a letter of credit from the house of Joseph and William Russell, of Providence, with whom the complainant had only a slight acquaintance, but believed them to be in good credit.

That Jonathan Russell informed the complainant, that when he left New York he was authorized by R. M. & Co. to say, that they would forward to him at Charleston, letters of guaranty from their friends, Clark & Nightingale, of Providence, addressed to the complainant, and that he expected soon to receive them.

That he soon afterwards presented to the complainant the before-mentioned letters of Clark & Nightingale, of the 20th and 21st of January, 1796, and that, confiding in the responsibility and integrity of C. & N., and in the purity and simplicity of their views, he indorsed *the bills in questiou, amounting in the [*71 whole to £3,886 10*s.* 8*d.* sterling.

That Clark & Nightingale knew that the house of R. M. & Co. began business without capital, under their patronage, and were supported by their credit, and that in the year 1795 it was found requisite, in New York and Boston, where the house of R. M. & Co. chiefly did business, that their bills of exchange, in order to their being negotiated in those places, should have the indorsement of C. & N., and even then it was necessary they should be drawn for very small sums.

That the advances and responsibilities of the house of C. & N. for that of R. M. & Co. were originally predicated chiefly upon their personal honor and integrity, and afterwards continued upon the assurances of R. M. & Co. that in case of disastrous events they should be secured by a priority of indemnity. And that upon like assurances C. &. N. agreed to aid R. M. & Co. with funds and credit to enable them to carry on the Charleston speculation which had been concerted between them; and had agreed to give them a letter of credit and guaranty to the complainant; and if the letters sent did not, in legal construction, amount to such (which the complainant does not admit), it must have arisen either from the defendant, Clark, accidentally penning the letters in terms that did not quite come up to the idea intended by himself (in which case it would be contrary to equity and good conscience, that he should be permitted to avail himself of such accident to the injury of the complainant), or from the terms being artfully and fraudulently contrived by the defendants, Clark, to give to the complainant the impression he intended, and yet by secret reservation to leave a door open for his own escape.

That the deceased partner of the defendant (Nightingale) in his life-time, confessed that the house of C. & N. was bound by their letters to indemnify the complaiuant; and that Clark has offered to compromise.

The bill further states, that the recommendations of the house of R. M. & Co., given by C. & N., were fallacions *and unwarranted, [*72 covenous and deceitful, and were made in consequence of a concerted plan to put R. M. & Co. into possession of large property, upon credit, to give the chance in the first instance of great profits to that house, in case the speculation should be successful, and finally, whether successful or not, to briug to the hands of C. & N. large reimbursements from the proceeds of property so to be acquired, and that accordingly, shortly after, it was known in America that the house of R. M. & Co. must fall, the defendant, Clark, availed himself of the private stipulations before alluded to, by obtaining from that house the greater part of their property, including the proceeds of the rice purchased upon the credit of the complainants' indorsements.

That J. B. Murray, who was named a trustee, being a citizen of New York, could not be compelled to appear in the Circuit Court, at

Rhode Island, and, therefore, is not made a party.

The complainant exhibited copies of five deeds from R. M. & Co., assigning their property to the defendant, Clark, viz., one dated 23d March, 1798, one 24th March, 1798; two dated 22d of March, 1799, and one 31st of May, 1800; and called for the originals.

The bill avers that the house of R. M. & Co. has been duly declared bankrupt, and discharged; that the assignees under the commission are resident in New York, and could not be made parties to this bill; and that, in fact, there was nothing left to assign to them the previous assignments to the defendant, having transferred the whole.

That Joseph & William Russell assigned away all their property, so that the complainant cannot enforce against them the judgment at law which he had obtained upon their letter of credit.

That in the deed of the 24th of March, 1798, among the uses to which the assigned property is to be applied, is the following, viz.: "Also "for the sum or sums which the said Clark & "Nightingale have paid, or are liable to pay, on "a suit commenced against them by Nathaniel "Russell, of Charleston, South Carolinia, for **73***] "*amount of certain bills of exchange, "there drawn in his favor by Jonathan Russell, "of New York, for the amount of three thous- "and nine hundred and uinety-eight pounds "seven shillings and twopence sterling, or "thereabouts." And in a subsequent part of the same deed, another use declared is, "to re- "tain, and pay to Joseph & William Russell "the amount that shall be recovered and paid "from them to Nathaniel Russell, of Charles- "tou, in South Carolina, upon account of a "letter of credit to him, given by the said "Joseph & William Russell, in favor of Jona- "than Russell," &c.

The complainant further states that, although he is unable to compel the payment from Joseph & William Russell, by reason of their having assigned away all their effects, yet William, who has survived Joseph, refuses to assent, or afford any aid in converting those funds to the relief of the complainant; and the defendant has the use of the property for an indefinite time, and refuses to account therefor to the complainant.

He further charges, that C. & N. were dormant copartners with R. M. & Co., in the Charleston speculation; that R.M. & Co. were, at the time of the recommendation from the complainant, deeply involved in debts, which they had not the means of discharging, that their credit was fictitious, and the fiction created and kept up by C. & N., who were privy to their transactions, and who knew that the representation they made was false, and fraudulent.

The bill seeks a discovery of the funds of R. M. & Co., in the hands of the defendant, Clark, and of the trusts upon which he holds them, and the manner in which he has applied them or any part of them; and prays that the intention of the parties as to the guaranty, may be enforced; that the proceeds of the rice purchased by means of the complainants' indorsements may be applied to his relief; that the defendant, Clark, may be compelled to execute the trust reposed in him, and to apply to his indemnification the funds set apart for the indemnification of Clark & Nightingale, and of Joseph and William Russell; and that he may have such other relief as his case may require and be entitled to.

*The deed of assignment of the 23d [***74** of March, 1798, transferred all the property and effects of the firm of R. M. Co., in the United States, to the defendant, Clark, and J. B. Murray, to pay the balances due them, and to such other creditors as R. M. & Co. should nominate withiu twelve months; reserving to them also the power to appoint new trustees instead of Clark and J. B. Murray, if they should think proper. This assignment was made expressly subject to certain prior liens on certain parts of the property, which are particularly set forth; one of which was an assignment to Loomis & Tillinghast, of a policy on certain goods laden on board the ship Jefferson, and a policy on goods on board the ship Butler, and four promissory notes of Mott and Lawrence, amouuting to 6,460 dollars, the proceeds of which were to be applied, first to indemnify and secure Loomis & Tillinghast for a debt due to them, and for responsibilities they had, or were about to incur, and out of the surplus to pay to Joseph & William Russell, of Providence, all such moneys as they should be liable to pay as guaranty to the defendant. This assignment was afterwards transferred by Loomis & Tillinghast to Clark in consideratiou of 60,000 dollars, of R. M. & Co's. notes, indorsed by L. & T., giveu up to them by Clark.

The deed of the 24th of March, 1798, contained an express power in R. M. & Co. to revoke or alter the directions and appointments therein contained, and to make other appointments and give other directions, within twelve months from that date. In pursuance of which power, they did, by an indenture tripartite, dated the 21st of March, 1799, between R. M. and Co., of the first part, the defendant Clark, and J. B. Murray of the second part, and the defendant and J. B. Murray and other creditors, of the third part, revoke and annul the deed of the 24th of March, 1798; and substituted no other trust for the indemnification of the defendant, Clark, against his liability to the complainant.

The deed of the 22d of March, 1799, which declared the new trusts, under which the defendant, Clark, and J. B. Murray should hold the assigned property, directs them to pay "to William Russell, as surviving *part- [***75** "ner of the firm of Joseph & William Rus- "sell, the amount that shall be paid by them "on a judgment recovered against them by "Nathaniel Russell, of Charleston, in South "Carolina, for the amount of £3998, 7*s*.2*d*. ster "ling in bills of exchange guaranteed by him "by the said Joseph & William Russell in "favor of the drawer, Jonathan Russell. And "the said parties of the first part do hereby or- "der and direct the said parties of the second "part to allow and pay, in manner before "mentioned, to the parties of the third part, in "addition to the claims herein before admitted, "all charges of suit and other expenses paid "upon the said several claims, together with in- "terest due thereon, payable in like mauner "with the claims as herein before recited."

This deed also contained a power of revocation and of making new appointments of trust.

On the 31st of May, 1800, (the day before the bankrupt law of the United States was to go into operation) R. M. & Co. made their final declaration of trust, under the power reserved in their former deeds; and expressing an intention to alter and add to the trusts formerly declared, but without expressing any intention of revoking any of them, they designate five successive classes of creditors to be paid in the order in which they are named; but neither of those classes included an indemnity to the defendant, Clark, or to William Russell, against their liability to the complainant.

The defendant, Clark, in his answer, admits his letters of the 20th and 21st of January, 1796, to the complainant, but does not admit that the complainaint at that time considered them as letters of credit, or guaranty, or that he indorsed the bills upon the faith of those letters. He avers that they were intended only as letters of introduction and recommendation, and not as letters of credit or of guaranty, and that the house of R. M. & Co. was then in good credit. He denies that the house of C. & N. had any interest in the purchases made in Charlestou by Jouathau Russell. He does not admit that any bills of R. M. & Co., with the indorsement of C. & N., were negotiated in New York. He denies that he had any reason to suspect that [*76 the credit of the *house of R. M. & Co., was fictitious and not real. He denies that C. & N. attempted to give them a false credit to deceive the public or auy person. He avers that he as well as the house of C. & N. had full faith aud confidence in the responsibility and solvency, the honor and integrity, of the house of R. M. & Co., and had no agreement or understanding with them for their indemnity or security in case of any disastrous event, of which he had no apprehension. He denies that C. & N. ever made any agreement to aid R.M. & Co. in raising funds for the speculation in Carolina produce, and that they ever asked from C. & N. any letter of guaranty to go or be sent to Charleston. He denies that they ever promised such letter of guaranty, or gave R.M. & Co. any authority to instruct their agent to assure any person that such letter of guaranty should be furnished by them. He denies that the letters of 20th and 21st of January were designed or written in artful and ambiguous terms with intent to deceive. He does not admit that his partner, Nightingale, acknowledged that they were letters of guaranty, or that the house of C. & N. were bound thereby to indemnify the complainant.

He avers that C. & N. never asked, and R. M. & Co. never offered, any security for their responsibilities until after the failure of R. M. & Co. was publicly known in the United States. He admits the deeds and assignments to himself and J. B. Murray, as set forth in the complainant's bill, and admits the receipt of large sums of money, a part of which has been applied, and part remaius to be applied, to the objects of the trust. He states that since the execution of the deeds of assignment to him and J. B. Murray, Robert Murray has been discharged as a bankrupt, under the law of the United States; and the assignees under that commission have brought suit in equity in New York against this defendant, and J. B. Murray and R. M. & Co., claiming an account of the assigned property and praying that it may be transferred to them; which suit is still pending.

He declares his belief that the assigned property will be sufficient to discharge all the appropriations made by the deeds of trust, and also the whole claim due to the complainant, but denies that it is liable in his hands therefor.

*William Russell, in his answer, admits [*77 the guaranty and judgment, and the insolvency of the house of Joseph & William Russell. He states that he has uo knowledge that R. M. & Co. ever conveyed any property to the defendant, Clark, and J. B. Murray, in trust to indemnify him, but if there be any such conveyance he is willing that the complainant should have the beuefit thereof.

There was evidence that bills of exchange for £5,500*l.* sterling, drawn in eighteen sets by R. M. & Co. and indorsed by Clark & Nightingale, were sold in Boston in December, 1795, and January, 1796, and derived credit chiefly from their indorsement.

There was also evidence to prove that the house of R. M. & Co. were in good credit until after January, 1796.

The decree, in the court below, was rendered, by consent, against the complainant, who brought his writ of error.

Dexter, for the plaintiff in error, contended,

1. That the letters themselves, under the circumstances of the case, imposed a liability upon Clark & Nightingale to indemnify the plaintiff; and,

2. That the defendant, Clark, was liable by reason of the funds which he held in trust for the plaintiff's indemnification.

1st. In support of the first point he contended, first, that the letters themselves created an absolute responsibility. 2d. That if they did not of themselves create an absolute responsibility, yet they contained a direct affirmation of a fact which the defendant must show to be true, or must prove that he was himself deceived; and 3d. That the evidence shows that the affirmation contained in the defendant's letters was not true, and that he was guilty of such negligence and falsehood as will render him liable to indemnify the plaintiff.

1st. The defendant is absolutely bound by these letters. *They contain an unquali- [*78 fied assertion of a fact—the responsibility and integrity of R. M. & Co. In other cases, if a man will assert positively a fact, and request another person to act upon the faith of such assertion, he is bound to make good his assertion, or to compensate the injury which he has sustained who placed confidence iu such assertion.

Thus, if a persou covenant that he has a good title, he is bound to make it good or to repair the damage sustained by his defect of title. This is the case of a covenant under seal.

So in a policy of insurance, the positive assertion of a fact is a warranty, and he who makes it is bound to prove it to be true. This is a case not under seal.

In the present case, it is more reasonable that C. & N. should sustain the loss, because they voluntcered the affirmation, and with a view to induce the plaintiff to give credit to R. M. & Co. Words spoken upon inquiry made for iu-

formatiou will not bind, if he who spoke them was himself deceived.

But the present case is not like that, it was not a sudden answer made on inquiry; it was a deliberate affirmation, in writing, made to one who they knew would place confidence in their representatiou of a fact which they had the means of knowing, and which they ought to have known, before they asserted it in such a manner. It was not a letter of friendship, but of business. It requested the plaintiff "to render them every assistance in his power;" that is, to aid them with his credit.

If a man receive services upou request, he is bound to remunerate them. Is there in reason, justice, or law, any difference between services rendered and responsibilities incurred? In the present case, C. & N. not only requested the plaintiff to lend his credit to R. M. & Co., but told him he might be assured of their complying fully with any contract or eugagement they might enter into with him. If the words had been "we assure you," &c., there could have been no doubt of their responsibility. But when they say "you may be assured," &c., it is evident they meant the same thing. It was their **79***] *assurance, whether expressed in the one way or the other; and it was their assurance upon which the plaintiff acted.

2d. But if these words are so artfully selected that they would uot in a court of law bind the defendant, yet if they were calculated to deceive, and intended to induce the plaintiff to give credit to R. M. & Co.; if they were such as between merchants, were understood to guaranty the credit of the persons recommended, they will have that effect in equity.

C. & N. ought to have been assured of the fact of the solidity of the house of R. M. & Co. before they stated it so positively.

They ought to have inquired of them the state of their affairs. It is not sufficient for them to say that they did not know but the fact was so. If they were not certain, they ought to have stated the simple truth—that it was a young house, had been conducting business for some time, and sustained a good character. That they themselves had given them credit to a considerable amount and that they were still their debtors. If C. & N. had written thus, as they ought to have done, the plaintiff would not have given them credit; he would have continued to hold the rice until he had security, aud would not have given it up, but upon the faith of letters which in his opinion would bind C. & N. to indemnify him.

They must have known that they were not justified in stating the facts as they did. There were facts withiu their knowledge which ought to have excited their suspicions of the credit of R. M. & Co.—particularly the fact that their bills could not be sold without the indorsement of C. & N., and then only in small sums. The knowledge of the great losses of R. M. & Co. by captures in 1794, and the fact that they began business without capital, ought to have made C. & N. more careful. That C. & N. trusted them, is not evidence that they believed them solid. They had a personal confidence that R. M. & Co. would secure them by assignments in case of difficulty, as, in fact, they did.

80*] *2. As to the trust. It is objected that the assignments are to the defendant, Clark, and J. B. Murray jointly, and that the latter is not made a defendant to this bill. But he was not within the jurisdiction of the court, and by the act of Congress he could not be made a defendant unless he had been found in Rhode Island. By the practice of courts of equity, they will not dismiss a bill for want of parties who cannot be served with process. (2 Atk., 510, *Darwent* v. *Walton*.)

Another reason for charging Clark alone is, that he has received by far the greater part of the funds of R. M. & Co., and it is a principle in equity that each trustee shall answer only for the effects which he himself received. (Digest of chancery cases, 182; 1 P. Will., 81. *Fellows* v. *Mitchel;* 3 Atk., 583, *Leigh* v. *Barry*.)

But there is a stronger ground for charging Clark alone. He received from Loomis and Tillinghast an assignment of funds which they held in trust, to pay to Joseph & William Russell all such moneys as they should be liable to pay as guaranty to the plaintiff. The defendant, Clark, received a transfer of this assignment from Loomis & Tillinghast, with full notice of the trust, and is thereby bound to execute it. It was a trust substantially for the benefit of the plaintiff. There were no funds of Joseph & William Russell, or of either of them, to which he could resort to satisfy his judgment against them. If he had recovered the money from them they might have resorted to this fund; and equity, which avoids circuity of actiou, will make it liable directly to the plaintiff.

C. Lee, suggested that there was no allegation in the bill to which these facts are pertinent.

Dexter. The defendant is charged with having received such assignments as make him liable as trustee to the plaintiff.

These facts appear in the exhibits, which are referred to in the bill and make part of it. The bill prays for general relief, and under such a prayer, the court will give such relief as the facts of the case will warrant.

*C. *Lee*, contra. [*81

This case presents two questions:

1. Whether the plaintiff's demand shall be satisfied out of the funds of Clark & Nightingale; and,

2. Whether it shall be satisfied out of the funds of R. M. & Co.

1. Are Clark & Nightingale liable out of their own estate?

If so, it can only be upon the letters of the 20th and 21st of January, 1796, either because they create a liability at law, or because they contain a fraudulent misrepresentation. If the letters do not create a liability at law, a court of equity will not extend them beyond their legal import. If they do create a liability at law, a court of equity has no jurisdiction.

None of the parties considered them as letters of guaranty until it was suggested by Jonathan Russell, in his letter to Nathaniel Russell, of the 11th of July, 1796. The plaintiff himself, although he wrote six letters to the defendant after he indorsed the bills, and before notice of their dishonor, yet never once mentioned that he had indorsed such bills upon the credit of C. & N. This uegligence to give them notice that he had done so, is a complete discharge to them, upon the same principles as the want

of notice discharges the drawer of a bill of exchange.

The bill states certain facts from which slight infereuces are drawn—that C. & N. intended to guaranty the plaintiff's indorsement of the bills—but the answer of Clark expressly denies all those inferences, and all intention of becoming responsible, and all private assurances of idemnity from R. M. & Co.

Although no external proof can be added to the letters, or adduced to explain them, yet the answer of the defendant, who is called upon to answer as to his intention, is evidence. It is made evidence by the plaintiff having called for it in his bill.

82*] *The opinion of this court upon the construction of the letters iu this case, as reported in 3 Dall., 424, although not conclusive, because it was not upon the point on which the court decided the cause, yet will be respected. The Chief Justice there states that the majority of the court inclined to the opinion that the letters did not, of themselves, import an undertaking or guaranty. To support this opinion, *Mr. Lee* referred to the cases cited in 3 Dall., 420, 421.

But it is said that the defendant is liable by reason of the misrepresentation. If so, it is a clear case at law, and not in equity.

But the allegation is not supported by the evidence. The representation was true. R. M. & Co. were a house of integrity and punctuality, and were in good credit.

In order to charge the party at law (and *a fortiori* iu equity), the representation must be false. (3 T. R. 51, *Palsey* v. *Freeman;* 2 Esp., 92.) But here the evidence proves the represeutation to be true, and if it had been false, it would have been wholly a case at law.

2. As to the ground of trust. The plaintiff relies upon three trust funds. 1. The idemnity to Clark & Nightingale. 2. The idemnity to Joseph & William Russell. 3. The trust fund in the hands of Loomis & Tillinghast.

1. The idemnity to Clark & Nightingale was only against the suit at law then depending, which has been since abandoned by the plaintiff; and the fund withdrawn, and the deed revoked under the power of revocation which it contained.

2. The idemnity to Joseph & William Russell was only for what they should pay. They never did, and never will pay anything. It was a provision for their benefit, not for that of the plaintiff. Equality is equity. If the plaintiff claims a priority of payment, he must show a strict right. The indemnity is upon the condition of a release, which J. & W. Russell have never given. But the deeds uuder which **83***] this indemnity is *claimed, were revoked by those of March, 1799, and May, 1800.

3. As to the trust deed to Loomis & Tillinghast, the evidence respecting it is not admissible. It appears only in a copy of the examination of one of the partuers of the house of R. M. & Co. before the commissioners of bankrupt, certified by the clerk and judge of the District Court, which is not competent evidence.

Nothing in the bill alludes to this deed, so that Clark had no opportunity of answering respecting it. Besides, it appears that the amount of indemnity claimed by Loomis & Tillinghast, which was to be first satisfied before the trust could arise in favor of Joseph & William Russell, was for R. M. & Co.'s notes to the amount of 60,000 dollars, indorsed by Loomis & Tillinghast, and the property pledged to them does not appear to exceed 28,000 dollars. Clark delivered up to L. & T. the notes for 60,000 dollars, and received the property amouuting to 28,000 only. Clark had a right to stand in the shoes of L. & T. and claim the 60,000 dollars, in prefereuce to J. & W. Russell, so that, in fact, there was no fund assigned for the benefit of the latter. There was no surplus after satisfying the claim of Loomis and Tillinghast.

J. B. Murray ought to be a party. The plaintiff has no right to call upon one of the trustees only to answer for the whole fund, when he has received only a part. If the jurisdiction of the Circuit Court of the United States is so limited, that it cannot compel the appearance of all the parties, let the plaintiff apply to the state court. The case of *Darwent and Walter* (4 T. R. 500) applies to the state courts, but not to courts of limited jurisdiction, as the circuit courts of the United States are.

The assignees of the bankrupt, Murray, ought also to be made parties, for they have an iuterest in the residuum.

The plaintiff also ought to have obtained a judgment and *fieri facias* against R. M. & Co. before he could call for a discovery of their effects. (1 Veruou, 399, *Augell* v. *Draper;* 3 Atk., 200, *Shirley* v. *Watts.*)

*The want of proper parties, may be [***84** objected at the hearing. (3 Atk., 111, *Jones* v. *Jones;* 2 Atk., 510, *Darwent* v. *Walton.*)

Jones, on the same side. 1st. As to the law of the case.

This court, as a court of equity, has no jurisdiction upon any ground stated in the bill. It states that the letters amount to a guaranty, but that the plaintiff has failed in three suits at law. If there be a remedy at law, and no fraud, nor defect of evidence, it is no case in equity. Nor is there any equitable jurisdiction on the ground of construction of the letters. They must have the same construction in equity as at law. The confessiou that the plaintiff has no legal remedy, is a confession that the defendant is not bound by the contract. (Mitford, 111, 189.) Nor does the ground of fraud alone, give an equitable jurisdiction. A court of law is as competent as a court of equity, to decide a case of fraud. But it is said, there is a different remedy in a court of equity. This is true in some cases. When the fraud is on the part of the complainant, a court of equity will refuse its aid;—when on the part of the defendant, it may set aside a deed obtaiued by fraud; but it will give no remedy in damages for a fraud; it will give no indemnity for a deceit by a third party. Where these are the object of the suit, the remedy is at law where damages are assessed by a jury. (Prec., in ch., 147.)

It is true, that mistake and accident, are grounds of equitable jurisdiction; but the mistake or accident, must be specifically stated; the accident must be manifest, and the evidence clear. The court will then correct the instrument, and make it what it ought to have been.

(1. Vez., 318, 319, *Hankle* v. *Roy;* Ex. ass. Comp., 3, Br. C. C., 451, *Burt* v. *Barlow;* 1 Vez., Jun., 59, *Doran* v. *Ross;* Id. 171, *Payne* v. *Collier;* Id. 364, *Smith* v. *Maitland.*)

2. As to the construction of the letters, *per se;* and the effect of the evidence in regard to them.

They do not import a contract on their face. A letter of credit is well understood among **85***] merchants. It *must include a request to advance money. No declaration that a man is trustworthy is sufficient. The words of the letters are to be taken in their usual signification. "You may be assured," means only you may be certain; it is only an affirmation of a fact. It contains no promise. It is immaterial how false or fraudulent the affirmation may be; it is but an affirmation, and does not constitute a contract.

No action will lie against a man upon his mere affirmation that he will give his daughter a portion. (1 Vin., 261, *Winn* v. *Talbot.*) There must be fraud accompanied by actual damage to support an action on the case, for a deceit, against a stranger to the contract. (3. T. R., 51, *Pasley* v. *Freeman;* 2 East., 92, *Haycraft* v. *Creasey.*) It is not law, that the defendant is liable, if he does not use due diligence to ascertain the truth. But the evidence shows that the representation was fairly and honestly made, and therefore, whether true or false, is wholly immaterial. If the plaintiff was deceived, it must have been either by his own mistake of the purport of the letters, or by the assertions of Jonathan Russell. R. M. & Co., in their letters to the plaintiff, call them letters of introduction and recommendation, not letters of credit or guaranty. There is no evidence to connect the representations or assertions of Jonathan Russell with C. & N. He was not their agent, nor can they be responsible for anything he may have said.

There is no evidence of *mala fides*, but strong evidence of the contrary. When one merchant speaks of the credit or integrity of another he speaks only as to general reputation. In the present case, this general reputation is fully proved. The burden of proof lies on the plaintiff, to show some act or information to the contrary, which came to the knowledge of the defendant. Fraud is never to be presumed. As to the captures in 1793 or 1794, it does not appear that the vessel and cargoes were not insured. As those losses had happened several years before the letters of recommendation, and as the house of R. M. & Co., for aught that appears, had stood unshaken thereby, those losses themselves seem to be the best evidence of the stability of that house.

As to the trust. This is a ground of com- **86***] plaint totally *distinct from the question of liability under the contract. The complainant seems to rely upon some specific lien on the rice itself, or its proceeds. But when he let the rice go out of his hands, upon being satisfied of the solidity of the house of R. M. & Co., he could not recall it—he lost all claim to a specific lien.

The evidence respecting the assignment to Loomis & Tillinghast is not such as this court can notice. There is only a certificate of the clerk of the District Court that it is a copy of a paper filed in that court by Robert Murray, upon his examination under a commission of bankruptcy. It is not proved by the oath of any person who had seen the original, nor is it mentioned in the bill, nor confessed in the answer. The plaintiff can make no title to a specific lien on this fund.

The other trusts in favor of C. & N., and of Joseph & William Russell, were expressly revoked by the subsequent deeds; and the plaintiff does not claim as a general creditor.

The plaintiff must, in his bill, show a title, an interest, and a right to call upon the defendants. There must be some privity between them; and all persons interested in the trusts must be made parties. (Mitford 31, 136, 144, 220; 2 Br. C. C., *Burt* v. *Dennet.*)

If there are no allegations in the prior part of the bill to justify the interrogatories in the subsequent part, the defendant is not bound to answer them. The plaintiff had no right to call for a discovery of general assets; he was confined to the funds alleged in his bill. This is fatal as to the trust of Loomis & Tillinghast; and another objection is, that suits are now pending in New York against the present defendants and others, calling for an account of these very funds.

If the courts of the United States have not power to call all parties before them, it is a good objection to their proceeding in the case. The plaintiff should have applied to the state courts, which have power. It is true that each trustee is only liable for what he received, but that is no reason why the co-trustee should not be made a party.

**Dexter* and *P. B. Key*, in reply. [*87

It is true that there ought to be before the court all the parties who may be necessary to enable the court to do complete justice; but the books also add the proviso, that they be within the jurisdiction of the court. Under the agreement to bring this cause up to this court for a final decision, without an argument in the court below, it was not expected that it would now be delayed by the allegation of the want of proper parties.

1. As to the liability of the defendant upon the letters, this case differs essentially from that of *Haycraft* and *Creasey*, in 2 East., 92. In that case it appeared that the defendant himself was grossly duped and deceived, and his assertion was founded upon his belief only. If this had not been the case he would have been liable. There is no difference in morality between the assertion of a falsehood and an affirmation, without any knowledge on the subject, with intent to induce the plaintiff to give credit. We have called upon the defendant to show that he was himself deceived. This he has not done, but has shown facts tending to excite his suspicions, and which ought to have put him more upon his guard. It is doubtful whether the case of *Haycraft* and *Creasey* be law. It was decided by two doubting judges against the clear and decided opinion of the Chief Justice, supported by great strength of argument. The opinion of Grose is clearly untenable.

In the case of *Pasley* v. *Freeman*, (3 T. R. 51,) the only doubt was, whether the only remedy was not in equity, and whether it could be supported upon the strict principles of the common

law. But that doubt was overruled, and a legal remedy established. But it is not decided that there is no relief in equity. Courts of chancery do give relief in some cases, where relief may also be had at law. Thus, whne a case of equitable jurisdiction is blended with a case at law, or where the remedy at law is not complete, or where a court of equity once gets jurisdiction of the case upon proper grounds, although there may be a remedy at law, the court of equity, will retain it jurisdiction.

Although this cause has been several times **86***] argued *yet this is the first time the question has been made whether the defendant, Clark, is not liable upon the ground of misrepresentation.

The plaintiff was not bound to give C. & N. notice that he had indorsed the bills of R. M. & Co. It would have been indelicate both with regard to them and to C. & N. It was time enough to give notice when the bills were dishonored.

The conveyance of *cestui que trust* will be respected in a court of equity. W. Russell, by his answer, has assigned the trust fund to the plaintiff.

The supposed objections to the trust of Loomis & Tillinghast do not exist. The bill calls upon the defendant to set forth all the assignments and trust funds he holds from R. M. & Co., and to produce the original deeds, of which copies are produced by the plaintiff, and to declare on what trusts he holds the property assigned. The bill charges him with holding funds in trust for the plaintiff. The recital, in one of the deeds produced, leads to the trust of Loomis & Tillinghast, which they assigned to the defendant who had notice of the trust, and without the knowledge of William Russell. The defendant knew to what the recital alluded; he knew of the trust in favor of Joseph and W. Russell and ought to have stated it. The notes of R. M. & Co., with the indorsement of Loomis & Tillinghast, which the defendant gave up to them in lieu of the property assigned to them by R. M. & Co., were of no value. They were notes which R. M. & Co. had given to Clark in payment, and which they had paid by the assignment of other property so as to relieve L. & T. from their indorsement; so that in truth the whole funds which R. M. & Co. had assigned to L. & T. for their indemnity, and for the indemnity of Joseph & W. Russell, were applicable to the relief of the latter; and ought to be applied to the indemnification of the plaintiff.

The nature of the speculation itself indicated that the proceeds of the sales of the rice were to constitute the fund out of which the bills were to be paid which were drawn to pay for **87***] its purchase. The parties upon the *bills naturally looked to that fund as their principal security. This was known to the defendant, Clark; and with that knowledge he obtained possession of the proceeds of this very rice, for the purchase of which the plaintiff indorsed the bills. The defendant did not, as a stranger, get them innocently into his hands, but obtained those funds in consequence of his own misrepresentation as to the stability and integrity of the house of R. M. & Co. It is unconscientious for him to retain those funds under such circumstances.

March 5th. *All the judges being present,* MARSHALL, *Ch. Justice,* delivered the following opinion:

This is a suit in chancery instituted for the purpose of obtaining from the defendants payment of certain bills of exchange drawn by Jonathan Russell, an agent of Robert Murray & Co., and indorsed by Nathaniel Russell; which bills were protested for non-payment, and have since been taken up by the indorser. The plaintiff contends that the house of Clark & Nightingale had rendered itself responsible for these bills by two letters addressed to him, one of the 20th and the other of the 21st of January, 1796, on the faith of which his indorsements, as he says, were made.

The letters are in these words: (See the preceding statement of the case.)

The bill alleges that these letters bind Clark & Nightingale to pay to Nathaniel Russell any sum for which he might credit Robert Murray & Co., either because,

1st. They do, in law, amount to a guaranty; or that,

2d. They were written with a fraudulent intent to be understood as a guaranty; or that,

3d. They contain a misrepresentation of the solidity and character of the house of Robert Murray & Co.

Soon after the protest of these bills for non-payment, Robert Murray & Co. failed and became bankrupts. *Previous to their [***88** bankruptcy they assigned a great proportion of their effects, including the cargoes for the purchase of which these bills were drawn, to John J. Clark and John B. Murray, in trust for Clark & Nightingale, and for sundry other creditors and purposes mentioned in several trust deeds, which are recited in the bill, and which appear in the record. The plaintiff claims to be paid his debt out of this fund.

The answer of John J. Clark was filed, and a certain William Russell, a partner of the house of Joseph & William Russell, who gave a letter of credit and guaranty to the drawer of the bills indorsed by the plaintiff, Nathaniel Russell, was made a party defendant. Against Joseph and William Russell a judgment had been obtained by Nathaniel Russell for the amount of the bills indorsed by him, but they had become insolvent, and no part of this judgment had been discharged.

Many depositions having been taken and sundry exhibits filed, a decree of dismission, without argument, and *pro forma* was rendered in the Circuit Court for the District of Rhode Island, and the cause comes into this court by appeal from that decree.

It is contended by the defendants that the letters which have been recited create no liability on the part of Clark & Nightingale, but are to be considered merely as letters of introduction. Whatever may be the construction of the letters, they insist that the plaintiff, if entitled to recover, has complete remedy at law, and that a court of chancery can take no jurisdiction of the cause.

It is believed to be unquestionable that a suit in chancery could not be sustained on these letters against Clark & Nightingale, unless some additional circumstance rendered an application to this court necessary.

The plaintiff contends that such application

is necessary, because there are a great varicty of facts belonging to the transaction which could not be introduced into a court of law, or which would not avail him in that court, but which are proper for the consideration of a court of equity.

89*] *Because some of these facts rest within the knowledge of the defendants; and,

Because he cannot, at law, subject the trust fund to his claim.

So far as respects the question whether these letters constitute a contract of guaranty, there can be no doubt but that the construction in a court of law or a court of equity must be precisely the same, and that any explanatory fact which could be admitted in the one court, would be received in the other.

On the question of fraud the remedy at law is also complete, and no case is recollected where a court of equity has afforded relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud.

It is true that if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.

It is also true, that if a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made, in the first instance, to that court, which will not require that the claim should be first established in a court of law.

In the case under consideration, the answer confesses nothing. So far from furnishing any evidence in support of the plaintiff's claim, it denies, in the most full and explicit terms, the whole equity of the bill.

90*] *This ground of jurisdiction, therefore, is totally withdrawn from the case.

It remains to inquire whether the plaintiff can be let in to claim on any part of the trust fund; and this depends principally on his claim being within any one of the trusts declared.

The first trust deed, which was executed by Robert Murray & Co. on the 23d day of March, 1798, is declared to be in trust to apply the moneys arising from the trust property "in payment and satisfaction of the debts and balances which shall appear to be found to be due and owing from the said parties of the first part (Robert Murray & Co.) to them the said John J. Clark and John B. Murray (the trustees) and to such other of the creditors" of the said Robert Murray & Co. as they should, by any instrument of writing, within twelve months, appoint.

It may be doubted whether this declaration of trust would be applicable to a collateral undertaking not, at the time, carried into judgment.

In the second deed, one of the trusts declared is, to repay Clark & Nightingale for any sums they may pay or be liable to pay under a suit at the time depending against them. That suit was dismissed.

Without deciding whether Russell could avail himself of this trust, having failed in the particular action then depending, the court will proceed to inquire how far Clark & Nightingale were liable to the plaintiff for the debt due to him from Robert Murray & Co.

The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained construetions, but to require an explicit and plain declaration of the obligation he is about to assume. In their letter of the 20th, Clark & Nightingale indicate *no intention to take any responsi- [**91** bility on themselves, but say that Mr. Russell may be assured Robert Murray & Co. will comply fully with their engagements. In their letter of the 21st they speak of the letter of the preceding day as a letter of recommendation, and add "we have now to request that you will endeavor to render them every assistance in your power."

How far ought this request to have influenced the plaintiff? Ought he to have considered it as a request that he would advance credit or funds for Robert Murray & Co. on the responsibility of Clark & Nightingale, or simply as a strong manifestation of the friendship of Clark & Nightingale for Murray & Co., and of their solicitude that N. Russell should aid their operations as far as his own view of his interests would induce him to embark in the commercial transactions of a house of high character, possessing the particular good wishes of Clark & Nightingale?

It is certain that merchants are in the habit of recommending correspondents to each other without meaning to become sureties for the person recommended; and that, generally speaking, such acts are deemed advantageous to the person to whom the party is introduced, as well as to him who obtains the recommendation.

These letters are strong, but they contain no intimation of any intention of Clark & Nightingale to become answerable for Robert Murray & Co., and they are not destitute of expressions alluding to that reciprocity of benefit which results from the intercourse of merchants with each other. "The friendship," say they, in their letter of the 20th, "we have for these gentlemen, induces us to wish you will render them every service in your power, at the same time we flatter ourselves this correspondence will prove a mutual benefit."

Mr. Russell appears to have contemplated the transaction as one from which a fair advantage was to be derived. He received a commission on his indorsements.

The court cannot consider these letters as constituting a contract by which Clark & Nightingale undertook *to render themselves [**92** liable for the engagements of Robert Murray & Co. to Nathaniel Russell. Had it been such a

contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.

It remains to inquire whether these letters contain such a misrepresentation of the circumstances and character of the house of Robert Murray & Co. as to render them accountable to the plaintiff for the injury he has sustained by trusting that company.

The question, how far merchants are responsible for the character they give each other, is one of much delicacy, and of great importance to the commercial world.

That a fraudulent recommendation (and a recommendation, known at the time to be untrue, would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted. The case of *Pasley* v. *Freeman*, reported in 3 Durnford and East, recognizes and establishes this principle. Indeed, if an act, in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed.

But this does not appear to the court to be the case described. It is proved incontestibly that when the letters on which this suit depends were written, Robert Murray & Co. were in high credit, and were carrying on business to a great extent, which was generally deemed profitable. The bill charges particular knowledge in Clark & Nightingale that this apparent prosperity was not real. But this, as well as every other allegation of fraud, is explicitly denied by the answer; and the answer, being responsive to the bill, is evidence. Had the plaintiff been able to exhibit proofs which would have rendered this fact doubtful, it might have been proper to have directed an issue for the purpose of trying it; but he has exhibited no such proofs.

In writing the letters, then, recited in the bill, **93***] Clark *& Nightingale stand acquitted of the imputation of fraud.

But it is contended by the plaintiff that the representation they made of the circumstances of Robert Murray & Co. was, at the time, untrue; and that this misrepresentation, whether made ignorantly or knowingly, was equally injurious to Nathaniel Russell, and equally charges them with the loss he has sustained by trusting to their assurances.

The fact that Robert Murray & Co. were not, in January, 1796, in solvent circumstances, is not clearly made out; but the cause does not rest entirely on this fact. The principle, that a mistake in such a fact as the real internal solidity of a mercantile house, whose external appearance is unsuspicious, shall subject the person, representing their solidity to another, to the loss sustained by that other in trusting to this representation, is not admitted.

Merchants know the circumstances under which recommendations of this description must be given. They know that when one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He is not supposed to have inspected all the books and transactions of his friend, with the critical eye which is employed in a case of bankruptcy. He must, therefore, be supposed to speak of the credit, not of the actual known funds of the person he recommends; of his apparent, not of his real solidity. In such a case it is certainly incautious and indiscreet to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted that, in such a case, fraud may be presumed on slighter evidence than would be required in a case where a letter was written with more circumspection. Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to be responsible for its actual verity. The reason of the rule is, that merchants generally possess, and are therefore presumed, in their correspondence, to speak from that knowledge only of the circumstances of other merchants, which may be acquired by observing *their course of business, their punctuality [***94** and their general credit.

This principle appears to have been fully considered in the case of *Haycraft* v. *Creasey*, reported in 2 East, in which case all the authorities were reviewed. It does not appear that a single decision has been ever made asserting the liability of the writer of such a letter. The case of *Haycraft* v. *Creasey* denies his liability; and that case appears to this court to have been decided in conformity with all previous adjudications.

It is therefore the opinion of the court, that Clark & Nightingale, having believed, and had reason to believe, so far as is shown by the evidence in this cause, that the representation they made to the plaintiff of the character and circumstances of Robert Murray & Co. was true, are not liable to the plaintiff, in consequence of that representation, for the credit he gave to that company.

A claim is also set up to the funds in the hands of Clark & Nightingale, founded on the circumstance that they consist, in part, of the rice purchased with the bills indorsed by the plaintiff. But as no specific lien is alleged to have existed, and as the particular fraud, alleged to have been committed to acquire those funds, is not proved, this claim is unsustainable.

The plaintiff, then, cannot be considered as a trust creditor in consequence of any claim he can assert against Clark & Nightingale

The second deed, which is dated on the 24th day of March, 1798, is also in trust "to pay to Joseph & William Russell, the amount that shall be recovered and paid from them to Nathaniel Russell," &c., "upon account of a letter of credit," &c., "and for which the said Nathaniel Russell hath recovered a judgment against the said Joseph & William Russell."

No part of this judgment has ever been paid, and Joseph and William Russell are insolvent. The state of things, then, has perhaps not yet occurred in which Joseph and William Russell could demand the execution *of the trust; [***97** and the court, though with some hesitation, feels constrained to decide that, under the terms of this trust, Nathaniel Russell claiming through Joseph & William Russell, cannot demand its execution directly to himself.

It also appears that, in September, 1796,

Robert Murray & Co. assigned to Loomis & Tillinghast certain personalties in trust. This assignment was surrendered to Clark & Nightingale in consideration of notes to a large amount, in which Loomis & Tillinghast were bound for Robert Murray & Co. It appears that Clark & Nightingale are otherwise secured with respect to these notes, at least, there is reason to believe that they are secure.

Clark & Nightingale, having taken this assignment with notice of the trust, take it clothed with the trust. They are trustees for the same uses and to the same extent with Loomis & Tillinghast.

A paper appears in the cause which purports to be the assignment to Loomis & Tillinghast. The assignment is in trust, first, to repay themselves any sums which they may pay on account of certain undertakings made by them for Robert Murray & Co., and, secondly, in trust "to pay to Joseph & William Russell all such moneys as they shall be liable to pay, as guaranty as aforesaid, to Nathaniel Russell upon bills," &c., reciting the bills for which this suit is instituted.

It is settled in this court, that the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself.

This trust being to pay Joseph & William Russell a sum they are liable to pay to Nathaniel Russell, and being created in such terms that the money is certainly payable to them, the purposes of equity will be best effected by decreeing it, in a case like the present, to be paid directly to Nathaniel Russell. Indeed, a court ought not to decree a payment to Joseph & William Russell without security, that the debt to Nathaniel Russell should be satisfied. **98***] *But it is not shown, by any legal evidence, that this paper is the assignment which was made in trust to Loomis & Tillinghast, and transferred by them to Clark & Nightingale. Its verity is not admitted by the defendants nor proved by the plaintiff.

Nor are the circumstances under which the transfer was made, nor the present circumstances of the trust, sufficiently before the court to enable it to decide with certainty whether the prior trust to Loomis & Tillinghast is satisfied, or otherwise so secured that the trust fund may now be applied to the debt of Joseph & William Russell.

Could these defects be supplied, the court would still be unable to decree in favor of the plaintiff, for want of proper parties.

The incapacity imposed on the circuit courts to proceed against any person residing within the United States, but not within the district, for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interest of absent persons, it may be the duty of the court to decree, as between the parties before them. But in this case, the assignees of Robert Murray & Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties. They may contest the validity of all the deeds under which both parties claim, and assert in themselves, for the benefit of the creditors generally, a right to the whole fund. Certainly this court ought not, on light grounds, and without due precaution, to change the hands in which this fund is placed, until any claim of the assignees to it may be decided.

Should this difficulty be obviated by suspending the effect of the decree, till the validity of the trust deeds should be decided, or by directing security to be given, another presents itself which cannot be removed. The assignees have a right to contest the claim of Nathaniel Russell, and may either deny its original validity or *show that it has been paid. They [*99 are, then, essential parties, and the court ought not to decree in favor of the plaintiff without them. It is possible, that they may consent to make themselves parties in this cause, and as a court may, instead of dismissing a bill brought to a hearing without proper parties, give leave to make new parties, the court will, in this case, set aside the decree of the Circuit Court, dismissing this bill, and remand the cause to the Circuit Court, with leave to make new parties.

Cited—10 Wheat. 188; 7 Pet. 119, 122, 126; 10 Pet. 494, 503; 12 Pet. 213; 1 How. 185; 8 How. 410; 17 How; 139, 140, 508; 18 How. 469; 19 How. 278; 16 Wall. 451, 7 Otto, 15; 9 Otto, 124; 2 Abb. U. S. 5; 1 Bald. 19; 408, 409, 416, 417, 420; 4 Blatchf. 492; 12 Blatchf. 2914 1 Dill. 430; 2 Mason, 196, 198; 3 Mason 313; 4 Mason 36, 41; 5 Mason, 106, 571; 4 McLean 54, 58, 59; McAll. 29; 1 Story 32, 66; 2 Wood. & M. 29, 30, 233; 3 Wood. & M. 294, 467.

Distinguished—2 Mason, 271, 382; 2 Ware (Dav.), 261; 1 Wood. & M. 112, 146.

SCHOONER CATHERINE
v.
THE UNITED STATES.

Absent—WASHINGTON, *Justice.*

If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed.

THIS case was dismissed because the counsel for the appellant had not furnished the court with a statement of the points of the case, agreeably to the general rule on that subject.

It was afterwards re-instated by consent of parties.

BINGHAM AND OTHERS
v.
MORRIS AND OTHERS.

The rule to dismiss a writ of error for not filing the transcript of the record within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss.

MEREDITH moved the court to dismiss this appeal, because the transcript of the record was not filed within the first six days of the term, agreeably to the general rule (ante vol. 3, p. 239). The transcript was filed on the 13th day of the term and before the motion to dismiss.

THE COURT (WASHINGTON, *Justice*, absent), said that they did not consider the rule as applying to any case where the transcript shall have been filed before the motion for dismissal.

Motion overruled.

Cited—3 Wall. 103.

100*] *THE SLOOP ACTIVE
v.
THE UNITED STATES.

Present—All the Judges.

The departure of a vessel from the wharf of a port, and proceeding a mile and an half therefrom with intent to go to sea, is not a departure from the port, within the meaning of the 3d section of the supplementary embargo act of January 9th, 1808, if the vessel had not actually gone out of the port before seizure.

A licensed fishing vessel is liable to forfeiture (under the 32d section of the act of the 18th of February, 1793, for enrolling and licensing vessels) for sailing laden with goods with intent to carry them to another place, without a license therefor, although the goods are wholly of domestic growth and manufacture and not liable to any duty. But such cargo is not liable to forfeiture unless it belong to the master, owner, or a mariner of the vessel.

THIS was an appeal from the sentence of the Circuit Court of the District of Connecticut, which affirmed that of the District Court condemning the sloop Active and cargo.

The libel stated that the sloop Active was an American vessel duly enrolled and licensed for the cod-fishery on the 5th of July, 1808, and had given the bond required to be given by such vessels under the several acts of Congress laying and enforcing the embargo; and had a permit to depart and be employed in the cod-fishery.

That in the night between the 4th and 5th of July, 1808, at the port of New London, there was secretly and unlawfully laden on board her, a cargo consisting of barrels of beef, fish, butter, &c., without the knowledge and not under the inspection of a revenue officer, with intent unlawfully to proceed with the vessel and cargo to some place without the port, harbor and district of New London. That the vessel so laden left her place at the wharf in the port of New London, in the night, without the knowledge of any custom-house officer, without a license or permit, and without any custom-house papers, and departed therefrom and out of the said port, and proceeded on her said intended unlawful voyage to some place to the custom-house officers unknown. That the cargo was worth more than 600 dollars. That the vessel was unlawfully employed in trade other than that for which she was licensed.

The facts of the case appeared to be as stated in the libel, except that the vessel was seized in the act of leaving the port, but before she had gone out of the port; and that Gates, the owner of the greater part of the cargo, was neither master, owner, nor mariner of the vessel.

101*] **Pitkin* and *Dana*, for the appellants.

Three questions arise in this cause.

1. Whether the vessel and cargo were forfeited by being laden contrary to the 2d section of the act of 25th April, 1808, (vol. 9, p. 146), which declares that "no vessel shall receive a "clearance, unless the lading shall be made "hereafter under the inspection of the proper "revenue officers, subject to the same restric- "tions, regulations, penalties and forfeitures, "as are provided by law for the inspection of "goods, wares, and merchandise imported," &c.

2. Whether she departed from a port of the United States without a clearance or permit, contrary to the 3d section of the act of the 9th of January, 1808, (vol. 9, p. 11).

3. Whether she was employed in any other trade than that for which she was licensed, contrary to the 32d section of the act of February 18th, 1793, for enrolling and licensing vessels (vol. 2, p. 193).

1. Upon the first question, nothing will be added to the arguments urged in the case of the Paulina. (Ante p. 55.)

The only penalty under that act, for lading without the inspection of a revenue officer, is the denial of a clearance.

There was no law then in force to punish the intent to violate the embargo. The act of January 9th, 1809, (vol. 9, p. 184), first made it penal to lade a vessel with that intent.

The libel does not charge the intent to be to export the cargo to any foreign place, which was the evil intended to be guarded against by all those laws. It was not unlawful to transport domestic goods from one district to another in the United States. She had given bond according to the provisions of the act of January 9th, 1808, (vol. 9, p. 11), not to proceed to any foreign port or place.

*The 5th section of the act of January [**102** 9th, 1809, (commonly called the enforcing act), first made the vessel liable to forfeiture for lading without a permit. This is a legislative confession that the law was not so before. It sanctions our construction of the act of the 25th of April, 1808.

2. It appears from the evidence that the vessel was seized within the port, about a mile and an half from the wharf.

She did not "depart from" the port, and is therefore not liable to forfeiture under the 3d section of the act of January 9th, 1808.

3. Was the Active engaged in any trade, other than that for which she was licensed, within the meaning of the enrolling act?

By the 32d section of that act (vol. 2, p. 193), it is declared, "that if any licensed vessel shall "be employed in any other trade than that for "which she is licensed, such vessel, with her "tackle, apparel and furniture, and the cargo "found on board her, shall be forfeited."

The object of this provision evidently was to prevent smuggling and other frauds upon the revenue. This is evident from various expressions and provisions in other parts of the act.

Thus the 33d section provides that if the cargo belong to a person other than the master, owner, or mariners of the vessel so trading, and if the duties on the cargo have been paid or secured according to law, such cargo shall not be forfeited,

The reason is, that the revenue cannot be defrauded if the duties have been paid. If, then, this vessel had been laden with foreign goods, and the duties had been paid, they would not have been forfeited; *a fortiori*, would they be exempt from forfeiture, being American produce and not liable to any duty?

So, in the 4th section of the same act (vol. 2, p. 171), bond is to be given to pay to the United States 1,000 *dollars in case it shall ap- [**103** pear that the vessel has been employed in any trade, whereby the revenue of the United States has been defrauded, during the time the the license was in force; and the master is to take an oath that she shall not be employed in any trade whereby the revenue may be defrauded.

By the 5th section it is declared that no license shall be in force for carrying on any other business or employment than that for which the vessel is specially licensed; and by the 6th section, every vessel found trading between district and district, or between different places in the same district, without being enrolled and licensed, if laden with goods, the growth or manufacture of the United States only (distilled spirits excepted), or in ballast, shall pay foreign fees and tonnage, but if she has any articles of foreign growth or manufacture, or distilled spirits, the vessel and cargo shall be forfeited.

The license which the sloop Active had for the cod-fishery not being in force for the coasting trade, she was found trading between different places in the same district without a license, and therefore was within the 6th section of the act; and being laden only with domestic produce, was only liable to pay foreign fees and tonnage.

By the 8th section, if a vessel, enrolled and licensed, shall proceed on a foreign voyage, without giving up her enrollment and license, and being registered, such vessel, and the goods so imported therein, shall be liable to forfeiture. Under this section the vessel must actually make the foreign voyage and import goods before she can be forfeited.

The 12th section authorizes a change of the master, and requires the new master, or the owner, to make oath that the vessel shall not, while the license continues in force, be employed in any manner whereby the revenue may be defrauded.

By the 21st section, a licensed fishing vessel trading to a foreign port without a license or permit therefor, is only liable to forfeiture in case she be found within three leagues of the coast with foreign goods on board to the value of 500 dollars. Domestic goods found on **104***] *board are not liable to forfeiture. It cannot therefore be supposed that the legislature intended to render such a vessel liable to forfeiture for carrying domestic goods, upon which no duties were payable, from one part of a port to another.

The act of taking on board certain domestic goods and carrying them from one part of the port to another is not such a trade as was contemplated in the 32d section of the act. Such a construction would be contrary to the spirit of the whole act.

All that can be said is, that she took in the goods with intent to trade; but this is not trading. Such an intent is not punishable.

Dallas, Attorney of the United States for the District of Pennsylvania, and *Pinkney*, Attorney-General of the United States, for appellees.

The parties engaged in this transaction were conscious that it was an unlawful business. This vessel was confined by law to cod-fishery. She could not lawfully carry on the coasting trade.

She was laden in the night, and was towing out of the harbor when she was seized. Gates, who claims the cargo, appears to be master for that voyage—at least he had the use of the vessel, and was on board, and there was no other master.

1. The first inquiry is, whether this vessel is liable to forfeiture under the embargo law, and

2. Whether she is liable under the enrolling and licensing act.

1. She departed from a port of the United States without a clearance or permit, contrary to the act of January 9th, 1808. (Vol. 9, p. 11, § 3.)

To depart from a port does not mean to go out of the port. She departed from the port when she set sail to leave the port—when she broke ground. This is the construction always given to policies, when the insurance is from (not at and from) a certain port.

*2. The protection of the revenue [***105** was not the only object of the prohibition to use the license for another purpose than that for which it was given. It was material to know in what kind of trade every vessel was engaged. All the sections which have been cited show that it was the intention of the legislature to prohibit the vessel from engaging in any other employment than that for which she was licensed, although such employment should not in any manner affect the revenue. It is a plain and express prohibition under the penalty of forfeiture of vessel and cargo, and it is unnecessary to inquire into the motives of the legislature.

She was engaged in the business of carrying goods from one place to another, and this was an employment or trade for which she had no license. She was as much engaged in trade at the inception as she would have been at the consummation of the voyage. It was not necessary that she should have finished the voyage, or have been engaged in buying and selling.

February 26. MARSHALL, *Chief Justice*, delivered the opinion of the court as follows:[1]

The sloop Active, a vessel licensed for the fishing trade, was laden, in the night of the 4th of July in the year 1808, in the port of New London, and was seized by the revenue officer, after having left the wharf without a clearance, under circumstances which justify a belief that she was about to proceed on a foreign voyage in violation of the acts laying an embargo. The vessel and cargo were libeled as having been forfeited under the laws of the United States, and were both condemned in the District Court, which sentence was affirmed in the Circuit Court.

This sentence is supported on the part of the United States under the 3d section of the supplementary act to the act laying an embargo, and the 32d section of the act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries.

*This court is of opinion, that how- [***106** ever criminal the intentions of those on board the Active might have been, neither the vessel nor cargo were forfeited under the 3d section of the "act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," because she appears to have been seized in port; and a departure from port without a clearance was necessary to consummate the offence.

The case is undoubtedly within the words of

1.—Judge Todd was absent in consequence of indisposition.

the 32d section of the enrolling and licensing act. The Active was a licensed vessel employed in a trade other than that for which she was licensed.

The argument that this act was intended merely to secure the revenue, and that its provisions do not contemplate a vessel laden with domestic produce not subject to duty, has been urged with great force, and certainly derives much strength from the various sections of the act which have been quoted. But the words of the 32d section are explicit, and although other preceding sections furnish much reason for believing that a forfeiture in a case where the revenue could not be defrauded, might not be contemplated by the legislature, yet they are not so expressed as to control the 32d section. The Active and her cargo, therefore, must be considered as forfeited, except so far as they come within the 33d section,

That section is in these words: "Provided "nevertheless, and be it further enacted, That "in all cases where the whole or any part of "the lading, or cargo on board, any ship or "vessel, shall belong, *bona fide*, to any person "or persons other than the master, owner, or "mariners, of such ship or vessel, and upon "which the duties shall have been previously "paid or secured, according to law, shall be "exempted from any forfeiture under this act, "anything therein contained to the contrary "notwithstanding."

In this case the libel states, that Billings and Morgan were owners of the vessel, and a certain Gates owner of the cargo. A claim is filed by Billings and Morgan for the **107***] vessel and part of *the cargo, and by Gates for the residue of the cargo. It appears, then, both from the libel and claim, that a part of the cargo did "belong, *bona fide*, to a person other than the master, owner or mariners of the ship or vessel." This part of the cargo comes completely within that part of the description which relates to the ownership of the property. But the goods on board being liable to no duty, the duties could not have been previously paid or secured.

The court considers this section as manifesting a clear intention in the legislature to exempt from forfeiture a cargo not belonging to the owner, master or mariners, provided that cargo was not liable to duties. Whether this condition was produced by a previous payment of duties, or by a perfect exemption from duties, must be immaterial. Duties cannot be paid or secured, according to law, on goods not liable, by law, to duty. The legislature must be understood, when saying "upon which the duties have been previously paid or secured according to law," to mean, "upon which the duties, if any, have been previously paid," &c.

It is the opinion of the court, that the sentence of the Circuit Court be reversed as to so much of the cargo of the sloop Active as is claimed as the property of Gates, and be affirmed as to the vessel and the residue of the cargo.

And it is directed to be certified that there was probable cause of seizure.

Aff'g—1 Paine, 247.
Cited—1 Gall. 121, 144; 2 Gall. 10; 1 Ware, 24; 3 Ware, 162; 1 Sum. 518.

HAWTHORNE, CLAIMANT OF THE BRIG CLARISSA CLAIBORNE.
v.
THE UNITED STATES.

Present—All the Judges.

This court will grant a commission to take new evidence to be used here, in a case of admiralty jurisdiction.

THIS was an appeal from the sentence of the District Court, at New Orleans, condemning the brig Clarissa Claiborne for violating a law of the United States.

Hare* moved for a *certiorari* upon a [*108** suggestion of diminution of the record, in not sending up the depositions of the witnesses.

MARSHALL, *Ch. J.* What prevents you from producing the witnesses here, or taking their depositions *de novo?*

Hare suggested a doubt, whether cases for violation of the embargo are cases of admiralty, or of prize jurisdiction.

However, on a subsequent day he moved for, and obtained a commission to take the depositions of witnesses at New Orleans, to be used on the trial in this court at the next term.

A like commission was granted in the case of *Williams* and *Armroyd*, at this term.

THE UNITED STATES
v.
JOHN GOODWIN.

No writ of error lies to the Supreme Court of the United States, to reverse the judgment of a circuit court in a civil action, which has been carried up to the Circuit Court from the District Court by writ of error.

THIS was an action of debt brought originally in the District Court, for the District of Pennsylvania, by the United States, against John Goodwin, for 15,000 dollars, as a penalty for not entering goods agreeably to the prime cost, at the place of exportation, with intent to defraud the revenue. The judgment of the District Court, which was in favor of the United States, was, upon a writ of error, reversed in the Circuit Court; and thereupon the United States sued out the present writ of error to this court.

A doubt having been suggested, whether this court could take jurisdiction by a writ of error, in a civil action, which had been carried up by writ of error from the District Court to the Circuit Court, that question was submitted to this court without argument.

*At a subsequent day, viz., March 10, [***109** all the judges being present,

WASHINGTON, *J.*, delivered the opinion of the court, as follows:

This case stands upon a writ of error to the Circuit Court, for the District of Pennsylvania. By the record it appears that an action of debt was brought, in the name of the United States, against the defendant in error, in the District Court of Pennsylvania, in which judgment was rendered for the United States. On a writ of

error to the Circuit Court for that district, that judgment was reversed; and upon like process, the cause has been brought into this court for re-examination. A rule has been obtained by the defendant in error, upon the United States, to show cause why the writ of error should not be dismissed; and the ground of the rule is that, as the cause was not removed from the District into the Circuit Court by appeal, but by writ of error, there is no provision in any of the laws of the United States, giving jurisdiction to this court to re-examine the judgment of the Circuit Court, upon a writ of error or otherwise. This question can only be decided by an attentive consideration of the different acts of Congress on this subject.

The 21st section of the judicial law of 1789 declares, that from final decrees in a district court in cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds 300 dollars, an appeal shall be allowed to the Circuit Court. The 22d section provides, that final decrees and judgments in civil actions, in a district court, where the matter in dispute exceeds the value of 50 dollars, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court, upon a writ of error. This section then proceeds to declare that, upon a like process (that is to say, upon a writ of error), may final judgments and decrees in civil actions and suits in equity, in a circuit court, brought there by original process, or removed there from the state courts, or by appeal from a district court, where the value exceeds 2,000 dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court.

110*] *The 2d section of the act of the 3d of March, 1803, so far changes the above sections of the act of 1799, that whereas the latter allows an appeal from the District to the Circuit Court, only in admiralty and maritime cases, where the value in dispute, exclusive of costs, exceeds 300 dollars, the former provides, an appeal from all final judgments or decrees in a district court, where the matter in dispute, exclusive of costs, exceeds 50 dollars, and also an appeal to the Supreme Court, from all final decrees and judgments in a circuit court, in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, where the value, exclusive of costs, exceeds 2,000 dollars. But this law makes no provision for the appellate jurisdiction of the Supreme Court in any other cases than those above mentioned. Consequently, we must refer to the sections of the act of 1789, before noticed (which are still in force, except so far as they are inconsistent with the provisions of the act of 1803), to see in what cases, other than those provided for by the act of 1803, the Supreme Court can review the decisions of the circuit courts. It has been shown that all final judgments or decrees in civil actions and suits in equity, in a circuit court, brought there by original process, or removed from the state courts, or by appeal from a district court, may be re-examined in the Supreme Court, upon a writ of error. But no case can, under this act, be removed from a district court by appeal, except it be of admiralty and maritime jurisdiction; and, consequently, under the literal construction of this law, no other cases could be carried from the Circuit Court to the Supreme Court. The question, then, is whether the word appeal, in the 22d section, is to be understood technically, or merely as descriptive of the appellate jurisdiction of the superior court, without regard to the particular mode by which a cause is transmitted to that jurisdiction. This question appears to have been considered by the Supreme Court so early as the year 1796, in the case of *Wiscart* v. *Dauchy*. Chief Justice Ellsworth, in delivering the opinion of the court in that case, expresses himself as follows: "The act of 1789 speaks of appeal and writ of error, but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil law process, and removes a cause entirely, subjecting the law and fact to a review and re-trial. *A writ of error is a common law pro- [***111** cess, and removes for re-examination nothing but the law. This statute observes this distinction. In admiralty and maritime causes, an appeal is allowed from the District to the Circuit Court, if the matter in dispute exceeds 300 dollars, and yet decrees and judgments in civil actions may be removed by writ of error, from the District to the Circuit Court, though the value barely exceeds 50 dollars." In another part of this opinion, the judge adds, "that as to the appellate jurisdiction of the Supreme Court, the 22d section says, and upon a like process that is, upon a writ of error, shall final judgments and decrees in civil actions, viz., cases not criminal, and suits in equity, &c. Among the causes which may be brought to the Supreme Court, by writ of error, are cases which had been removed to the Circuit Court, by appeal from a district court, which can only be cases of admiralty and maritime jurisdiction.

The objection made to this interpretation of the word appeal, that judgments in civil actions at common law, commenced in a district court, could be re-examined only in a circuit court, if well founded in itself, could not, with any propriety, be addressed to courts, after the legislative meaning of the term is ascertained. The technical distinction between a writ of error and an appeal, and between the different cases to which they were applicable, was clearly marked in the act of 13th February, 1801, which was afterwards repealed by the act of the 8th of March, 1802. The former act, after providing for the removal of all final judgments or decrees, above the value of 50 dollars, from a district to a circuit court, by appeal, and by a like proceeding for a removal to the Supreme Court, of those cases only which were of equity, of admiralty and maritime jurisdiction, and of prize or no prize, proceeded to provide for civil actions at common law, originating in a district court, by declaring that final judgments, in such cases, if of a certain value, might be removed at once from the District to the Supreme Court, by writ of error. So, that as the law stood at that time, a party, in cases at common law, had an election to carry his case, where it exceeded 2,000 dollars, by writ of error, from the District to the Circuit Court, under the 22d section of the act of 1789, but without the privilege of proceeding *farther, or to pro- [***112** ceed with his cause, at once, to the Supreme Court, passing by the Circuit Court. But it appears not to have been the policy of the legislature at that time to subject the decisions of

the District Court, in civil cases at common law, to more than one re-examination in an appellate court.

Cited—Post, 288; 5 Pet. 204, 205; 6 Pet. 495, 497; 12 Pet. 144; 14 Pet. 621; 3 Wall. 679; 16 Wall. 342; Bald. 403, 406; 1 Gall. 6, 7.

WHELAN
v.
THE UNITED STATES.

Cases of seizure upon waters navigable from the sea, by vessels of more than ten tons burthen for breach of the laws of the U. S., are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury.

THIS cause standing so late on the docket that it was not likely to be called for trial at this term, *Dallas*, for the United States, suggested the propriety of assigning a particular day for the hearing, as it was a case of importance, and involved a question of jurisdiction, viz., whether a seizure of a vessel, on waters navigable from the sea for vessels of ten and more tons burthen, for breach of a law of the United States, was to be tried by a jury. This question was said to be important because the Judge of the District of Pennsylvania had refused to try any cases of that kind, until the question was finally settled by this court.

The court accordingly assigned a day for hearing that question, but intimated an opinion that it was already decided in the cases of the *Vengeance* (3 Dall., 297), *The Betsy and Charlotte* (4 Cranch, 443), and *Yeaton* v. *United States* (5 Cranch, 281).

E. Tilghman, for the appellant, after looking into those cases, abandoned the question as to jurisdiction, considering the cases cited as conclusive against him.

THE COURT (all the judges being present), said that the question had been certainly settled in this court, upon full argument.

Cited—5 How. 486; Blatchf. & H. 240.

113*] *THE UNITED STATES
v.
THE BRIG ELIZA.

Present—All the Judges.

A vessel which has proceeded to a foreign port, contrary to the embargo act of January 9th, 1808, is liable to be seized upon her return, although that act gives a penalty of double her value in case she should not be seized.

THIS was an appeal from the sentence of the Circuit Court for the District of Delaware, which affirmed that of the District Court which dismissed the libel, and ordered the vessel to be restored. She had been seized by the collector of the District of Delaware, for having "proceeded to a foreign port or place," (viz., to Havanna) contrary to the 3d section of the act of January 9th, 1808, (vol. 9, p. 11), "supplementary to the act, entitled an "act laying an embargo on all ships and vessels in the ports and harbors of the United States;" and for having exported from the United States sundry goods, &c., contrary to the 4th section of the act of March 12th, 1808, "in addition to the act, entitled an act supplementary to the act, entitled an act laying an embargo," &c., (vol. 9., p. 71).

By the 3d section of the act of January 9th, 1808, it is enacted, that if any vessel shall, contrary to the provisions of that act, or of the act to which that is a supplement, proceed to a foreign port or place, such vessel shall be wholly forfeited, "and if the same shall not be "seized, the owner or owners, agent, freighter "or factors of any such ship or vessel, shall, "for every such offense, forfeit and pay a sum "equal to double the value of the ship or ves- "sel and cargo, and shall never thereafter be "allowed a credit for duties," &c., "and the "master or commander of such ship or vessel, "and all other persons who shall knowingly "be concerned in such prohibited foreign voy- "age, shall each respectively forfeit and pay a "sum not exceeding twenty thousand, nor less "than one thousand dollars, for every such "offense, whether the vessel be seized and con- "demned or not."

By the 4th section of the act of March 12th, 1808, it is enacted, "that it shall not be lawful "to export from the *United States, in [*114 "any manner whatever, any goods, wares or "merchandise of foreign or domestic growth "or manufacture, and if any goods, wares or "merchandise shall, during the continuance of "the act, entitled an act laying an embargo," &c., "and of the act supplementary," &c., "contrary to the prohibitions of this act, be "exported from the United States either by "land or water, the vessel," &c., "in which "the same shall have been exported, shall, to- "gether with the tackle, apparel," &c., "be "forfeited, and the owner or owners of such "goods," &c., "and every other person know- "ingly concerned in such prohibited exporta- "tion, shall each respectively forfeit and pay a "sum not exceeding ten thousand dollars, for "every such offense."

Joseph R. Ingersoll, for the appellees (the claimants of the vessel),

Contended, that as the vessel was once out of the jurisdiction of the United States after the offense committed, the United States could only sue for the penalty of the double value, and could not seize the vessel itself. That the offense was complete before the return of the vessel, and while she was absent she could not be seized; that the words "if the same shall not be seized," mean, if the same cannot be seized. That as the vessel could not be seized before her return, and as the offense was complete before her return, the case had happened in which the United States were entitled to sue for the double value; and as the forfeiture of the vessel and the penalty of double value were not concurrent and cumulative remedies, the United States could only resort to the latter. The right to seize the vessel was lost by her escape, and could not be revived upon her return. If the United States had brought suit for the penalty before the return of the vessel, they might have supported it, although the vessel should have returned before judgment. Their right of action was complete.

Dallas, contra.

There is no limitation of time for the seizure;

the vessel has actually been seized, and thereby the United States have relinquished their claim to the double value. If the vessel could be seized, it is probable the United States **115***] *could not have recovered the double value; and in an action therefor it would have been necessary for the United States to prove that the vessel could not have been seized. This could not be proved while the vessel was lying in a port of the United States, liable to seizure.

March 5th. *All the Judges being present,* MARSHALL, *Ch. J.*, stated that it was the opinion of the court that the vessel was liable to seizure; but that a majority of the court was of opinion that the offense was not complete until the arrival of the vessel in a foreign port; but the facts of the case do not appear so as to enable the court to decide that point; the cause is therefore continued for further proof.

Cited—1 Gall. 110, 267.

THE UNITED STATES
v.
JONAH CROSBY.

The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate.

THIS case is fully stated in the following opinion of this court, which was delivered by

STORY, *Justice,* on the 24th of February, all the judges being present:

A writ of intrusion was brought by the United States against the defendant in error to recover possession of an undivided part of certain land lying within the District of Maine. Upon the trial of the cause in the District Court of that district, a special verdict was found by the jury, upon which the same court gave judgment in favor of the defendant in error. This judgment was afterwards affirmed in the Circuit Court of Massachusetts, and is now before the Supreme Court for a final decision.

By the special verdict it appears that the claim of the United States to the land in con- **116***] troversy is under one *Nathaniel Dowse, who derived his title, if any, from an instrument stated at large in the same verdict, and executed in his favor by one John Nelson. The instrument is without a seal and was executed at the Island of Grenada, in the West Indies, before a notary public, according to the mode prescribed, by the existing laws, to pass real estate in that colony; and both parties were, at that time, residents therein.

By the laws of Massachusetts, no estate of freehold in land can be conveyed unless by a deed or conveyance under the hand and seal of the party; and to perfect the title as against strangers, it is further requisite that the deed should be acknowledged before a proper magistrate, and recorded in the registry of deeds for the county where the land lies.

The question presented for consideration, is whether the *lex loci contractus* or the *lex loci rei sitæ* is to govern in the disposal of real estates.

The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate.

The judgment of the Circuit Court must, therefore, be affirmed.

Cited—3 Wheat. 220; 9 Wheat. 570; 10 Wheat. 202; 5 How. 273; 6 Otto, 635; 9 Otto, 54; 1 Wood. & M. 80.

THE SCHOONER EXCHANGE
v.
M'FADDON AND OTHERS.

Present—All the Judges.

A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.

THIS being a cause in which the sovereign right claimed by Napoleon, the reigning Emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney-General, ordered to a hearing in preference to other causes which stood before it on the docket.

*It was an appeal from the sentence [***117** of the Circuit Court of the United States, for the District of Pennsylvania, which reversed the sentence of the District Court, and ordered the vessel to be restored to the libellants.

The case was this: On the 24th of August, 1811, John M'Faddon and William Greetham, of the state of Maryland, filed their libel in the District Court of the United States, for the District of Pennsylvania, against the schooner Exchange, setting forth that they were her sole owners, on the 27th of October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in Spain. That while lawfully and peaceably pursuing her voyage, she was, on the 30th of December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain Dennis M. Begon, her reputed captain and master. That no sentence or decree of condemnation had been pronounced against her, by any court of competent jurisdiction; but that the property of the libellants in her, remained unchanged and in full force. They therefore prayed the usual process of the court, to attach the vessel, and that she might be restored to them.

Upon this libel the usual process was issued, returnable on the 30th of August, 1811, which was executed and returned accordingly, but no person appeared to claim the vessel in opposition to the libellants. On the 6th of September, the usual proclamation was made for all persons to appear and show cause why the vessel should not be restored to her former owners, but no person appeared.

On the 13th of September, a like proclamation was made, but no appearance was entered.

On the 20th of September, *Mr. Dallas*, the **118***] Attorney *of the United States, for the District of Pennsylvania, appeared, and (at the instance of the executive department of the government of the United States, as it is understood), filed a suggestion, to the following effect:

Protesting that he does not know, and does not admit the truth of the allegations contained in the libel, he suggests and gives the court to understand and be informed,

That in as much as there exists between the United States of America and Napoleon, Emperor of France and King of Italy, &c., &c., a state of peace and amity; the public vessels of His said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation. That a certain public vessel described, and known as the Balaou, or vessel, No. 5, belonging to His said Imperial and Royal Majesty, and actually employed in his service, under the command of the Sieur Begon, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia for refreshment and repairs, about the 22d of July, 1811. That having entered the said port from necessity, and not voluntarily; having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations and the laws of the United States, was about to depart from the said port of Philadelphia, and to resume her voyage in the service of His said Imperial and Royal Majesty, when on the 24th of August, 1811, she was seized, arrested, and detained in pursuance of the process of attachment issued upon the prayer of the libelants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libelants, their captain and agent on the high seas, as prize of war, or otherwise; but that if the said public vessel, belonging to His said Imperial and Royal Majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libelants, citizens thereof, as in their libel is alleged **119***] (which nevertheless, *the said attorney does not admit), the property of the libelants, in the said vessel was seized and divested, and the same became vested in His Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular state of the United States, according to the decrees and laws of France, in such case provided. And the said attorney submitting, whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays that the court will be pleased to order and decree, that the process of attachment, heretofore issued, be quashed; that the libel be dismissed with costs; and that the said public vessel, her tackle, &c., belonging to His said Imperial and Royal Majesty, be released, &c. And the said attorney brings here into court the original commission of the said Sieur Begon, &c.

On the 27th of September, 1811, the libelants filed their answer to the suggestion of the District Attorney, to which they except, because it does not appear to be made for, or on behalf, or at the instance of the United States, or any other body politic or person.

They aver, that the schooner is not a public vessel, belonging to His Imperial and Royal Majesty, but is the private property of the libelants. They deny that she was compelled by stress of weather to enter the port of Philadelphia, or that she came otherwise than voluntarily; and that the property of the libelants in the vessel never was divested, or vested in His Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms.

The District Attorney produced the affidavits of the Sieur Begon, and the French consul, verifying the commission of the captain, and stating the fact that the public vessels of the Emperor of France never carry with them any other document or evidence that they belong to him, than his flag, the commission, and the possession of his officers.

In the commission it was stated that the vessel was armed at Bayonne.

On the 4th of October, 1811, the District Judge dismissed *the libel with costs, [***120** upon the ground that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.

From this sentence the libelants appealed to the Circuit Court, where it was reversed, on the 28th of October, 1811.

From this sentence of reversal the District Attorney appealed to this court.

Dallas, Attorney of the United States, for the District of Pennsylvania, contended,

1. That this is not a case of admiralty and maritime jurisdiction.

2. That the public character of the vessel is sufficiently proved; and,

3. That being a public national vessel of France, she is not liable to the ordinary judicial process of this country.

1. It ought to appear upon the proceedings themselves that this is a case of admiralty and maritime jurisdiction.

In England the jurisdiction of the Court of Admiralty comprehends three branches. 1. The criminal jurisdiction, for the punishment of offenses committed upon the high seas, or submitted to its cognizance by the statute law.

2. The prize jurisdiction, as to captures as prize of war, on the high seas.

3. The instance court, which has jurisdiction of *torts* committed at sea, in which case locality is essential; and of maritime contracts, which are also perhaps local.

The district courts of the United States have the same three branches of jurisdiction, but the jurisdiction *must be shown in the pro- [***121** ceedings, together with the authority to seize within our waters. (Laws United States, vol. 1, p. 53, sect. 9, 11; vol. 3, p. 91, sect. 6; 3 Dall., 6.)

But the libel does not bring the case within either of those branches of jurisdiction. The libel simply states that while she was lawfully and peaceably pursuing her voyage, she was forcibly seized under the decrees of Napoleon,

Emperor of the French. It does not allege any crime upon the high seas. It does not state the seizure to be as prize of war. It does not allege a *tort* committed upon the high seas, nor any maritime contract. The admiralty has no jurisdiction upon the mere possession of the vessel in our harbors, unconnected with a *tort* on the high seas. Nor upon a *tort* committed here, or in a foreign country; nor upon a mere question of title. (2 Browne, civ. and ad. law, 110, 111, 113, 114, 115, 116, 117.)

There is not a single instance of admiralty jurisdiction exercised in this country without possession, coupled with a maritime *tort*.

2. As to the proof of the public character of the vessel. The flag, the public commission, and the possession of the officer, have always been sufficient evidence, at sea or in port, and for fiscal or executive purposes. Why should it not be sufficient evidence in a judicial proceeding? No public vessel ever carries any other documents. No other proof of property in the sovereign is ever required. It is acknowledged in all our treaties. Even the common law requires only the best evidence which the nature of the case admits.

In the case of Mr. Pichon (4 Dall., 321), no other evidence of his public character was produced or required than a letter from Talleyrand, the French minister for foreign affairs. Upon that evidence he was discharged.

Harper, for the appellees,

Admitted that the commission, the flag, and the possession, were sufficient evidence of the public character of the vessel.

122*] **Dallas*. The principal question then is, whether a public national vessel of France, coming into the United States to repair, is liable to be arrested upon the claim of title by an individual.

This vessel was seized by a sovereign, in virtue of his sovereign prerogative. In such a case, the claim of the individual merges in the right of the offended sovereign. The size of the vessel can make no difference. Upon principle, the Royal George, belonging to his Britannic Majesty, is as liable to this process as the Balaou No. 5. Suppose a British frigate lying at New York, and one of her seamen should escape and libel her for his wages: the same argument which will support this case would support that.

This was one of the seizures under the Rambouillet decree. We do not justify that decree, but we say that whenever the act is done by a sovereign in his sovereign character, it becomes a matter of negotiation, or of reprisals, or of war, according to its importance.

It is proved that she arrived in distress; that she had been sent on a distant mission with a military cargo. No assent to submit to the ordinary jurisdiction of the country can be presumed in such a case as that. She had committed no offense while here. She did not come to trade. There was no implied waiver of the peculiar immunities of a public vessel. The right of free passage was open to her, as it was to the public vessels of every other nation, except England, whose ships were expressly excluded by a particular statute.

But put the question generally: can a vessel of war, for any cause, be attached at the suit of an individual? In doubtful cases the argument *ab inconvenienti*, ought to have great weight. The jurisdiction now claimed would extend to all men, to all suits, to *torts* and to contracts; to every vessel seized in a foreign port and taken into the public service. Impressed seamen might libel a whole British squadron for their wages. The peace of our ports and harbors would be at the mercy of individuals. It would be impossible to carry it into practice. The sentence of the court could not be executed. It is beautiful in theory to exclaim "*fiat *Justitia—ruat cœlum*," but [***123** justice is to be administered with a due regard to the law of nations, and to the rights of other sovereigns. When an individual receives an injury from a foreign sovereign, he must complain to his own government, who will make it a matter of negotiation, and if justice be refused may grant reprisals.

Our acts of Congress never subject foreign public vessels to forfeiture. The non-intercourse act (as it is called) forfeits private, but not public British vessels; the public vessels are forbidden to come; if they do come, you order them to depart. If they refuse and you are not strong enough to drive them away, you prohibit supplies to them; but you do not subject them to forfeiture.

We do not, however, deny the right of a nation to change the public law as to foreign nations, upon giving notice. We may forbid the entrance of their public ships, and punish the breach of this prohibition by forfeiture; nor do we deny the obligation of a foreign sovereign to conform to pre-existing laws, as to offenses, and as to the acquisition of property; nor his liability for his private debts and contracts. (Vattel, 426; B. 2, c. 18, sect. 340, 344, 346.) So, if a sovereign descend from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable. So, if he charter a vessel, the cargo is liable for the freight.

But in the present case he appears in his sovereign character; the commander of the national vessel exercises a part of his sovereign power; and in such a case no consent to submit to the ordinary judicial tribunals of the country can be implied. Such implied consent must depend on the act, on the person, and on the subject.

Such consent is implied where the municipal law, previously provides and changes the law of nations; where it regulates trade, where it defines and punishes crimes, and where it fixes the tenure of property, real or personal. But it cannot be implied where the law of nations is unchanged, nor where the implication is destructive of the independence, the equality and dignity of the sovereign. Such a jurisdiction is not given by the constitution of the United States, nor *is it mentioned in [***124** the judiciary act. If so important a jurisdiction was intended to be given, it would certainly have been mentioned and regulated by law. It cannot be derived from any practical construction of our laws. In 1794, the public vessels were not seized, but ordered away. The impost law (Laws of U. S., vol. 4, p. 331, sect. 31) excepts public vessels from the obligation to make report and entry. The act of March 3d, 1805, (vol. 7, p. 334, sect. 4), for the preservation of peace in our ports and harbors,

gives authority to the President to prohibit the foreign armed vessels from entering our ports, and to order those to depart which may have entered, and if they refuse to depart, to prohibit all intercourse with them, and to drive them away; but not to seize them. Public vessels were excepted from the embargo, in 1807, and in 1808. (Laws of U. S., vol. 9, p. 7, sect. 2, and p. 243, sect. 1, 2 and 3.)

The judicial construction of the law by the courts in Pennsylvania was, that a state could not be subjected to judicial process, unless by the words of the constitution of the United States; and many sound minds were of opinion that even those did not give jurisdiction; and when it was finally decided in the Supreme Court of the United States that a suit might be maintained against a state in the federal courts, the states amended the constitution so as not to admit of that construction.

The case of *Nathan* v. *The Commonwealth of Virginia* (1 Dall., 77) was a foreign attachment against some military stores belonging to the state of Virginia, the object of which was to compel an appearance; and the court refused to compel the sheriff to return the writ; being of opinion that Virginia, being a sovereign state, could not be compelled to appear in a court in Pennsylvania. The present process against the vessel is to compel an appearance. It is true the master may give security; but to compel him to do so is to bring the Emperor into court, and to subject him, in his sovereign character, to the jurisdiction of the courts of the United States.

The Cassius (in the case of *United States* v. **125**] *Judge* **Peters*, 3 Dall., 121, and *Ketland, qui tam* v. *The Cassius*, 2 Dall., 365) had violated a municipal law of the United States; yet, being a public vessel of France, the government of the United States directed the Attorney General to file a suggestion, stating the character of the vessel, which it was supposed would have taken the case out of the jurisdiction of the court. But the case went off upon another objection to the jurisdiction.

There is then no municipal law, nor any practical construction by the executive, the legislative, or the judicial department of our government, which authorizes the jurisdiction now claimed; we can only have recourse to the law of nations to try the validity of that claim. That law requires the consent of the sovereign, either express or implied, before he can be subjected to a foreign jurisdiction. (2 Rutherford, 163 to 170.) There is no express assent of a foreign sovereign to the jurisdiction over his prerogative. The distinction is between his private acts, and his acts as sovereign, and between his private and his public property. (Vat. B., 2, p. 343, ch. 14, § 213, 216; 2 Ruth., 536; Vat., 707, B., 4, c. 7, § 108, Martyn, 181; Ruth., 54; Galliani B., 1, c. 5.)

The cases of implied assent are: 1. Trade, when his goods are liable for freight, or liable to his factor for advances, &c., or liable to pay duties. In all which cases there is a specific lien on the goods. 2. In case he acquire property in the country, whether real or personal. 3. In case of offenses against existing laws, such as entering when prohibited, or breaking the peace when in port. But the law of nations excludes the implication and presumption in every case where the sovereignty is concerned; as, 1. In the case of an ambassador. 2. Of the sovereign himself. 3. The passing of his armies through the country, in which case he retains all his rights of sovereignty and jurisdiction over his army. 4. In case of his navy passing through our waters.

The British government, although it authorizes the search of private ships for their seamen, disclaims the right to search ships of war, even on the ocean, the place of common jurisdiction.

Bynkershoek (p. 39, c. 4) for the first time asserts a *principle not recognized by [***126** any prior writer, viz., that the goods of the sovereign, however acquired, whether of a public or private nature, are liable to process to compel an appearance. But he does not cite one adjudged case, nor one writer upon the law of nations to support him. The only case he cites is from Huber, and that denies the jurisdiction. The *exima* which he cites is only a kind of chronicle or journal, like the annual register.

It is a book of no authority. The case of the Queen of Spain's ship arrested at Flushing, and the Queen of Bohemia's in 1654, which were released by the states general, are against him. His book clearly shows that the practice of nations is against his doctrine. It is evident that he alludes to a practice of citation in the states of Holland, or among the members of the Germanic body.

The general principle is against him. He is opposed by other writers and supported by none. He is opposed by the practice of nations and supported by no judicial decision.

If the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war. There is already a case before this court in which it will be called upon to decide whether St. Domingo be an independent nation; and another in which it is to determine whether the crown of Spain belongs to Ferdinand the 7th or Joseph Bonaparte. If this court is to exercise jurisdiction upon subjects of this nature, it will absorb all the functions of government, and leave nothing for the legislative or executive departments to perform.

Hare, contra.

The position which we are to meet, is understood to be this, That the possession of property by a foreign sovereign, without the limits of his jurisdiction, and within the limits of the United States, precludes all inquiry into the title of the thing within his possession.

This principle, we say, is unfounded. The general rule is that all sovereignty is strictly local, and cannot *be exercised beyond [***127** the territorial limits. This flows from the nature of sovereignty, which being supreme power, cannot exist where it is not supreme. (4 Cranch, 279, *Rose* v. *Himely*.) There is no instance of its actual extra-territorial operation, except where by fiction of law it is supposed to be territorial; or at most where it exclusively operates upon its own subjects. The household of an ambassador is supposed to be within the territorial jurisdiction of his sovereign. (Vattel, 448; Martyn, 228, 230.)

In other respects the rights of an ambassador are his own rights, founded in considerations appertaining exclusively to the ambassadorial

character. In the vessels belonging either to his nation or to himself, he may exercise, on the high seas, a limited jurisdiction. The same principle operates here. The ship is considered as part of his territory. But in this case his jurisdiction extends over his own subjects only. His armies abroad are also subject to his jurisdiction, but this is the result of positive compact, without which they cannot go abroad.

The general principle then being in our favor, our adversaries must show the exception.

Whatever is within the extent of a country is within the authority of its sovereign; and if any dispute arises concerning the effects within the country or passing through it, it must be decided by the judge of the place. (Vat. 446.)

Unless the case now before the court be an exception, this rule is universal. It grows out of the first principles of government, which, in giving security assumes jurisdiction.

The general authority, over the property of foreigners is as absolute as over the property of subjects.

The arguments in favor of the exception are drawn rather from inconvenience than from principle, but cannot be supported upon either ground.

As it regards the private property of the sov-
128*] ereign, *why not assume jurisdiction? Because, it is said, it would violate his dignity, inasmuch as it is to be presumed that he will never do wrong. Such a presumption, contrary to the fact, may be calculated to give him weight at home, but can be of no use abroad. It is not universally adopted even at home. The king of England may be sued by *monstrans de droit*. States may prescribe the mode in which they shall be sued. This is a matter of internal regulation. Will you then respect a foreign sovereign more than his own subjects are bound to respect him?

If the sovereign of any free country should unlawfully seize the goods of one of his subjects, he would be liable in his private capacity like any other person. As regards the public property of a foreign sovereign, why should there be any distinction, where the only object of the suit is merely to ascertain the right?

His public service may suffer, but will you respect that service at the expense of the rights of your own citizens?

But it is said, if you arrest this vessel you may arrest a fleet. This is true. And when a foreign fleet shall have been created by the plunder of our own citizens, let it be arrested.

But the danger of such a case is remote and improbable. The libel must be supported by oath and probable cause. A judge would not hastily direct process against a fleet.

But consider the inconveniencies on the other side. Your own citizens plundered. Your national rights violated. Your courts deaf to the complaints of the injured. Your government not redressing their wrongs, but giving a sanction to their spoliators.

The argument of our opponents allows no remedy to the citizen although dispossessed of his property within the limits of our own territory. Although the ship should have been seized in the Delaware, and converted into a public armed vessel, we are supposed to have no redress. It does not appear upon the face of the present proceedings, that this was not the case.

The argument of inconvenience is [
129 equally applicable to cases in which our own laws authorize process to issue. Thus, under the act of June 5th, 1794, (§ 3, vol. 3, p. 89), if any ship shall be armed in any of the waters of the United States, with intent to be employed in the service of any foreign state to cruise against the subjects of another foreign state with whom the United States are at peace, such ship shall be forfeited. So also in case a foreign armed ship should be found smuggling. In cases of *tort*, then, there is a remedy against the public armed ship of a foreign sovereign. It is obvious also that there must be such remedy in cases of contract. As in the case of material men for repairs—bottomry and mortgage—wreck and pledges. If he may pledge, the pledge may be proceeded against. If, then, there are cases both of *tort* and contract in which there is a remedy, why not in this?

It is in vain to urge against the right of proceeding, the inconveniences that may result from the mode.

On principle, then, there is no foundation for the exception. Nor is it warranted by authority.

Vattel (B. 2, § 83) says: "Many sovereigns "have *fiefs*, and other properties, in the lands "of another prince; they therefore possess "them in the manner of other individuals." Thus the kings of England did homage for the lands they held in France.

Martins (p. 85, 182, Book 5, sect. 9) says that the supreme police extends over the property of a sovereign.

The cases of *Glass* v. *Sloop Betsy* (3 Dall., 6), *Rose* v. *Himely* and *Hudson* v. *Guestier* (4 Cranch, 279); *The Cosmopolite* (3 Rob., 269), and the authority of *Azuni* (245, 246), affirm the right, in certain cases, of examining the legality of the prizes of foreign sovereigns.

Prizes are made for account of the sovereign. In England they are distributed according to the prize act; but if made by a non-commissioned vessel, they are *droits* of the admiralty.

The possession of the captors is the [
130 possession of the sovereign. In these cases, therefore, the right of the sovereign to the thing in his possession is subjected to judicial investigation.

Bynkershoek upon Ambassadors (40 to 46), expressly states that the property of the sovereign, public and private, is subject to the authority of the judge of the place. (2 Rutherford, 476, 382.) The case of the Swedish convoy is also an authority to the same effect.

The Constitution of the United States (art. 3, sect. 2) expressly gives the courts of the United States jurisdiction in cases between citizens and foreign states.

The cases cited on the other side refer only to suits brought directly against a sovereign, or to compel his appearance. But such cases are wholly inapplicable, because not brought in consequence of your jurisdiction over the thing within your territory, but to create a jurisdiction over the person which is without it.

In Massachusetts suits between foreigners by process of attachment cannot be sustained; but the right to the thing in dispute, whether be-

tween foreigners or others, will be ascertained there.

You cannot draw to your jurisdiction those who owe you neither a local nor an absolute allegiance; but you may inquire into the validity of every claim to a thing within your jurisdiction.

This doctrine is peculiarly applicable to sovereigns:

In the case of *Olmstead* v. *Rittenhouse's executors* (5 Cranch, 115), under the name of *United States* v. *Judge Peters*, the state of Pennsylvania contended that the Dirtrict Court had not jurisdiction, because she, as a sovereign state, claimed the money in the hands of the executors, and was really the party interested; but this court decided that, as the state was not ostensibly a party, and as the thing was within the jurisdiction of the court, the District Court should proceed to enforce its sentence; thereby clearly marking the distinction between a suit against a sovereign, and a process against a thing claimed by a sovereign.

131*] **Harper*, on the same side.

Two questions are raised in this case.

1. Whether this be a case of admiralty jurisdiction, and

2. Whether a judicial remedy can be given for a wrong done by a foreign sovereign.

1. The libel states the seizure to have been made "during the voyage," and the answer to the claim denies that she was seized in port; it follows, therefore, that she must have been seized upon the high seas.

2. As to the general power to interfere in case of an illegal seizure made by a foreign sovereign.

Sovereignty is absolute and universal. This is the general rule. But it is contended that there is an exception in four cases.

1. As to the person of a foreign sovereign.

2. As to his ambassadors.

3. As to his armies; and,

4. As to his property—which last is said to be an inference from the three former cases. But the three former cases are all founded upon consent, and the latter is not; consequently there can be no analogy between them. Besides, these cases are not exceptions to the sovereignty, but merely exemptions from the ordinary judicial process, by consent of the sovereign. If a foreign sovereign comes secretly into the country, he is not protected from ordinary process; but when he comes openly in his character as a sovereign, an assent is implied, and he comes with all the immunities incident to his dignity, according to the common understanding of the word. All the cases supposed to be against us are founded upon consent. Bynkershoek also places it upon the ground of consent, and he is supported by Barbeyrac and Galliani.

132*] *The positive authorities against the exemption of the property of the sovereign from the ordinary judicial process, are Bynkershoek, 25; Martins, 182; and 2 Rutherford, 476. The constitution of the United States takes for granted the inability of the states, and merely provides the means of carrying the principle into effect. The exemption of the sovereign himself, his ambassador and his armies, depends upon particular reasons which do not apply to his property, nor to his ships of war.

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Pinkney, Attorney-General, in reply.

When wrongs are inflicted by one nation upon another, in tempestuous times, they cannot be redressed by the judicial department. Its power cannot extend beyond the territorial jurisdiction. However unjust a confiscation may be, a judicial condemnation closes the judicial eye upon its enormity. The right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations.

The simple fact in this case is, that an individual is seeking, in the ordinary course of justice, redress against the act of a foreign sovereign. But the rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it.

An ambassador is unquestionably exempt from the ordinary jurisdiction; but if he commit violence it may be lawfully repelled by the injured individual; so, if he commit public violence he may be opposed by the nation. This right arises from the necessity of the case. But as to ordinary cases he is to be referred to the tribunals of his own country. In cases where those tribunals cannot interfere to prevent the injury, the jurisdiction of the country, for that purpose, may interfere; but when the act is done, and prevention is too late, he must be referred to his own tribunals.

We claim for this vessel, an immunity from the ordinary jurisdiction, as extensive as that of an ambassador, *or of the sovereign [***133** himself; but no further. If she attempt violence, she may be restrained.

The constitution of the United States, decides nothing; it only provides, a tribunal, if a case can by possibility exist.

The statutes of the United States, are in hostility to the idea of jurisdiction. Private vessels are made liable to confiscation, but public vessels are to be driven away. The remedy is by opposing sovereign to sovereign, not by subjecting him to the ordinary jurisdiction.

The jurisdiction over things and persons is the same in substance. The arrest of the thing is to obtain jurisdiction over the person.

A distinction is taken between civil and territorial jurisdiction, civil jurisdiction is referred to consent; it binds all who have consented. Territorial jurisdiction goes farther; it operates upon those who have not assented—such as aliens—but the alien must do something; he must come within the territory whereby he submits to the jurisdiction; so, if he purchases property within the country, or sends property into the territory, in ordinary cases, his assent is implied. But if the property of an alien be forcibly or fraudulently carried within the territory, no consent is implied, and consequently there is no ground for jurisdiction.

If a foreign sovereign be found in the territory, he is not liable to the ordinary jurisdiction. Vattel places his exemption on the ground that he did not intend to submit to it; Rutherford, on the ground of the assent of the other sovereign.

The case of the ambassador is precisely in point—his immunities depend upon the implied assent. The reason is, that he may be inde-

pendent. Grotius, places it upon the conventional, and Rutherford, upon the natural law of nations.

So in the case of the passage of troops through a neutral territory, the permission to pass implies a compact, that they should enjoy all **134***] necessary immunities. *From the nature of the case, they cannot be subject to the ordinary jurisdiction of the country, through which they pass. To suffer one of the soldiers to be arrested for a debt due to a citizen of that country, would be inconsistent with the permission to pass.

We are asked, whence we infer the immunity of the public armed vessel of a sovereign. We answer from the nature of sovereignty, and from the universal practice of nations from the time of Tyre and Sidon.

Sovereigns are equal. It is the duty of a sovereign not to submit his rights to the decision of a co-sovereign. He is the sole arbiter of his own rights. He acknowledges no superior, but God alone. To his equals, he shows respect, but not submission.

This vessel is not the ordinary property of a sovereign. It is his national property; a public ship of war duly commissioned. There is no difference in principle between such a vessel and an army passing through the territory. She has the same rights. She has your permission to pass, and you are bound to give her all necessary immunities. You gave her an asylum as the property of a great and powerful nation, you must not suffer her to be thereby entrapped in the fangs of a municipal court. She was charged with public despatches; she visited your ports *in itinere*. It was a deflexion merely, that she might more effectually perform her voyage. It was a mere passage through your jurisdiction. Her commander had an unquestionable right to exclusive jurisdiction over her crew. In the eye of the law of nations, she was at home, whether in your ports or upon the high seas. The exemption from delay is more necessary than the exemption from final condemnation.

By the usage of states, no other evidence is required of the property of a sovereign than his commission and flag. This is strong evidence that such property is not subject to the ordinary jurisdiction of the country. Otherwise other documents would be required and would be furnished. No others are required at sea, nor on shore. This usage of nations is universally known, and as the vessel sailed **135***] upon the faith of such a usage, *good faith requires that you should receive the flag and commission as evidence of the character of the vessel.

This court will not decide this case upon the authority of the slovenly treatise of Bynkershoek, or the ravings of that sciolist Martins, but upon the broad principles of national law, and national independence. One would as soon consult Gibbons or Hobbs, for the doctrines of our holy religion as Martins for the principles of the law of nations. Bynkershoek, upon this point, draws his authorities from Dutch courts, and Dutch jurists. Not one of his cases was adjudged, except that cited from Huber. And in one of the cases, the states general requested that the vessel should be discharged, which had been arrested in Zealand, for a debt due from Spain, saying that they would write to the Queen of Spain, to pay her debts, or they would be obliged to issue letters of marque and reprisal; which was the proper course. The other cases were only abortive attempts to subject national property to the ordinary jurisdiction of the country.

The case of the *Swedish convoy* was upon the ground that the convoy resisted by force the right of search. It was war *quoad hoc;* and the seizure was made as prize of war. But that case was never decided.

In the case of *Glass* v. *The Sloop Betsy*, the privateer's commission was to capture the property of an enemy, but she had captured that of a friend. The court did not subject the privateer to their jurisdiction, but the prize which she had wrongfully made.

March 3d. *All the Judges being present,*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles *of national [***136** and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

137*] *A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this 138*] subjection *that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction *which are admitted [*139 to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining *the exclusive command and dis- [*140 position of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and per-

mits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war; and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privi-
141*] lege by its irregular and improper *conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent.

*In all the cases of exemption which [***142** have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases,

143*] *applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the court, it appears, that where, without treaty, the ports of the nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

144*] *When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegience, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the *property of [***145** an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed that there is a manifest distinction between the private property of a person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing for a debt, due from the King of Spain. In that case, the state's general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world of an attempt made by an individual to assert a claim against a foreign prince by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be *considered [***146** as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the libelants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of, the Emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title by which the Emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of **147***] our courts, has a *right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

Distinguished—7 Wheat. 352.
Cited—1 Wheat. 252; 2 Otto, 525; 7 Otto, 515; 10 Otto, 165; 2 Curt. 372; 1 Brock. 497; 3 Sum. 315, 316; 1 Story, 542.

ARCHIBALD FREELAND
v.
HERON, LENOX & COMPANY.

An account current sent by a foreign merchant to a merchant in this country and not objected to for two years, is deemed an account stated and throws the burden of proof upon him who received and kept it without objection.

THIS cause having been argued by *Winder*, for the appellant, and *P. B. Key*, for the appellees.

All the Judges being present,

DUVALL, *Justice*, delivered the opinion of the court as follows:

*This case comes up by appeal from [**148** the decree of the Circuit Court for the District of Virginia.

The record presents the following state of facts: A bill in equity was filed by Heron, Lenox & Company against Archibald Freeland, the appellant, in the Circuit Court, in the month of December, 1798. It states that the company consisted of Nathaniel Heron, a subject of Great Britain, Samuel Lenox, also a subject of Great Britain, and James Freeland and William Gillin. That articles of copartnership between the said company and Archibald Freeland, of Virginia, were entered into on the 15th of February, 1789, to commence on the first day of April following, and to continue for five years, unless sooner dissolved by mutual consent. It is stipulated by the articles that the business of the copartnership should be managed and carried on in the town of Manchester, in Virginia, by Archibald Freeland, under the firm of James Freeland. That there should be no advance put on the goods furnished but the charges and commissions in Britain, and that all bounties, discounts and abatements which might be received, should be credited. The complainants in their bill further state that Archibald Freeland had the sole management of the affairs of the company, and the care and custody of the books and funds.

That during the existence of the copartnership, Heron, Lenox & Company remitted to James & A. Freeland goods, wares and merchandise, to the amount of several thousand pounds sterling, and had received some payments, but that a considerable balance remained due to them on account of those remittances; that J. & A. Freeland had been frequently called on to account and pay the balance due. That the firm of J. & A. Freeland had been long since dissolved by mutual consent; and that A. Freeland, retaining all the books and effects of the company, had refused to account and pay the balance due; and they pray relief.

To this bill A. Freelaud filed his answer, ad-

mitting the copartnership, as stated, and that the business of the concern had been conducted by him at Manchester, until the 10th day of April, 1795, when by contract the whole of the property of the copartnery was vested in **149***] *him for his own use and benefit upon the conditions therein expressed; and he insists that upon a fair settlement of the accounts between the complainants and him agreeably to the custom of merchants in London, as stipulated by the said contract, he owes nothing.

It further appears that shipments of merchandise by Heron, Lenox & Company were made from time to time, during the first four years of the concern, amounting in the whole to more than £19,000 sterling, and that remittances were made by A. Freeland in bills of exchange and country produce during the same period to a large amount; and that in the year 1793 the partnership was dissolved by mutual consent. A. Freeland continued to settle and liquidate the accounts of the firm at Manchester; and in September, 1796, wrote a letter to Freeland and Gillin, of which the following is an extract: "Your claim will be among the first of my debts that is paid; for the indulgence I have met with, I have to thank you, and mean to exert myself in order to pay off the whole as early as possible."

During the pendency of this suit in the Circuit Court, a cross bill was filed by A. Freeland against Heron, Lenox & Company for discovery, which they answered by denying the allegations in the bill without disclosing the evidence sought for. No exception, however, was taken to the answer.

An order had passed directing an account to be stated by a commissioner appointed for the purpose, who reported that there was due from A. Freeland to Heron, Lenox & Company a balance of one thousand one hundred and sixty pounds seventeen shillings and tenpence sterling, to which report various exceptions were taken by the defendant.

On the 14th of December, 1809, the cause came on to be heard in the Circuit Court upon the bill, answer and exhibits, and the report of the commissioner, when it was adjudged, ordered and decreed that the defendant, A. Freeland, pay to the plaintiffs, Heron, Lenox & Co., the sum reported to be due by the commissioner, at certain specified periods, with interest from the first day of June, 1798, and costs; **150***] and the cross bill was *dismissed with costs. From which decree the defendant appealed.

The exceptions taken to the report of the commissioner in the court below have been urged on the part of the appellant in this court, and may be comprised under the following heads:

1. That he has not given the defendant credit for all the bounties, drawbacks and duties which were allowed to the complainants on the purchase and shipment of the goods in England, which he ought to have allowed agreeably to the contract of copartnership.

2. That the commissioner adopted a mode of calculating interest contrary to the agreement of the parties in April, 1795, and prejudicial to the defendant.

3. That he allowed the complainants a commission on the sales of produce shipped directly to Cadiz, Lisbon and other places, where the property was consigned directly to persons residing in those several places; by them sold, and who charged the ordinary commission, and who remitted the proceeds to the complainants in London.

4. That he has not given credit to the defendant for 25 hogsheads of tobacco.

There was another exception, but as it was abandoned in the argument by the counsel it will not be noticed.

With respect to the first, third and fourth exceptions, the record does not furnish the evidence necessary to enable the court to form a correct decision from the facts. The positive assertions of the appellant are denied by the appellees; and in proof both are equally defective.

The appellant claims a credit of 764*l.* 10*s.* 5*d.* sterling on account of bounties, drawbacks and discounts: he has been allowed upwards of £300 sterling, and the appellees deny that he is entitled to more credit than is given, averring that more has not been received by *them. [***151** Each insists that the *onus probandi* ought to be thrown on his adversary.

It is proper to observe that it appears by the record that Heron, Lenox & Company furnished A. Freeland with an account current annually for the four first years of their transactions, and that no objection was made to them. This circumstance, combined with the promise contained in A. Freeland's letter of September, 1796, to pay the whole balance due, affords room for the application of a rule of the chancery court and of merchants to decide the controversy. It is thus: When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him.

The same rule is applicable to the third exception. After an acquiescence of several years the account is considered as binding upon him, as he has failed to falsify the allegations of the appellees that the shipments of produce to Cadiz, Lisbon and Bourdeaux were made pursuant to their orders and under their superintendence.

He has failed also to prove that he is entitled to the credit insisted on in his fourth exception. To be entitled to the credit it is incumbent on him to prove that the 25 hogsheads are exclusive of the 80 hogsheads of tobacco shipped in the Mercury. The record affords no testimony whatever.

With respect to the second exception, it is considered by this court that the Circuit Court erred in sustaining the report of the commissioner as to the manner of stating the account between the parties. The commissioner adopted the mode established in Virginia, and which it is believed prevails generally throughout the United States: but by the written agreement of the parties in April, 1795, it is stipulated that the interest shall be charged agreeably to the custom and manner of settling accounts in London. In all other respects the opinion of the Circuit Court is affirmed.

*It is therefore the opinion of this [***152**

court that the decree of the Circuit Court with respect to the second exception be reversed, and that the cause be remanded to the Circuit Court, in order that an account may be taken pursuant to the written agreement of the parties—agreeably to the custom and manner of settling accounts in London.

Cited—1 Bald 418, 540.

WELCH *v.* MANDEVILLE.

Present—All the Judges.

The refusal of the court below to re-instate a cause which has been legally dismissed, is no ground for a writ of error. The nominal plaintiff may dismiss a suit brought in his name by a creditor who has not an assignment of the cause of action.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

An action of covenant was brought in that court, in the name of James Welch, the plaintiff, but really for the use and by the sole orders of Allen Prior, against Mandeville and Jamesson, upon a contract for the sale of land to them by Welch. At the second term after an office judgment had been entered against Welch at the rules, the defendant, Mandeville, who alone had been taken, produced to the clerk a release under the seal of Welch and an order from him to dismiss the suit; whereupon the clerk made an entry on the minutes of the court that the action was dismissed by agreement of the parties. Afterwards, at the same term, the attorney who brought the suit in the name of Welch, moved the court to re-instate it, and grounded his motion upon his own affidavit and the papers mentioned therein. The affidavit stated, that in the autumn of 1799, Prior, brought to the attorney 3 bills of exchange, drawn by Welch upon Mandeville and Jamesson, for 2,500 dollars each, and an account in the handwriting of Mandeville, acknowledging a balance due to Welch on the 31st of January, 1798, of 8707 dollars and 9 cents to be paid in the times and manner therein stated. Prior, at the same time, stated that Welch was indebted to him, and that he had taken those bills in payment, which Mandeville and Jamesson refused to accept, say-

153*] ing that Welch *had deceived them in the sale of the lands. Prior left the papers with his attorney, and requested him to take the best measures to obtain the money from Mandeville and Jamesson; whereupon he brought two suits in the County Court of Fairfax, in Virginia, the one was a suit at law in the name of Welch against M. and J. founded upon their acknowledgement of the balance of account. The other was a chancery attachment, in the name of Prior against Welch, as an absent debtor, and charging M. and J. as garnishees.

Upon the trial of the suit at law, the defendants produced the original contract respecting the sale of land, whereupon the attorney for Welch suffered a non-suit, and having obtained an office copy of the contract brought the present suit thereon, for the use of Prior, in the name of Welch, but without his directions, which was known to Mandeville. There had been no decision in the chancery attachment. The attorney never had any communication with Welch upon the subject of this suit; but he had reason to believe that Welch knew of the suits in Fairfax county and did not interfere with them. The attorney corresponded solely with Prior on the subject of this suit, who had directed the application of the money when recovered. That the attorney did not know of the release and order to dismiss the suit until after the entry was made on the minutes, and that the suit had been dismissed without his consent or that of Prior, who had been at all the expense of the suit. That he had been informed that Welch was in the prison bounds, and that when Prior put the papers into his hands he informed him that it was his only prospect of receiving payment of the debt due to him by Welch.

Whereupon the defendant, Mandeville, produced the affidavit of Welch, stating that he drew the bills in favor of Prior, merely for him to get them accepted, and negotiate them for account of Welch and as his agent. That Prior never gave value for them, and instead of being the creditor of Welch, was his debtor; and that he (Welch) never made a transfer or assignment of the contract with Mandeville and Jamesson to Prior or any other person.

*The defendant, Mandeville, also pro- [**154

duced a paper purporting to be the answer of Welch to the chancery attachment in Fairfax county (but which had not then been filed in the suit), which contained the substance of his affidavit, and also a letter written by Welch to Mandeville and Jamesson, and sent by Prior at the time he presented the bills, corroborating the fact that Prior was only his agent in that business.

In this state of the case the court below continued the motion to re-instate the cause until the next term, to give an opportunity to Prior to produce evidence of an assignment of the contract and of his right to bring suit upon it; at which term he produced his own affidavit stating that Welch was indebted to him upwards of 14,000 dollars, and that Welch gave him the 3 drafts on Mandeville and Jamesson for his (Prior's) own use and benefit, for and on account of a tract of land sold to Welch, and which Welch sold to another person. He produced also certain other documents tending to corroborate his affidavit.

But the court below refused to re-instate the cause and ordered it to be dismissed according to the agreement of the parties; to which refusal Allen Prior took a bill of exceptions which the court signed.

Upon the opening of the case,

MARSHALL, *Chief Justice*, inquired whether the question, whether a refusal to re-instate a cause, be ground of error, had not been decided by this court.

E. I. Lee, for plaintiff in error, said that it had not been directly decided.

The clause of the act of Congress which gives this court appellate jurisdiction of causes decided in the Circuit Court for the District of Columbia (Laws United States, vol. 5, p. 270, § 8), differs from that clause of the general judiciary which gives this court its appellate jurisdiction in other cases. The expression of the former clause is "any final judgment, order or decree;" but the expression in the general

law (vol. 1, p. 62, § 22) is "final judgments and decrees." The word order must mean something different from a judgment or a decree. It seems peculiarly applicable to a final
155*] order *dismissing a suit. This peculiar phraseology was relied upon to give jurisdiction to this court in the case of *Custiss* v. *The Georgetown Turnpike Company* (Cranch, vol. 6, p. 233).

Swann, contra.

This case is within the principle of the cases already decided by this court—such as the refusal of the court below to grant a new trial, or to continue a cause. To re-instate a cause, after it has been once legally decided, is a matter of mere discretion.

E. I. Lee, in reply.

If the clerk had dismissed it at the rules, and the plaintiff had applied to the court at the next succeeding term to re-instate it, and the court had refused, it would not have been an exercise of discretion, but denial of right. It would have been error in law. (1 Strange, 235, *Newell* v. *Pidgeon*.)

C. Lee, on the same side.

There is a difference between dismissing a cause without trial and refusing a new trial. It cannot be possible that the court may dismiss every suit upon the docket and yet the injured parties have no remedy; which would be the case if the dismissing of a suit be matter of discretion which this court cannot control.

March 5th. *All the Judges being present,*

MARSHALL, *Ch. Justice.* The majority of the court is of opinion that the motion to re-instate the cause was an application to the discretion of the court, and its refusal is not a ground for a writ of error.

After the court had delivered this opinion it became a question whether the writ of error should be dismissed, or the judgment affirmed.

After consideration of the case again,

On the 7th of March,
156*] *MARSHALL, *Ch. Justice*, stated it to be the opinion of the court, that the judgment of the court below should be affirmed. The writ of error is to the judgment generally. The refusal to re-instate the cause being no error in law, the court can see no error in the principal judgment.

Judgment affirmed.

MARSTELLER AND OTHERS *v.* M'CLEAN.

Present—All the Judges.

In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary to show that all the plaintiffs were under a disability to sue.

ERROR to the Circuit Court for the District of Columbia.

This was an action of trespass for mesne profits after a recovery in ejactment by the present plaintiffs against the present defendant, who pleaded the statute of limitations, to which the plaintiffs replied, in substance, that Christiana, the wife of one of the plaintiffs, and Elizabeth, the wife of another of the plaintiffs, in whose rights they sue, "were *femes covert* "when the cause of action accrued, and have ever "since continued *femes covert*," and "that "Kitty Hunter," one of the plaintiffs, "was a "*feme covert*," and that the other plaintiffs, in whose right the suit was brought, were infants at the time the cause of action accrued, and also at the commencement of the action. To this replication there was a general demurrer and joinder, on which the court below rendered judgment for the defendant.

C. Simms and *R. I. Taylor*, for the defendant in error, contended,

1. That the replication was bad, because it did not show that all the plaintiffs were entitled to sue, notwithstanding the statute of limitations. It did not state that Kitty Hunter continued a *feme covert* until less than five years next before the commencement of the suit. If *her disability of coverture was removed [***157** five years before bringing the action, she was barred by the statute; and the replication being joint, if bad as to one, is bad as to all.

2. That upon a demurrer the court will give judgment against that party who commits the first fault in pleading. The declaration states all the material allegations under a "whereas"—a *quod cum*. It is all recital, which is fatal upon a general demurrer, or upon a motion in arrest of judgment.

The courts of Virginia follow the practice of the king's bench in England, where this exception has always been held good. (1 Str., 621, *Amyon* v. *Shore;* 2 Hen. and Mun., 595, *Hord.* v. *Dishman;* 3 Hen. and Mun., 134, *Moore's Admr.* v. *Dauney;* Id. 271, *Lomax* v. *Ford;* 4 Hen. and Mun., 277, *Sym* v. *Griffith*.)

E. I. Lee, contra.

The objection to the declaration is only an objection to form. The statute of jeofails in Virginia does not justify the cases cited from the Court of Appeals. Upon a demurrer to the replication the defendant cannot take advantage of an error in the declaration.

As to the objection that the replication does not state that Kitty Hunter continued a *feme sole*, it is sufficient for us if we show that some of the plaintiffs are not barred by the statute. Those who were under a disability are not to be prejudiced by the negligence of those who were not disabled. Joint tenants cannot sue severally, they must join. (1Tidd. Prac., 7; 1 Sanders, 291; note 4, *Cobel* v. *Vaughan*, 2 W. Bl., 1077.) If the plea is bad as to some of the plaintiffs it is bad as to all. (2 Sand., 49, 50; 1 Sand., 28.)

Taylor, in reply.

The case of *Perry* v. *Jackson* (4 T. R., 516) was the first in which it was decided that the statute runs against all the joint plaintiffs if any of them were free from disability. In that case it was replied to the plea of limitations, that one of the plaintiffs was beyond seas, and the replication was adjudged bad.

E. I. Lee.* The declaration states [*158** that some of the plaintiffs are infants; the plea was no bar to those plaintiffs. In the case of *Perry* v. *Jackson* the plaintiffs were partners in trade. It was a voluntary association; but here the plaintiffs are joined by act of law.

March 13th. All the Judges being present, STORY, *J.*, delivered the opinion of the court as follows:

The plaintiffs in error brought an action of trespass *quare clausum fregit*, to which the defendant in error pleaded the statute of limitations. The replication in substance states that, at the time when the cause of action accrued, Christiana, wife of one of the plaintiffs, and Elizabeth, wife of another of the plaintiffs, "were *femes covert*, and ever since have continued *femes covert*;" and "that Kitty "Hunter," one of the plaintiffs, "was a *feme* "*covert*;" and that the other plaintiffs in whose right the suit was brought, at the time when the action accrued, and also at the commencement of the suit, were infants. To this replication there is a general demurrer and joinder on which the court below gave judgment for the defendant.

It is contended by the defendant that this replication is insufficient, inasmuch as it does not allege that Kitty Hunter continued a *feme covert* until within five years, the time prescribed by the statute of limitations for the pursuit of this remedy. And it is further contended, that, even if the replication be good, yet the plaintiffs ought not to recover, because the declaration charges the trespass by way of recital—"for that whereas the defendant with force and arms," &c.—and not by positive and direct allegations as the law requires. On this last exception the court do not intend to give any opinion; but unless the point were fully settled by authority, they would feel little inclination to sustain an objection which would seem directed more to the form than the merits of the action.

The objection to the replication deserves more consideration. It is certainly a rule of pleading that a replication should of itself contain a full and complete answer to the bar, and that a joint plea which is bad, affects with its consequences all the parties joining in it. [**159*] *In the present case it may be true that Kitty Hunter was a *feme covert* at the time when the action accrued; and yet it may be equally true that five years have elapsed since the disability was removed. It was therefore incumbent on the plaintiffs, not barely to show a coverture, but, by a proper averment, to show its continuance to a time within which it would have been a perfect avoidance of the bar. The objection then would have been fatal in a several action brought by Kitty Hunter.

But it is said that though the replication be bad as to one of the plaintiffs, yet it can only bar her; that the infancy or coverture of the other plaintiffs entitles them to a recovery in this action for the injury done to them; and that, as parceners and tenants in common are compellable to join in actions of this nature, it would be hard to affect them with the disability of a co-tenant.

It seems, however, to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported; and the case of *Perry* v. *Jackson*, cited from 4 Term Reports, 516, decides that a plea of the statute of limitations, which is good as to one partner, bars them both in a joint action. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.

It is therefore the opinion of the court that as this answer to the objection fails, the replication must be adjudged insufficient, and of course the bar must prevail.

Judgment affirmed.

Distinguished—2 Brock. 445.
Cited—2 Wheat. 324; 5 How. 263; 3 Cranch, C. C. 33.

WELCH *v.* LINDO.

Present—All the Judges.

The mere possession of a promissory note by an indorsee, who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee. An indorsement "without recourse," is not evidence of money had and received by the indorser to the use of the indorsee.

ERROR to the Circuit Court for the District of Columbia, sitting in Alexandria.

*Welch brought an action of *assumpsit* against Lindo, upon his indorsement of a promissory note. The declaration contained two counts. The 1st count stated, that one John Kercheval, on the 25th of August, 1796, made and delivered a promissory note to Lindo, payable to his order on demand, for 246 dollars, for value received. That Lindo, on the 24th of January, 1800, indorsed it to Welch (the plaintiff) in these words, viz.: "Pay the within to James Welch, or order, without any recourse whatever on—A. Lindo." That on the 30th of April, 1800, Welch assigned the note to a certain William Hodgsett, by writing on the back thereof the following words, viz.: "I assign the within to William Hodgsett," and signed his name thereto, and delivered it to Hodgsett. That Kercheval failed to pay the money to Hodgsett on demand, whereupon Hodgsett, as assignee of the note, brought suit against Kercheval, the maker thereof, in the Circuit Court of Woodford County, in the state of Kentucky; in which suit Kercheval, pleaded that he had paid the debt to Lindo; upon which plea issue was joined, and the jury found a general verdict thereupon, for the defendant, Kercheval, upon which the court rendered a judgment, which still remains in full force; by reason of which premises the plaintiff, Welch, became liable to pay to Hodgsett the 246 dollars, with interest from the time the suit was brought (viz., the 11th of June, 1803,) until the 2d of November, 1804, the time when he paid the same to Hodgsett, and the costs of that suit, amounting to 11 dollars and 72 cents, and did pay the same; of all which premises the defendant had notice, and by reason whereof, he became liable to pay the said 246 dollars, with interest on the same, and the said 11 dollars and 72 cents, being the costs as aforesaid; and being so liable, the defendant, in consideration thereof, afterwards, &c., undertook, &c., to pay the same sum to the plaintiff, &c. [**160*]

The 2d count was for money had and received to the plaintiff's use.

Upon the issue of *non assumpsit*, there was a verdict in the court below, for the plaintiff, on the first count, and for the defendant, on the second count, but the judgment on the first count was arrested, and judgment was entered for the defendant.

161*] *Upon the trial the plaintiff took a bill of exceptions, which stated, that he offered in evidence a duly authenticated copy of the record of the Circuit Court of Woodford County, in the suit of Hodgsett against Kercheval, which was inserted in the bill of exceptions; and produced the original promissory note, with its indorsements, and proved the handwriting of the defendant, Lindo, to his indorsement, and offered no other evidence; whereupon the defendant's counsel prayed the court to instruct the jury, that the evidence so offered and produced, is not of itself competent to enable the plaintiff to maintain his action; and the court decided that it was not competent to enable the plaintiff to recover upon the second count, but the judges were divided in opinion, whether the same was competent to support the first count, and therefore refused to give the instruction as prayed. To the opinion that the evidence was not competent to support the action upon the count for money had and received, the plaintiff excepted.

The motion in arrest of judgment was grounded upon the general insufficiency of the first count.

E. I. Lee, for plaintiff in error.

1st. There was sufficient evidence *prima facie*, to support the count, for money had and received.

The indorsement of the note was evidence of money had and received, and the record showed that the consideration for which it was received had failed. And where a man pays money upon a consideration which fails, he may recover it back by the action for money had and received. (1 Esp., N.P.,3 & 4; Doug., 696; Chitty, 190, 123, 124, 125; 3 Cranch, 318; 2 Burr, 1226; 1 Johnson, 590, *Green* v. *Hart;* 2 Johnson, 52, *Russell* v. *Ball;* 2 Burr, 1005, 1008, 1010, 1011.)

2d. The first count shows a good cause of action. It was not necessary to avert fraud; but if it was, the want of such an averment is cured by the verdict; for a verdict helps everything which is necessary to be proved upon the trial, and without proof of which no verdict ought to have been given for the plaintiff. (Carthew,389; 10 Mod.,300; 2 Vin.,ab.396; [W. a.] and [W. b.]

162*] **Swann* & *Jones*, contra.

1. The evidence was insufficient even if it had been a common indorsement. The note having been assigned by the plaintiff to Hodgsett, it did not appear but that the right of action was still in the latter; but Lindo having expressly stipulated in his indorsement that he would not be liable, cannot be made liable by an implied *assumpsit*.

2. The first count was bad because, 1st. It did not aver any consideration for the indorsement. 2d. The defendant expressly excluded his liability. 3d. No fraud is averred; and, 4th. There was no averment of a re-assignment of the note.

E. I. Lee, in reply.

The possesion of the note by the plaintiff was evidence that he had repaid the money to Hodgsett. A re-assignment of the note would have made Welch a remote assignee, and he could not have maintained a suit at law against Lindo. Lindo, by implication, warranted that the money was due from Kercheval, as every vendor warrants his title. The record between Hodgsett and Kercheval shows fraud in Lindo.

March 9th. *All the Judges being present,*

MARSHALL, *Ch: J.*, delivered the following opinion of the court:

This was an action brought by the plaintiff against the defendant, in the Circuit Court for the county of Alexandria. The declaration contained two counts. The first was special, and the second for money had and received, by the defendant to the plaintiff's use.

At the trial of the cause, the plaintiff gave, in evidence, the record of the proceedings in a court in the state of Kentucky, in a cause in which William Hodgsett, assignee of James Welch, who was assignee of Abraham Lindo, was plaintiff, and John Kercheval was defendant. This suit was instituted on a promissory note. The defendant pleaded payment to Lindo. Issue *was joined on this plea, and [***163** a verdict was found for the defendant. The plaintiff also produced the original note with the indorsements thereon, the last of which was an assignment made by him to Hodgsett.

On the prayer of the defendant, the court decided that this evidence was not, in itself, sufficient to support the action on the second count, and to this opinion the counsel for the plaintiff excepted.

The testimony offered by the plaintiff was certainly incompetent of itself to prove that the defendant had received money to his use. The mere possession of a note which he had assigned to another could not, while that assignment remained, be evidence that the note was his property. Some re-assignment or receipt from the last assignee was necessary while the indorsements remained to prove that the title against the prior indorser was in him, and that he had paid a sum of money which gave him a claim on that indorser. And if the record of the state of Kentucky could prove that Lindo had received the money due upon the note, it would not prove that he had received it to the use of the plaintiff. Nor, under this indorsement, which is an assignment of the note without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid.

There is, then, no error in the direction given by the Circuit Court.

On the first count, there was a verdict for the plaintiff, but judgment was arrested, because that count was insufficient in law.

This count states, that a promissory note was made by John Kercheval, payable to Abraham Lindo; that Lindo indorsed that note to the plaintiff, in these words, "pay the within to James Welch, or order, without any recourse whatever on—A. Lindo." That the plaintiff indorsed the said note to William Hodgsett, who instituted a suit thereon, in which the said Kercheval pleaded that he had paid the debt to Abraham Lindo. A verdict was found for the defendant, on which a judgment was *rendered, which remains in full force. [***164** By these proceedings, the plaintiff became liable to pay the said Hodgsett the amount of the said note and costs of suit, which he had actually paid. The declaration then proceeds to state, that, by reason of the premises, the de-

fendant, Abraham Lindo, became liable to pay the plaintiff the amount of the said note and costs of suit, and, being so liable, he assumed, &c.

Under the mere assignment from Lindo to Welch, it is clear that this suit is not sustainable; because it is a part of the contract, that Lindo shall not be liable under his indorsement. The count is also defective, in not stating that the indorsement was made on a valuable consideration, and also in not averring that Lindo had actually received the money for which the note was given.

These are substantial faults, which are not cured by a verdict. The declaration presents a case in which there was no liability on the part of the defendant, to the plaintiff, which can sustain the *assumpsit* found by the verdict.

There is no error and the judgment is affirmed.

THE STATE OF NEW JERSEY
v.
WILSON.

A legislative act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act; such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

THIS case was submitted to this court, upon a statement of facts, without argument.

March 3d. All the Judges being present, MARSHALL, *Ch. Justice*, delivered the opinion of the court as follows:

This is a writ of error to a judgment rendered in the court of last resort in the state of New Jersey, by which the plaintiffs allege they are deprived of a right secured to them by the constitution of the United States.

165*] *The case appears to be this:

The remnant of the tribe of Deleware Indians, previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles 2d, to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commissioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed, release their claim to all others, and to appoint certain chiefs to treat with commissioners on the part of the government for the final extinguishment of their whole claim.

On the 9th of August, 1758, the Indian deputies met the commissioners and delivered to them a proposition reduced to writing—the basis of which was, that the government should purchase a tract of land on which they might reside—in consideration of which they would release their claim to all other lands in New Jersey south of the river Rariton.

This proposition appears to have been assented to by the commissioners; and the legislature on the 12th of August, 1758, passed an act to give effect to this agreement.

This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the "Indians aforesaid shall not hereafter be subject "to any tax, any law, usage or custom to the "contrary thereof, in any wise notwithstand-"ing."

In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceable possession of the lands thus conveyed to them until some time in the year 1801, when, having become desirous of migrating from *the [***166** state of New Jersey, and of joining their brethren at Stoekbridge, in the state of New York, they applied for, and obtained an act of the legislature of New Jersey, authorizing a sale of their land in that state.

This act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the act under which they were purchased and settled on the Indians.

In 1803, the commissioners under the last recited act sold and conveyed the lands to the plaintiffs, George Painter and others.

In October, 1804, the legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. The plaintiffs, thinking themselves injured by this assessment, brought the case before the courts in the manner prescribed by the laws of New Jersey, and in the highest court of the state the validity of the repealing act was affirmed and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, does the act of 1804 violate the constitution of the United States?

The constitution of the United States declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

In the case of *Fletcher* v. *Peck*, it was decided in this court on solemn argument and much deliberation, that this provision of the constitution extends to contracts to which a state is a party, as well as to contracts between individuals. The question, then, is narrowed to the inquiry whether in the case stated, a contract existed, and whether that contract is violated by the act of 1804.

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the *consideration agreed upon, which [***167** is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the bene-

fit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

Judgment of the Court.

This cause came on to be heard on the transcript of the record of the writ of error of the state of New Jersey, and was argued by counsel on the part of the plaintiffs in error; on consideration whereof, it is the opinion of the court, that there is error in the judgment of the said court of errors in this, that the judgment of the said court is founded on an act passed by the legislature of the state of New Jersey, in December, 1804, entitled "An act to repeal part of an act respecting lands purchased for the Indians;" which act, in the opinion of this court, is repugnant to the constitution of the United States, inasmuch as it impairs the obligation of a contract, and is, on that account, void. It is therefore considered by the court, that the said judgment be reversed and annulled, and that the cause be remanded to the said court of errors, that judgment may be rendered therein annulling the assessment in the proceedings mentioned, so far as the same may respect the land in the said proceedings also mentioned.

Distinguished—4 Pet. 563; 12 Pet. 744; 16 How. 401.

Cited—6 Pet. 738; 16 Pet. 289; 6 How. 332, 542; 16 How. 385, 401; 4 Wall. 550, 554; 8 Wall. 438; 13 Wall. 376; 15 Wall. 458; 16 Wall. 232; 21 Wall. 498; 22 Wall. 573; 3 Otto, 223; 5 Otto, 109; 6 Otto, 503; 7 Otto, 661; 1 Woods, 423, 424; 1 Bald. 220; 1 Abb. U. S. 327; 12 Blatchf. 459; 1 Black. 446.

168*] *KING *v.* RIDDLE.

Present—All the Judges.

A recital in a deed is good evidence to take a case out of the statute of limitations. A discharge under the insolvent law of the District of Columbia is no bar to an action.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

Riddle brought an action of *assumpsit* in the court below against King. The declaration contained a general count for money paid, laid out and expended by the plaintiff for the use of the Defendant, and a special count which stated that the defendant, in the year 1798, being taken in execution upon a judgment of the County Court of Fairfax at the suit of *Fosters* and *May*, gave a prison-bounds-bond, with sureties, which bond he forfeited, and judgment was obtained against his sureties. That the plaintiff (who was not bound in the bond) did afterwards, at the request of the defendant, advance, settle and pay the one-sixth part of the judgment, amounting to 350 dollars and 52 cents, and that the defendant in consideration thereof undertook, &c.

The defendant pleaded *non assumpsit*, and *non assumpsit infra quinque annos*, &c., upon which issues were joined; and upon the trial the defendant took a bill of exceptions to the refusal of the court to instruct the jury that the evidence was not sufficient in law to enable the plaintiff to recover in this action.

The evidence stated in the bill of exceptions was as follows:

1. A paper signed and sealed by the defendant on the 15th of July, 1804, reciting that the plaintiff and others had become his sureties for a large debt due to Mr. John Foster, and having become accountable, had paid the debt, and he, the defendant, being desirous to secure them as far as he could, assigned to Thomas Vowell, one of his sureties, certain bonds in trust to collect the money and distribute it equally among them.

2. The testimony of the said Thomas Vowell that he had never received anything upon those bonds.

*3. The testimony of John M'Donald, [***169** that some time in the summer of 1799 he heard the defendant say he owed the plaintiff a sum of money, but he did not state the amount, nor upon what account he owed it.

4. An abstract of the judgment against the sureties amounting to 2,103 dollars and 12 cents; and,

5. A receipt at the bottom thereof signed by Fosters and May, dated September 18th, 1799, as follows: "The above sum of 2,103 dollars and 12 cents has been discharged by the negotiable notes of John Harper, William Harper, Thomas Vowell, Jr., Samuel Harper and Joshua Riddle, at thirty days, and the cash of Charles Harper, which notes, when paid, will stand in full payment of the above judgment and costs."

All the above named persons, except Joshua Riddle, the plaintiff, were bound in the bond.

The writ in the present suit was issued on the 1st of July, 1809.

The defendant offered in evidence a copy of his certificate of discharge from imprisonment, dated August 12, 1805, under the act of Congress for the relief of insolvent debtors within the District of Columbia. (Vol. 6, p. 294.)

The verdict and judgment being against the defendant, he brought his writ of error.

E. I. Lee, for the plaintiff in error, contended,

1. That the plaintiff's evidence did not maintain his action.

If he had any cause of action it was upon the sealed instrument. There was no evidence of the request of the defendant to the plaintiff to pay the money, and he was under no legal obligation to pay it. He was not a party to the judgment on the prison-bounds-bond. The receipt states the judgment to be paid by the notes of the plaintiff and others; but it does not appear that the plaintiff has ever paid this note.

*2. There is no evidence to take the [***170** case out of the statute of limitations, except the testimony of M'Donald, which is too vague and indefinite.

3. The defendant having been discharged under the insolvent act, no suit can be maintained against him, without showing that he has acquired new property since his discharge.

Swann, contra.

1. The plaintiff was no party to the sealed instrument. He is only named in the recital. It contained no contract on the part of the defendant to pay the plaintiff. But it is evidence from which the jury might infer that the plaintiff had paid the money at his request. It is true there was no positive evidence that the note had been paid, but there are circumstances from which the jury might infer it.

2. The recital in the instrument acknowledging the debt was on the 15th of July, 1804, and the suit was brought up on the 1st of July, 1809: so that 5 years had not elapsed.

3. The discharge under the insolvent law, only discharges the person; it is no bar to an action.

March 4th. All the judges (except Duvall, *J.*) being present,

MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

In this case the whole evidence is spread upon the record by the bill of exceptions, and the court below refused to instruct the jury (as requested by the defendant) that it was not sufficient in law to enable the plaintiff to recover in this action.

If the court ought to have given this instruction, their refusal is certainly error.

The evidence shows that a note was given, or money paid by the plaintiff for the use of the **171***] defendant; but *it is objected that it was not paid at the request of the defendant. If the plaintiff was not bound to pay it, and if it was paid without the request of the defendant, it is certain that the plaintiff is not entitled to recover, but the court thinks that the recital in the deed of assignment is evidence from which the jury might infer a request.

The court is also of opinion that the recital in the deed is sufficient to take the case out of the statute of limitations. Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion that the cases on that point have gone too far, yet this is not a casual or incautious expression: the deed admits the debts to be due on the 15th of July, 1804, and five years had not afterwards elapsed before the suit was brought.

Then it is objected that there is no evidence of the payment of the money by the plaintiff; but the court thinks that the recital of the deed is evidence from which the jury might infer the payment.

There was no error respecting the discharge under the insolvent act. It was ouly a discharge of the person and could not affect the judgment.

Judgment affirmed.

DAVY'S EXECUTORS *v.* FAW.

An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant.

When the price of land, and not the question of title, is submitted, the submission and award need not be by deed.

THIS case seems to be sufficiently stated in the following opinion, delivered by MARSHALL, *Ch. J.*, on the 9th of March. All the Judges being present:

This is an appeal from a decree of the Circuit Court for the county of Alexandria, sitting in Chancery, by which that court set aside an award made between the parties, and directed an account.

*The bill impeaches the award, be- [***172** cause,

1. The arbiters exceeded their power.

2. They made no award with respect to a part of the matter submitted to them.

3. They were partial, and proceeded to make their award without hearing the party against whom it was made.

The arbitration bond binds the parties to submit to the award, order and arbitrament of Francis Peyton, Theophilus Harris and Thomas Herbert, or any two of them, respecting a controversy of several accounts and contracts existing between them.

A judgment at law has been obtained for the amount of the award; for relief against which and against the award itself this suit was instituted.

By the plaintiffs in error it is contended, that excess of power in arbiters is a defense at law, and is therefore not examinable in this court.

That the injured party may avail himself of this defeuse in a court of law, where the excess of power is apparent on the face of the award, is not controverted. But, in this case, it is not shown by the award itself, and the defendant insists that he was not at liberty, in a court of law, to avail himself of evidence *dehors* the award; and in support of this opiniou the case of *Wills* v. *Maccarmick* (2 Wilson, 149) has been much relied upon. Without decidiug that question, the court will proceed to inquire whether the defendant in error has succeeded in proving that, in this case, the arbiters have, in fact, exceeded their power.

It appears that Abraham Faw sold to David Davy a lot of ground, the purchase money for which was payable in four years, in four equal annual payments. Davy conveyed to Faw about the same time a lot which he had purchased from Elisha C. Dick, and which he held on the condition of making certain improvements. Davy becoming insolvent, it was agreed that his contract *with Faw [***173** should be annulled, that the bonds he had given Faw for the purchase of the lot should be returned to him, and that he should surrender the bond for a title which Faw had executed. It had been stipulated that, in the event of his failing to pay the purchase money, and of the contract being avoided, the money actually paid by Davy to Faw should be considered as rent so far as rent was allowed. There had been some other dealings between the parties, and there had been a small piece of ground rented to Davy, on which he had put some inconsiderable improvements.

In this state of things they agreed to submit their affairs to arbitration, and the bond was

executed which has been stated. The arbiters awarded that Faw should pay Davy £314 4*s*. 11*d*. and it is proved that, in making up the account between the parties, they debited Faw with £300 for the lot which had been conveyed to him by Davy. Faw contends that this was not a contract subsisting between the parties, and consequently is not included within the terms of the submission.

Faw alleges in his bill that this whole transaction was closed; that the lot conveyed to him by Davy formed no part of the consideration given for the lot he had sold, but was conveyed to him because Davy considered the rent reserved on that lot and the conditions of improvement, which were inserted in the deed, as equivalent to its full value. These allegations are denied in the answer; and the defendant avers that the price of the lot purchased by him was £500; that he conveyed the lot he had purchased from Dick at £100, and gave his bonds for £400, the residue of the purchase money; that, when this contract was annulled, he became entitled to his lot or to its value, and that this was one of the subjects submitted to the referees.

In addition to this testimony furnished by the answer, the defendant has produced the testimony of a witness who was present when the arbitration was agreed upon and the bond executed. He says that the lot purchased by the defendant from the plaintiff, and that which had been conveyed by the defendant to the plaintiff as well as other accounts between the parties formed the subjects of conversation.

174*] *Francis Peyton, one of the arbiters, declares that he considered all the transactions between Faw and Davy as submitted to them; that Faw himself laid before them the bond he had given to Davy for a conveyance of the lot he had sold, and that he always understood from Mr. Faw during the arbitration that he was willing to pay £100 for the lot conveyed to him by Davy. Peyton adds that the mode adopted by the arbiters for arranging that part of the subject, was understood by them to be the one which was most agreeable to Mr. Faw.

The court is of opinion that the plaintiff in the court below has failed in showing that the arbiters have exceeded their powers.

2. A second objection to this award is, that the arbiters have not settled the accounts between the parties for flour stored by Faw for Davy, which accounts were clearly within the submission.

The defendant has not shown that he is injured by this omission, and it is, therefore, unneccessary to decide whether, had he been injured, a court of equity could or could not have afforded relief.

3. A third ground on which the application for relief is placed, is the partiality and improper conduct of the arbiters.

That judges chosen by the parties themselves as well as those who are constituted by law, ought to be exempt from all imputation of partiality or corruption; that their conduct ought to be fair, and their proceedings regular, so as to give the parties an opportunity to be heard, and themselves the means of understanding the subjects they are to decide, are propositions not to be controverted. But corrupt motives are not lightly to be ascribed to the arbiter, nor is partiality to be attributed to him on account of difference of opinion with respect to the decision he has made.

The charge made in this case, that the parties were not sufficiently heard, is not supported, and is contradicted by the testimony in the cause. The general *charge of parti- [***175** ality is also contradicted and is expressly denied by the arbiters, who have been made defendants, and by the deposition of Francis Peyton who did not sign the award.

Some particular facts have been proved, by which this charge, it is supposed by the counsel for the defendant in error, may be supported.

M'Kinsey Talbot deposes that, after the arbiters had separated, Thomas Herbert, who was one of them, said that David Davy ought to buy his winter's meat for him without making any charge on account of the particular service he had rendered him in the said arbitration.

That such language is unbecoming in a judge will not be denied; and if the circumstances leading to these expressions, and the manner in which they were uttered, had been stated in the record, and there had been reason to believe that the words were spoken seriously, they would have furnished objections to the award not easily to be removed. But nothing is stated which could give these expressions a serious aspect. They appear not to have been delivered confidentially; and as it is difficult to conceive that a man, who could be chosen as an arbiter, would thus wantonly and unnecessarily expose the depravity of his own conduct, the court must consider these words as spoken in sport, with indiscreet levity, but not as seriously indicative of an opinion that he had made an unjust award.

The same witness, in another deposition, states that he was present at a meeting of the arbiters, and heard Thomas Herbert say that they had the hands of Abraham Faw so fast tied that he could not, for his life, get them loose.

It is impossible to consider these expressions in an arbiter without some disapprobation. But what led to the employment of them does not appear; nor is the court informed of the temper in which they were employed. It is worthy of remark that Thomas Herbert does not appear to have had an opportunity of cross-examining this witness, and that this deposition was *taken before the arbiters were made [***176** parties to the cause.

There is some testimony respecting some altercations or jealousies between Faw and some of the arbiters at a corporation election, but they were too trivial to be worthy of notice; and as they occurred about the time of the submission, and before the arbiters proceeded on the business, it is supposed that they would have induced Faw, had he thought them of any importance, to make some effort to prevent an award.

Upon a view of the whole case, the court is of opinion that the plaintiff in the court below has not shown sufficient matter to set aside the judgment at law, and doth therefore direct that the decree of the Circuit Court be reversed and annulled.

March 13th. After the decision of the cause,

C. Lee for the defendant in error, cited *Kyd on Awards*, to show that where the dispute is about land the submission and award must be by deed.

MARSHALL, *Ch. J.* That is where the title is in question. But here the title was conveyed—the dispute was only as to the price. The question of title was not submitted.

LIVINGSTON, *J.* Although that point was not made in the argument, yet it was considered by the court.

HUGHES *v.* MOORE.

Present—All the Judges.

A plaintiff may before verdict, discontinue a count in his declaration, and waive the issues joined thereon.

A promise to pay a sum of money as a compensation to the plaintiff for the injury done him by the misconduct of the defendant in obtaining a patent in his own name for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the sale of land within the statute of frauds, and must be in writing.

Oyer of a deed set forth in the first count does not make that deed part of the record so as to apply it to other counts, in the declaration.

ERROR to the Circuit Court for the District of Columbia, sitting in Alexandria.

This was a special action of *assumpsit*, brought by Moore against Hughes. The declaration, after several amendments, contained four counts.

177*] *1. The first count stated, that whereas, on the 16th of June, 1797, it was agreed between the plaintiff, and one John Darby, by a writing under their hands and seals, now here shown to the court, in substance as follows: "Whereas Cleon Moore had located, in his own name, 9922 acres of land in Kentucky, by a treasury warrant No. 19,100," and the said Cleon Moore, hath sold all his right, title and interest of, and in the same, to John Darby, for the consideration of £300 and warrants that no person or persons claiming under John Tebbs, now deceased, or under him the said Cleon Moore, shall interrupt him, the said John Darby, in his said claim to the said lands, but as to all other claims he is to run the risk, and on their account, will never require, that the said Cleon Moore, or any other person or persons, shall refund the said £300 or any part thereof, but if there should be as much land secured by the said location as will bring two thousand pounds or upwards, the said John Darby is to pay the said Cleon Moore £700 in money, over and above the said three hundred pounds, so that he may receive altogether one thousand pounds; otherwise the said Cleon Moore is only to have the said consideration of three hundred pounds." At the bottom of which writing was a receipt in these words: "Received of John Darby the sum of three hundred pounds, the full consideration for the first-mentioned location, in the foregoing agreement, or of his right, title, and interest of, and in the same—Cleon Moore, and a seal. And whereas, on the same day, a memorandum in writing, and under the seals of the plaintiff and the said Darby, was added and indorsed on the said agreement as part thereof as follows: "Memorandum—If a patent or patents have already issued for the first within mentioned location, the said Moore doth agree to assign the same, to the within named John Darby, his heirs and assigns; or if not issued, that they issue in the name of the said Cleon Moore, and he is to assign them to the said John Darby, his heirs and assigns; and if in the opinion of any two respectable men in the neighborhood of the said lands, to be mutually chosen, shall say the said lands will sell for two thousand pounds, or upwards, the said John Darby doth bind himself, his heirs and assigns, to pay unto the said Cleon Moore, his executors,*ad- [***178** ministrators and assigns, the sum of seven hundred pounds, as herein mentioned."

"And whereas, the said defendant, afterwards, on the 5th of October, 1799, well knowing the contract and covenants aforesaid, between the said Cleon Moore and John Darby, and more especially well knowing that a patent or grant had not then been issued for the tract of 9922 acres, located in the name of the said Cleon Moore, and well knowing that the patent for that land ought, and could only be issued unto the said Cleon Moore, and well knowing that the said Cleon Moore was entitled to the sum of £700, lawful money of Virginia, of the value of 2,333 dollars and 33 cents, provided, in the opinion of any two respectable men in the neighborhood of the said lands, to be mutually chosen, they should say the said lands would sell for £2,000 or upwards, lawful money of Virginia; and whereas, the defendant, well knowing that the said lands were really and truly worth, on the day and year last mentioned, a much greater sum than £2,000, and well knowing that it would materially injure the plaintiff in his contract aforesaid, and would materially benefit the said John Darby and himself, the said defendant, he the said defendant, on the said 5th day of October, &c., assigned the plat and certificate of survey, made of the said 9922 acres, and a warrant numbered 19605, in the name of the plaintiff, unto himself, the said defendant, and the said John Darby, without any lawful authority so to do from the said Cleon Moore, by making and subscribing the said assignment of the said survey, in the name of him, the said Cleon Moore, by him, the said James Hughes, as attorney in fact for the said Cleon Moore, which assignment, imported a desire of him the said Cleon, that patents might issue in the names of the said Darby and Hughes, intending thereby to defraud and injure the said Cleon Moore, and to benefit himself and the said John Darby, in respect to the premises aforesaid. And whereas, the said James Hughes, by means of the herein before mentioned assignment, had caused and done to the plaintiff, an injury to the value of a great sum of money, to wit, the value of 4,000 dollars, which he was disposed to compensate; the said James Hughes in consideration thereof, afterwards, viz., on the 17th of March, 1806, came to an agreement with *the said [***179** Cleon Moore, whereby the said Cleon Moore, promised that he would quit all claim to the said tract of land, and discharge the said James Hughes of, and concerning all damages for, and by reason of his actings and doings aforesaid,

in assigning the survey in manner aforesaid; and he, the said James Hughes, promised to the said Cleon Moore, that he would pay to him the sum of £700 when he should be thereafter required; and the plaintiff avers, that he has been always ready to keep, and has always kept his promise aforesaid, in consideration of which premises the defendant became liable to pay to him the said sum of £700, &c., and being so liable, the defendant in consideration thereof, undertook," &c.

2. The second count stated, that whereas, on the 5th of October, 1799, the plaintiff was owner and proprietor of a certain plat, and certificate of survey, of 9922 acres of land in Mason county, in the state of Kentucky, dated the 28th of November, 1796, of the value of 20,000 dollars; and whereas, the defendant well knowing the premises afterwards, viz., on the 5th of October, 1799, without any lawful authority from the plaintiff, and with a view to benefit himself, and a certain John Darby, and to injure the plaintiff, in this particular, assigned the last mentioned plat and certificate of survey unto him, the said defendant, and the said John Darby, by subscribing the name of the said Cleon Moore by the said James Hughes, as attorney in fact, for the said Cleon Moore; and in consequence of the said unauthorized assignment, a grant of the said tract of land was afterwards made to the defendant, and the said Darby, by the commonwealth of Kentucky, styling them assignees of the plaintiff. And whereas, the defendant, by the assignment aforesaid, had caused and done to the plaintiff an injury and loss to the value of a great sum of money, viz., to the value of 4,000 dollars, which he was willing to repair and compensate; in consideration thereof, the said defendant afterwards, viz., on the 7th of March, 1806, at the county of Alexandria, &c., promised to pay to the plaintiff the sum of £700, lawful money of Virginia, as compensation for the said injury and loss of the said land assigned as aforesaid.

The said plaintiff at the same time agreed to the said terms, and to accept of the said compensa-**180*** tion in full of *all claims and demands for the said land, and for the injury aforesaid. And the plaintiff avers, that he has always kept his promise aforesaid, and has been at all times ready and willing to do everything on his part to be done; and afterwards, viz., on, &c., at, &c., offered to perform the agreement on his part, and the defendant then and there refused to perform, &c., whereby the defendant became liable, &c., and being so liable, promised to pay, &c.

3. The 3d count stated, that whereas, the plaintiff, by virtue of a certain land warrant issued, &c., on the 26th of September, 1783, duly located by entry on the 7th of December, 1783, and duly executed by actual survey, duly made on the 28th of November, 1796, a plat and certificate whereof had been duly made and delivered according to law, was entitled to have a grant from the commonwealth of Kentucky, by patent to be founded on the said survey, and to be completed and issued to him of 9922 acres of land in the county of Mason, &c., bounded, &c. And whereas, the defendant had, on the 5th of October, 1799, (the plaintiff, being so entitled to have the land patented to him aforesaid, and the defendant well knowing the premises,) for his own gain and advantage, and to the great wrong and damage of the plaintiff, without any lawful authority to that effect from the plaintiff, and without his knowledge or consent, but under color and pretense of being attorney in fact for the plaintiff, wrongfully, injuriously and willfully made and executed in the name of the plaintiff a certain indorsement in writing, upon the back of the said plat and certificate of survey, purporting to be an assignment by the plaintiff, of the said plat and certificate, to one John Darby and the said James Hughes, for value received, and purporting to express a desire of the plaintiff, that patents might issue in their names, and purporting to be subscribed with the name of the plaintiff, by the said James Hughes, his attorney in fact. And whereas, the said James, afterwards, viz., on the 5th of April, 1800, (the plaintiff being entitled to have the said land patented to him as aforesaid,) without any authority to that effect from the plaintiff, and without his knowledge or consent, by means of the said pretended assignment, and under color of the same, for his own gain and advantage, and to the great wrong *and damage of [***181** the plaintiff, wrongfully, injuriously and willfully caused and procured the land so located and surveyed for the plaintiff as aforesaid, and bounded as aforesaid, to be granted by the commonwealth of Kentucky, to them the said John Darby and James Hughes, by patent, bearing date, &c., founded on the said warrant and survey, and on the said pretended assignment of the plat and certificate, and signed by James Garrard, the governor, and sealed with the seal of the said commonwealth of Kentucky, and in all respects, finally completed and issued to them the said Darby and Hughes, and entered of record in the land-office of Kentucky, aforesaid. And the plaintiff says, that the said land was patented to the said Darby and Hughes by the procurement and pretenses of the said James as aforesaid, without the plaintiff's having ever in any manner authorized, contracted, or consented that the same should be patented in the name of any other person or persons whatsoever, other than himself. And the plaintiff produceth here in court a copy of the said patent, &c.

And whereas, afterwards, on the 13th of March, 1806, at Alexandria, &c., a conversation was had, and propositions for an accord and satisfaction were moved between the said James and the plaintiff, concerning a compensation for the loss and a liquidation of the damages sustained by the plaintiff by reason of the misconduct and wrong-doing of the said James in the premises, and of the vesting them, the said Darby and Hughes, with the legal title to the said land as aforesaid; and it was then and there agreed by the said James on his part, in consideration of the premises, and of the just claims of the plaintiff for compensation and damages as aforesaid, that the said James should pay to the plaintiff in satisfaction of the same, £700 Virginia currency, equal to 2,333 dollars and one-third of a dollar, currency of the United States, to be paid in four equal quarterly installments, the first in three months, &c., each installment to be secured by a bond of the said James; and the plaintiff agreed to accept the said £700 by installments as aforesaid, in full

satisfaction of his just claims as aforesaid, and upon the said installments being secured by the bonds of the said James, as aforesaid, to release and quitclaim to the said James, all the plaint-
182*] iff's *claims and demands whatsoever, for compensation, redress, or damages arising from the wrong-doing and misconduct of the said James, in the premises, and from the vesting the said Darby and Hughes with the legal title to the said land as aforesaid. The count then states, that the defendant promised to fulfill the agreement on his part, and the plaintiff on his part. That the plaintiff is, and always was ready and willing to perform his part, if the defendant would perform his. That he afterwards required the defendant to perform his part, and offered to accept, and would have accepted of the defendant the £700 in installments as aforesaid, and secured by bonds as aforesaid, in full satisfaction of all the claims and demands of the plaintiff for compensation, redress and damages as aforesaid, and did then and there offer to perfect and execute, and would have perfected and executed to the said James, a good and sufficient quitclaim and release to him, of all the plaintiff's claims and demands for compensation, redress or damages, arising from the misconduct and wrong-doing of the said James, in the premises, and from the vesting of the said Darby and Hughes, with the legal title to the said land as aforesaid, if he, the said James, would have secured by his bonds duly executed, the said £700, &c. But the defendant refused to perform his part of the agreement, &c.

4. The fourth count stated that whereas, on the 5th of October, 1799, the defendant, without any lawful authority to that effect, but for his own gain and advantage and to the great wrong and damage of the plaintiff, with intent to prevent the land hereinafter mentioned, from being patented to the plaintiff, and to cause and procure the same to be patented to the defendant and one John Darby, wrongfully, injuriously and wilfully made and executed in the name of the plaintiff, a certain other indorsement in writing, upon a certain other plat and certificate of survey duly made for the plaintiff, on the 28th of November, 1796, the said survey having been so made in due execution of a certain other warrant duly issued in favor of the plaintiff, from the land-office of Virginia, on the 26th of September, 1783, &c., and in pursuance of a location and entry, &c., which last-mentioned indorsement purported to be an assignment, &c., from the plaintiff to
183*] the said John *Darby and the defendant, for value received, &c., purporting to be subscribed, &c. And whereas, the defendant had, on the 5th of April, 1800, in further pursuance of his said intent to prevent the land from being patented to the plaintiff, and to cause it to be patented to the said Darby and the defendant, wrongfully and without authority, and under color of being attorney in fact for the plaintiff, caused the land to be patented to the said Darby and the defendant, &c. And the plaintiff produceth here a copy of the patent, warrant, survey, &c., &c. And the plaintiff avers, that he never authorized the defendant to make the said assignment, and that the defendant knew he had no such authority; that it was made without the plaintiffs knowledge or consent; that the plaintiff was, until the issuing of the patent to Darby and the defendant, entitled to have the land patented to himself; by which wrong-doing of the defendant, the plaintiff had suffered great wrong and injury and was entitled to be compensated in damages by the defendant, and to be indemnified for being prevented from having the land patented to him, and for the same being patented to Darby and the defendant. And whereas, afterwards, on the 13th of March, 1806, a conversation was had and propositions for a compromise were moved between the plaintiff and defendant, touching the compensation and indemnification of the plaintiff, and the defendant then and there agreed in consideration of the just claims of the plaintiff to be compensated for the damage and injury arising from the misconduct of the defendant in the premises, and in consideration of the defendant's having procured a patent to be issued to him and Darby for the land, that the defendant would pay to the plaintiff another sum of £700 Virginia currency of the value, &c., which the plaintiff agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid; and the defendant in consideration of his said agreement, assumed and promised to the plaintiff that he, the defendant, would perform his part of the agreement. And the plaintiff in consideration of that promise agreed to accept the £700 in satisfaction, &c., as aforesaid and upon payment of the same or upon its being secured to be paid in four instalments, &c.; that he, the plaintiff, would quitclaim and release to the defendant, all the plaintiff's claims and demands *and rights whatsoever to compensa- [***184**
tion for being prevented from having the land patented to him, and for and on account of the same being patented to the said Darby and the defendant. And the plaintiff says that he was and hath ever since been willing and ready to perform, &c., and requested the defendant to perform, &c., and offered to accept, &c., the £700, &c., in full satisfaction, &c., and offered to quitclaim, &c., all the plaintiff's claims for compensation, &c., if the defendant would pay, &c., but he refused, &c.

The defendant, having prayed oyer of the agreement and the memorandum, of which a profert was made in the first count, pleaded *non assumpsit* to that count, and so in like manner to each of the other counts separately; upon all of which pleas issues were joined.

2d. The defendant (without again praying oyer), for further plea to each of the counts, severally, said, that the promise alleged to be made by the defendant to the plaintiff, or any memorandum thereof, was not in writing, signed by the defendant or any other person by him thereunto lawfully authorized, and this he is ready to verify, &c.

3d. The defendant, also, without again praying oyer, for further plea to each of the counts, severally, said, "that after making the agree-
"ment and memorandum between the plaintiff
"and the said John Darby, in the declaration
"mentioned, viz., on the 29th of August, 1799,
"Alexander D. Orr and John Graham, two
"respectable men residing in the neighborhood
"of the lands, in the said agreement mentioned,

"were mutually chosen by the plaintiff and "the said John Darby, to say and determine "whether the said lands would sell for two "thousand pounds, or upwards, and the said "Alexander D. Orr and John Graham, after- "wards, viz., on the 29th of August, 1799, did "say and determine, that the plaintiff's claim "to a survey of 9922 acres, in the county of "Washington, being the land in the said agree- "ment and memorandum mentioned, would "not sell for £2,000 Virginia money, and this "he is ready to verify," &c.

185*] *4. The defendant, also, without again praying oyer, pleaded separately to each count, "that there was not as much land secured by the said location in the agreement mentioned as would bring £2,000 or upwards, and this he is ready to verify, &c. The plaintiff demurred generally to the second plea to all the counts, and to the 3d and 4th pleas to the 2d, 3d and 4th counts.

To the 3d and 4th pleas to the 1st count, there was a general replication and issue.

The court below adjudged all the demurrers in favor of the plaintiff.

The plaintiff then entered a *noli prosequi* upon the first count of his declaration, and waived all the issues joined thereon. Upon the issues of *non assumpsit* to the 2d, 3d and 4th counts, there was a verdict and judgment for the plaintiff.

After the jury had retired to consider of their verdict they returned into court and requested the court to determine whether a verdict for the plaintiff would give to the defendant all the right and interest of the plaintiff and his heirs in the patent of land in the declaration mentioned, and the court instructed them that if the plaintiff should recover a judgment in this case, he would be thereby barred in equity from setting aside the patent issued to the defendant and the said John Darby in the declaration mentioned. To this instruction the defendant excepted, and brought his writ of error.

Swann and *C. Simms*, for the plaintiff in error, contended,

1. That the plaintiff had no right to discontinue as to the first count and waive the issues on that count, without the leave of the court, or, the assent of the defendant.

2. That the statute of frauds was a good bar to every count in the declaration, and

3. That if it was not, the court erred in in-

186*] structing *the jury that a recovery in this suit would bar the plaintiff in equity from setting aside the patent.

1. The plaintiff had no right to discontinue as to the first count, after issue (Cro. Jac., 35, 316). The oyer being once prayed and granted, the agreement and memorandum were spread upon the record, and the defendant had a right to avail himself of it in all his pleas. The defendant had a right to show that the title of the plaintiff to those lands was never worth £2,000, and therefore he was never entitled to anything more than the £300, which Darby had paid him; consequently the obtaining a patent in the name of Darby & Hughes, could be no injury to the plaintiff, and if the plaintiff did promise to pay the £700 it was a promise without consideration. This was the real substantial defense in the cause. In order to entitle the plaintiff to recover, he must not only prove that the defendant did a wrong action, but that it did an injury to the plaintiff. (1, Bac. Ab., 50; 6, Mod., 46.)

2. As to the plea of the statute of frauds. By the act of assembly of Virginia (P. P. 15), which is like that of Kentucky, it is enacted that no action shall be brought, whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

The contract set forth in each count of the declaration is a contract for the sale of land. It is a contract whereby the plaintiff was to part with all his title to the land; and it is immaterial whether that title was legal or equitable.

The first count states expressly, that the plaintiff "promised to quit all claim to the tract of land," and the defendant promised to pay £700.

The 2d count also states, that the defendant was to pay the £700 as compensation for the injury and loss of the land; and the plaintiff agreed to accept it "in full of all *claims and demands for the said land [***187** and for the injury aforesaid."

The 3d count says, that a conversation was had concerning a compensation for the loss, and a liquation of the damages sustained by the plaintiff by reason of the misconduct and wrongdoing of the defendant, and of the vesting them, the said Darby and Hughes, with the legal title to the said land, and it was agreed in consideration of the premises, that the defendant should pay to the plaintiff £700 in full satisfaction of the plaintiff's claims as aforesaid, and the plaintiff agreed, upon such payment being made, to quitclaim to the defendant all the plaintiff's claims for compensation, &c., arising from the wrong-doing and misconduct of the defendant in the premises "and from the vesting the said Darby and Hughes "with the legal title to the said land.

The 4th count states that the defendant agreed, in consideration of the just claims of the plaintiff, to be compensated for the damage and injury arising from the misconduct of the defendant in the premises, and in consideration of the defendant's having procured a patent to be issued to him and Darby for the land, that he, the defendant, would pay the plaintiff an other sum of £700, &c.

Thus the quitclaim of the plaintiff's title to the land is the consideration of every promise in the declaration; and if the plaintiff had no title, or if no title was to pass from the plaintiff, by the contract, it was *nudum pactum*.

3. If this was not a contract for the sale of the plaintiff's title to the land, a judgment for him in this suit could not have barred the plaintiff from setting aside the patent in equity. There seems to have been an inconsistency in the opinions of the court below. If the agreement extinguished the plaintiff's equitable title, then it was an agreement for the sale of land, and ought to have been in writing. If it did not extinguish the plaintiff's equitable title, then it could not bar him from setting aside the patent.

Jones and *C. Lee*, contra.

This was a case of naked *tort*. There is no **188***] evidence *of any authority from Moore to Hughes to make this transfer, but it was done by the latter with a full knowledge that it was contrary to the plaintiff's intention. It was of itself an injury to the plaintiff for which he was entitled to redress. It was actionable *per se*.

But suppose that a judgment for the plaintiff in this case should prevent him from setting aside the patent, yet it does not follow that it is a case within the statute of frauds. Contracts executed are not within that statute. If there be a verbal agreement for the sale of land, and the vendor executes his part of the agreement by conveying to the purchaser the legal title; which he accepts, and receives the possession and the title papers, it is not necessary that the vendor should have a promise in writing from the purchaser, in order to compel him to pay for it; a court of chancery would decree him to execute the contract.

The plaintiff's subsequent ratification of the act of the defendant, was equivalent to his previous assent. The contract, then, was executed on the part of Moore. The defendant had all his title, and the possession, and the title papers. No further act was necessary on the part of the plaintiff.

Besides, it does not appear that the contract on the part of the plaintiff, if there was any, for the transfer of his right, was not in writing. If it was necessary that it should have been in writing, it will, after verdict, be presumed to have been so. (1 Chitty on pleadings, 133; 1 Sand., 276 (a) note 2, 4 East., 400.)

As to the *Noli Prosequi*, the plaintiff has a right to enter it at any time before verdict, and even after verdict, before judgment. (Sayer on damages, 113; 12 Mod., 558.)

The defendant could not by oyer of the agreement stated in the first count, make that agreement applicable to other counts which do not refer to it. The 3d and 4th pleas were only applicable to the first count.

It is immaterial whether the plaintiff actually sustained damage to the value of £700. It is **189***] sufficient if he sustained *any damage at all. It is an action for liquidated damages, and it is immaterial what was the real injury which the plaintiff suffered. (7 Vin., 300; Tit. Damages, S.; Moore, 419, *Colman's* case; 4 Burr., 2228, *Lowe* v. *Peers;* 1, *Lord Raym*, 1164.)

The court below was correct in the opinion, that a judgment in this suit would have barred a suit in equity to set aside the patent. It was only an agreement for the extinguishment of an equitable right which need not be in writing. It transferred nothing to the defendant.[1]

March 7th. *All the Judges being present*,

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

Much of the seeming intricacy of this cause will disappear, if we extricate the questions made by the pleadings before the court, from others which might greatly embarrass and perplex it.

The declaration contains four counts. The first recites an original contract between Cleon Moore and John Darby, for the sale of certain lands, lying in Kentucky, and proceeds to recount in detail those transactions on which the action was founded. The other counts state, in different terms, the several *assumpsits* which they allege to have been made.

The defendants crave oyer of the written contract, stated in the first count, and file several pleas to that *count. They then, [***190** without repeating the oyer, file similar pleas to the remaining counts. After taking issue on some of the pleas, and demurring to others, the plaintiff below discontinues his first count.

By the counsel for Hughes, this has been considered as error. But the court can perceive no reason for this opinion. After this discontinuance, the parties are in precisely the same situation as if all the issues both of law and fact, which were joined upon that count, had been decided in favor of the defendant below. Such decision could not, in point of law, have affected the rights of the parties under the issues joined on the remaining counts, and consequently the discontinuance upon that count must leave those rights unimpaired. Whether this count remain in the declaration, or be stricken out of it, the right of the plaintiff in the Circuit Court, to recover on the other counts, will be precisely the same. The examination of this right must be conducted on the same principles as if the declaration had never contained the first count.

By the plaintiff in error it is contended, that the oyer, which was prayed of the written contract alleged in the first count, spreads that contract on the record, and makes it a part of all his subsequent pleas. This is certainly true with respect to all his subsequent pleas to that count, but not with respect to his pleas to the other counts. Different counts allege different contracts, and different *assumpsits*. It is upon this idea alone that a verdict can be rendered for the plaintiff, on one count, and for the defendant on another. Now, the oyer of one contract cannot be the oyer of another contract, and cannot spread upon the record a contract supposed to be totally distinct from that which was read. The discontinuance of the first count produces no change in this respect, in the condition of the parties. Had it remained, it could have had no influence on the other counts, nor could the oyer of the written contract it stated have transferred that contract to the other counts.

1.—It is understood that the opinion of the court below was grounded on the idea that this case was to be governed by the principles relative to implied trusts which are not within the statute of frauds. Darby & Hughes having obtained the legal estate without the assent of the plaintiff, were to be considered as holding it in trust to secure to him the payment of £700 in case the land should turn out to be worth £2,000. This was an implied trust, resulting from the circumstances of the case, and which would cease to exist upon payment of the £700. Upon the plaintiff's receiving payment of that sum, his equitable title would cease. It would not be transferred to the defendant; but would be extinguished. If the £700 mentioned in the declaration were to be considered as the compensation for the injury done in depriving the plaintiff of his legal security for £700 to be paid upon a contingency, it is evident that that injury could not have exceeded £700. And whether it were to be paid as compensation for that injury, or as the sum which would be due upon the happening of the contingency, it would equally destroy the implied trust. And as an implied trust can be raised without writing, so, it was thought, it could be extinguished without writing.

The second count states, that Cleon Moore was owner and proprietor of a plat and certificate of survey for lands lying in Kentucky, for which he was entitled to a patent from the gov-
191*] ernment of that state; and that *James Hughes, without authority, transferred that plat and certificate, in the name of Cleon Moore to John Darby and the said Hughes, by which wrongful act a patent for the said land was issued to the said Darby and Hughes to the great injury of the said Moore. That afterwards the said Hughes promised to pay to the said Moore, "the sum of seven hundred pounds for the said injury, and loss of the said land assigned as aforesaid; the said plaintiff at the same time, agreed to the said terms, and to accept of the said compensation in full of all claims and demands for the said land and for the injury aforesaid."

To this count, the defendant pleaded several pleas, one of which was, that neither the promise nor any memorandum thereof was made in writing. To this plea the plaintiff demurred, and the court sustained the demurrer.

The correctness of this decision depends entirely on the application of the statute of frauds to the contract stated in the declaration.

Cleon Moore is averred to have been the proprietor of a plat and certificate of survey on which Hughes and Darby obtained a patent by using his name without authority. This tortious act did not divest Moore of his equitable title. The land, in equity, was his. Did he part with this title by the contract stated in the declaration? The answer must, in the opinion of the whole court, be in the affirmative. He agreed to accept of the said compensation in full of all claims and demands for the said land, and for the injury aforesaid. This, then, was an agreement to sell his equitable title to the land for the sum of seven hundred pounds. The court can perceive no distinction between the sale of land to which a man has only an equitable title, and a sale of land to which he has a legal title. They are equally within the statute.

It is, therefore, the unanimous opinion of this court, that the judgment upon the demurrer to this plea, ought to have been in favor of the defendant below. This plea being a complete bar to the second count, it is unnecessary to consider the other pleas.

192*] *The third count states the title of Cleon Moore, and the injury sustained by him, to the same effect with the second count. It then states a conversation between the parties, "concerning a compensation for the loss, and "a liquidation of the damages sustained by the "said Cleon, by reason of the misconduct and "wrong-doing of the said James in the prem-"ises, and of the vesting them, the said Darby "& Hughes, with the legal title to the said land "as aforesaid; and it was then and there agreed "by the said James, on his part, in considera-"tion of the premises, and of the just claims "of the said Cleon, for compensation and "damages as aforesaid, that the said James "should pay to the said Cleon, in satisfaction "for the same, the sum of £700" &c. "And "the said Cleon then and there agreed, on his "part, to accept of the said seven hundred "pounds in full compensation of his just claims "as aforesaid," and, upon the same being secured, &c., to release and quit claim to the said James, all his, the said Cleon's, claims and demands whatsoever, for compensation, redress or damages arising from the wrong-doing and misconduct of the said James in the premises, and from the vesting the said Darby and Hughes with the legal title to the said land as aforesaid.

To this count also, the statute of frauds was pleaded in bar. The plaintiff below demurred to the plea, and the defendant joined in demurrer.

Upon the true construction of the contract stated in this count, there was some contrariety of opinion among the judges. It is, however, the opinion of the majority that the contract must be understood to import a sale of land, and that the sum of money stipulated to be paid was, in contemplation of the parties, to extinguish the title of the said Cleon Moore.

The conversation was "concerning a com-"pensation for the loss and a liquidation of "the damages sustained by the said Cleon," not only "by reason of the misconduct of the "said Hughes, but also by reason of the vest-"ing them, the said Darby and Hughes, with the "legal title to the said land." "And it was "then agreed, in consideration of the just "claims, of the said Cleon, for compensation "and damages, that the said *James, [***193** "should pay the said Cleon, in satisfaction for "the same, the sum of £700" To the majority of the court, it seems that a compensation for the loss of the title to the land must be understood to be a compensation for the land itself, and that the receipt of this money by Cleon Moore, would not only have barred an action for damages, but a suit in equity for the title.

If this opinion be correct, then the contract is substantially for the sale of land, and, to be valid, ought to have been in writing. On this plea also the demurrer ought to have been overruled.

The fourth count states the injury more in detail than is done in either the second or third counts. It states the claim of Cleon Moore to be compensated for the loss sustained by his land being granted without his consent to Hughes and Darby. A conversation was then held, and "propositions for a compromise were made, touching the compensation and indemnification of him, the said Cleon," "and it "was then and there agreed by the said James, "in consideration of the just claims of the said "Cleon, to be compensated for the damage and "injury for the misconduct of the said James "in the premises, and in consideration of the "said James having procured and obtained a "patent to be completed and issued to the said "James, and the said John Darby, as last afore-"said, for the said land," that he, the said James, would well and truly pay the said Cleon one other sum of £700. This the "said Cleon "agreed to accept in satisfaction of his just "claims to compensation arising from the "causes and considerations last aforesaid."

The compensation here offered and accepted, is for the injury sustained by Cleon Moore, in consequence of the grant of his land, by the state of Kentucky, to Hughes and Darby. It seems to the court that this compensation was in lieu of the patent itself, and must have been intended to extinguish his right to that patent.

It is difficult to suppose an intention, in this case, to receive a full compensation for the loss of a title, and yet to retain the right to that title. The majority of the court is of opinion that, under the contract as stated in this count also, the payment of the money agreed to be **194*]** *paid would have extinguished the right of Cleon Moore to the land in question, and that this contract likewise is substantially a contract for the sale of land. The demurrer, therefore, to this plea, ought to have been overruled.

It is unnecessary to examine other points which were made in the cause. The judgment of the Circuit Court must be reversed, and judgment rendered for the plaintiff in error.

Judgment reversed.

Cited—2 Mason, 203; 2 McLean, 493; 3 Sum., 461.

BARTON *v.* PETIT AND BAYARD.

Present—All the Judges.

A plaintiff, who has declared jointly against two defendants, as being in custody, when in fact only one of the defendants was taken on the *capias*, cannot abate his own action against the party not taken, unless authorized so to do by the return of the process against that party.

If the marshal of Virginia return that the defendant is no inhabitant of the District of Virginia, the suit shall abate as to such defendant.

The plaintiff in Virginia is not bound to declare until all the defendants have appeared, or the suit be abated as to such as have not appeared.

ERROR to the Circuit Court for the District of Virginia.

The transcript of the record which was sent up, began by stating that "Heretofore, to wit, at rules held in the clerk's office of the said court in the month of December, in the year 1807, Andrew Petit and Andrew Bayard, by Philip N. Nicholas, gent., their attorney, appeared and filed their certain bill against Seth Barton and Thomas Fisher, which bill is in the following words, to wit: United States, fifth circuit, District of Virginia, to wit: Andrew Petit and Andrew Bayard, citizens and inhabitants of the state of Pennsylvania, merchants and partners, trading under the firm of Petit & Bayard, plaintiffs, complain of Seth Barton and Thomas Fisher, citizens and inhabitants of the state of Virginia, late merchants and partners trading under the firm of Barton & Fisher, defendants in custody, of a plea that the said defendants render unto the said plaintiffs the sum of four thousand dollars, also one thousand and four pounds of tobacco at twelve shillings and sixpence the hundred weight, being of the value of twenty dollars and ninety-two cents, which to the said plaintiffs the said defendants owe, &c.; stating a judgment of the general court of Maryland.

The record then states, that the defendant, Seth Barton, having been arrested upon the *capias ad respondendum*, and being called, but **195*]** not appearing, it was ordered *that he appear at the next rules and give special bail, &c., which he did and pleaded payment, upon which the issue was joined, and verdict for the plaintiffs. Whereupon the defendant, Barton, moved in arrest of judgment; because,

1. The declaration states a joint cause of action against this defendant and a certain Thomas Fisher, and therefore a judgment ought not to be rendered against this defendant alone.

2. Because the plaintiff has not in and by his declaration made a *profert* of the judgment stated in the declaration, under the seal of the General Court of Maryland, where the said judgment is stated to have been rendered.

3. Because the said Thomas Fisher ought, upon a joint judgment against him and this defendant (the said Thomas being stated to be in life and a citizen and inhabitant of the district of Virginia), to be a party to the judgment, if one is rendered against the said defendant; and,

4. Because the verdict is insufficient, uncertain, and wants form.

This motion was overruled, and judgment entered upon the verdict against the defendant, Barton, alone, "for 4,000 dollars, also one "thousand and four pounds of tobacco at twelve "shillings and sixpence the hundred weight, "of the value of twenty dollars and ninety-two "cents, and their costs, &c." Whereupon the defendant brought his writ of error.

P. B. Key, for the plaintiff in error.

1. The suit being joint, upon a joint debt, and the declaration being against both, averring both to be in custody, the judgment against one alone is erroneous.

The writ of *capias*, not being considered as part of the record, according to the practice in Virginia, does not appear in the transcript. The record states, that Barton was arrested, but says nothing as to Fisher. No reason appears upon the record why he was not a *party to the judgment. The declara- [***196** tion avers them both to be in custody, and complains against both. That is an averment of a fact upon record which the plaintiffs cannot contradict.

If it appears on the declaration, or in any of the proceedings on the part of the plaintiff, that another was jointly bound with the defendant, and is still living, judgment against one is error and must be reversed. (1 Sand., 291, (C.) note 4; 5 Bur., 2614.)

It is a rule in good pleading that the count must conform to the writ, and the bar and judgment to the count. (Co. Lit., 203, a.)

If this count conforms to the writ, which in good pleading it ought to do, then both were taken, and the judgment is erroneous.

But if both were not taken upon this joint writ for a joint debt, yet there is error. At common law, if there be process against two on a joint cause of action, and one only be taken, the other must be outlawed before there can be any other proceeding. (Strange, 473, *Edwards* v. *Carter*.) But if you could proceed against one, you must, upon the return of the writ, count against one, stating that the other was not taken, according to the truth of the case, and this must appear upon the record to justify a judgment against one. To authorize a judgment against one, upon a joint suit against two, there must be a discontinuance, abatement, or outlawry, or death suggested upon the record. You cannot aver anything out of the record to support the judgment. Everything necessary to justify the judgment must be affirmatively shown in the record by the plaintiff.

2. The court below erred in rendering judgment for more money than was authorized by the Maryland judgment, which was filed and declared upon as a judgment of record.

This is not an action of debt upon a simple contract, but technically upon a judgment on record.

The act of Congress of May, 1790, declares the mode of authenticating a judgment; and **197***] when so authenticated, *it is to have the same faith and credit in every court within the United States as in the courts of that state in which it was rendered.

It may be declared upon in the same manner as if it were a judgment of a court of the state in which the suit upon it is brought. (2 Dall., 303, *Armstrong* v. *Carson.*)

Whenever a judgment or matter of record is the gist of the action, it must be certainly and truly alleged. Any variance is fatal.

The Maryland judgment is for 4,000 dollars, and 1,004 lbs. of tobacco at 12 shillings and 6 pence per hundred. This 12 shillings and 6 pence must be Maryland currency, as the judgment was rendered in Maryland, where the dollar is 7 shillings and 6 pence. The value of the tobacco was only 16 dollars and 73 cents, whereas the judgment of the court below fixes its value at 20 dollars and 92 cents, which was at the rate of 12 shillings and 6 pence, Virginia currency, per hundred.

The court was bound to take notice of the Maryland currency. It was matter of law; and if they have mistaken it, it is error.

But if it was matter of fact, it ought to have been found by the jury; and their not having found it is error. (Cro. Eliz., 536, *Bagshaw* v. *Playn.*)

If it is an error, it is not amendable. (1 Cranch, 283, *Thompson* v. *Jameson.*) And in such a case there can be no *remittitur*. (2 Salk., 658, *Incledon* v. *Crips.*)

E. I. Lee and *Swann*, contra.

1. There is no evidence in the record that will authorize the court to take notice of the Maryland currency. Upon the plea of payment it was not necessary for the plaintiffs to produce the record of the judgment in Maryland. Besides, it was a matter for the jury to ascertain, and they have found it. Their verdict was "that the defendant hath not paid the debt in "the declaration mentioned."

198*] *The debt in the declaration mentioned was "the sum of four thousand dollars, "also one thousand and four pounds of tobacco "at twelve shillings and sixpence the hundred "weight, 'being of the value of twenty dollars "and ninety-two cents.'" This was the debt which the defendant pleaded that he had paid, and which the jury found that he had not paid. (2 Wash., 149, *Strode* v. *Head.*)

2. The averment in the declaration that the defendants are in custody is only matter of form, and is always made in cases where the defendants are not in custody, and cannot be holden to bail. In this very case (it being debt on a judgment), according to the decisions in Virginia, the defendant cannot be holden to bail. It is an immaterial averment, and if it appear by the record that one of the defendants never was taken, a judgment against the other is not erroneous. (1 Wash., 9, *Brown* v. *Belches.*)

The omission of the clerk, at the rules, to enter the suit abated as to Fisher, is not error.

By the statute of Virginia respecting the district courts of that state it is enacted "that where the sheriff or other officer shall return on any writ of *capias* to answer in any civil action, that the defendant is not found within his bailiwick, the plaintiff may either sue out an *alias* or a *plurias capias*, until the defendant shall be arrested, or a *testatum capias* where he shall be removed into another county; or may at his election sue out an attachment against the estate of the defendant to force an appearance." (Rev. Code, p. 86, § 33.) And "on the return of the *pluries*, that the defendant is not found, the court, instead of the process of outlawry formerly used, may order a proclamation to issue, warning the defendant to appear at a certain day therein named, or that judgment will be rendered against him, which proclamation shall be published," &c., "and if the defendant fails to appear pursuant to such proclamation, the same proceedings shall be had, and the same judgment given, as in other cases of default." (Rev. Code, p. 87, § 41.)

By the statute of Virginia respecting the county courts, "for the better ascertaining what process may *be sued out, where the [***199** sheriff or other officer returns that the defendant is not to be found in his bailiwick, it is enacted that where any sheriff or other officer shall make such return the plaintiff or plaintiffs in any civil action, shall and may sue an attachment, &c., to force an appearance, or an *alias* or *pluries capias*, at the election of the plaintiff or plaintiffs;" "and where any defendant shall be a known inhabitant of another county, and not of the county of that sheriff to whom the process shall be directed, such sheriff shall return the truth of the case, but not that the person is not found in his county, and thereupon such process issued from any county court clerk's office, as to such defendant, shall abate and be dismissed." (Rev. Code, 95, § 32.)

By the former act (Rev. Code, p. 86, § 35), rules are to be holden monthly at the clerk's office, and "the plaintiff shall file his declara-"tion in the clerk's office at the succeed-"ing rule day after the defendant shall have "entered his appearance, or the defendant may "then enter a rule for the plaintiff to declare, "which, if he fails or neglects to do, at the suc-"ceeding rule day, he shall be non-suited" and pay costs, &c.

The practice, under these statutes in Virginia, is to enter the suit abated against a defendant who is returned by the sheriff "no inhabitant of his county," and to proceed against the other; and the declaration is always joint, and in the same form as if both had been taken.

After one defendant has appeared, the plaintiff is bound by law to declare against him or to suffer a non-suit.

So, if one suffers judgment to be rendered against him by default, you proceed against the other and file your declaration against both. So one defendant in custody may confess judgment, and you proceed against the other. In the case of *Brown* v. *Belches*, cited from Washington's Reports, the declaration was against both, and stated them both to be in custody; and such has been the uniform practice for more than 20 years.

Afterwards, E. I. Lee obtained a *certiorari*

200*] upon a *suggestion that the transcript of the record did not contain the writ of *capias ad respondendum* against Barton and Fisher and the marshal's return thereupon.

Upon the return of the *certiorari*, the clerk sent up a copy of the *capias*, which was in the usual form, against both defendants, and of the marshal's return, which was "executed on Seth Barton only, and bailed by Thomas R. Rootes."

The clerk also certified "that the said *capias* "not having been executed upon the said "Thomas Fisher, an *alias capias* was awarded "against him, which has not been returned; "and the attorney for the plaintiffs having in- "formation that that defendant was no inhabit- "ant of the Virginia district, at rules held at "the clerk's office in the month of June, in the "year 1809, caused the said suit to be abated "as to the said Thomas Fisher."

This was stated by E. I. Lee to be conformable to the practice in Virginia.

March 14th. All the Judges being present, WASHINGTON, *J.*, delivered the opinion of the court as follows:

This was an action of debt brought in the Circuit Court for the District of Virginia by Petit and Bayard against Seth Barton and Thomas Fisher, upon a judgment rendered in the General Court of Maryland. The declaration is against the said Barton and Fisher, late merchants and partners, trading under the firm of Barton & Fisher, citizens and inhabitants of the state of Virginia, both of whom are alleged to be in the custody of the marshal. The record states that Barton, who had been arrested upon the *capias*, gave bail and put in the plea of payment, on which an issue was joined, and a verdict was rendered against him. He afterwards moved in arrest of judgment, and amongst other reasons, assigned the following, viz.: That the declaration states a joint cause of action against the said Barton and one Thomas Fisher, and that, therefore, a judgment ought not to be rendered against him alone. The **201***] *motion in arrest of judgment having been argued and overruled, judgment was rendered against Barton, and the record has been removed into this court by writ of error.

The general rule certainly is, that if two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain a judgment against one alone, but must wait until the others have been served with process, or until the other defendants have been proceeded against as far as the law authorizes for the purpose of forcing an appearance. In England the plaintiff must proceed to outlaw the defendants who have not been served, before he can proceed against those who appear. In Virginia, where this suit was brought, the plaintiff might have taken out an *alias* and a *pluries capias* or *testatum capias*, or, at his election, an attachment against the estate of such defendant; or, upon the return of a *pluries* not found, the court may order a proclamation to issue, warning the defendant to appear on a certain day, and, if he fail to do so, judgment by default may be entered against him.

But, whatever may be the mode provided by law for forcing an appearance, the plaintiff cannot proceed to obtain a judgment against one defendant in a joint action against two, until he has proceeded against the other as far as the law will authorize, unless the law dispenses with the necessity of proceeding against the other defendant beyond a certain point to force an appearance. Thus, in Pennsylvania, (as is known to one of the judges of this court) if the sheriff return *non est* as to one defendant, the plaintiff may procced against the other on whom the writ was served, stating in his declaration, the return of the writ as to his companion.

To remove the objection which arises in this case, the plaintiff obtained a *certiorari* to the Circuit Court of Virginia on a suggestion of diminution, and it now appears, by the certificate of the clerk of that court, that an *alias capias* issued against Thomas Fisher which was not returned, but the plaintiff's attorney caused the suit to be abated as to the said Fisher, upon information which he had received that the said Fisher was no inhabitant of the District of Virginia. Had the *mar-[***202** shal returned the writ and stated this fact, the law would have abated it as to Fisher; in which case the objection to the subsequent proceedings against Barton would have been removed. But since the plaintiff could not have supported his action originally against one defendant on a joint cause of action where it appeared by his own showing, or by a plea in abatement, that there was another person who was jointly bound, and might be sued, he ought not to be permitted, after stating a joint cause of action, to abate or discontinue his action against one, unless authorized to do so by the return of the process against that defendant. If he does so, it furnishes a good ground for arresting the judgment.

It is contended, in support of this judgment, that, as, by the law of Virginia, the plaintiff must file his declaration at the next succeeding rule day after the defendant shall have entered his appearance, or that the defendant may rule him to do so, which if he fails to do, he shall be non-suit, the plaintiff not only may, but is bound to proceed against one defendant alone, after he has appeared. But the court understands this law as applying to a single defendant, or, if there be more, to the appearance of all the defendants.

Judgment reversed.

S. C. Post 288.
Cited—1 Brock. 263.

WILSON *v.* KOONTZ.

Present—All the Judges.

The defendant to an attachment in chancery in Virginia may plead the statute of limitations without answer.

A defendant who removes from one county to another in Virginia, is not thereby prevented from pleading the act of limitations, unless the plaintiff has been, by such removal, actually defeated or obstructed in bringing or maintaining his action.

THIS was an appeal from the decree of the Circuit Court for the District of Columbia, which dismissed the complainant's bill in equity.

Wilson filed a bill in equity, in the nature of

an attachment in chancery, against Koontz, surviving partner of Koontz & Ober, as principal debtor, and Thomas Irvine and Joseph **203***] Mandeville as garnishees. It *stated that Koontz, a resident of Virginia, as surviving partner of the firm of Koontz & Ober, was indebted to the plaintiff, by note, in the sum of 1,261 dollars, and had in the hands of Thomas Irvine and Joseph Mandeville goods and effects which were liable to be attached for the payment of the debt; and that unless he could make them liable by the intervention of the court below, he would be without any means of recovering his debt. In tender consideration whereof, and for as much as he had no remedy at law, and could only subject the effects and money in the hands of Irvine and Mandeville to the payment of his debt by means of a court of equity, he prays a discovery, and a decree that Koontz may pay the debt, and that Irvine and Mandeville may be restrained from paying away the effects in their hands, and that they may be applied to the payment of the debt, and for general relief.

Koontz having entered his appearance, gave security to perform the decree of the court if it should be against him, thereby discharging the attached effects, and pleaded the statute of limitations in bar of the suit; to which the complainant replied, that on the 4th of August, 1794, a suit was brought by the orders of the complainant, in the name of the president, directors and company of the bank of Alexandria as nominal plaintiffs in the District Court in the town of Winchester, in the state of Virginia, upon the note in the bill mentioned, against Koontz & Ober; and upon the writ the sheriff returned that Koontz was not found, and that Ober was no inhabitant of that county. That in September, 1794, it was agreed that Koontz should place in the hands of the complainant sundry bonds towards the discharge of the note, and that he would pay the balance in 12 or 18 months, in consequence of which the suit was dismissed; in pursuance of which arrangement part of the money was paid, and the residue is still due with interest. That afterwards, in the year 1794, Koontz removed into some other part of the State of Virginia, unknown to the complainant. That in 1803, the complainant having learned the residence of the defendant in Rockingham county, 60 or 70 miles from his former residence, and more remote from the complainant, ordered a suit against him, which was brought, but not prosecuted, because the defendant required **204***]*security for costs from the complainant, who did not reside in Virginia.

To this replication there was a general rejoinder and issue, and a general *dedimus* to take depositions; upon the return of which the cause came to hearing upon the pleadings and evidence. Whereupon the court below decreed that the bill should be dismissed with costs; from which decree the complainant appealed to this court.

E. I Lee, for the appellant.

It was not necessary for the complainant to reply matter to bring himself within an exception to the statute of limitations; because the circumstances which take the case out of the statute are stated in the bill.

Before the defendant can be permitted to plead the statute, he must, by answer, either deny the debt or aver it to be paid. (Gilb. chancery practice, 61.)

The statute of limitations is not properly a plea in equity. The statute does not make it an absolute bar in equity. It is only under the equity (*i. e.* the reason) of the statute that courts of equity allow it to be pleaded. If it appear clearly that the debt has not been paid, the statute is no bar in equity. The questions put by Koontz upon the examination of the witnesses show that the debt was not paid. Less evidence than this has been held to take a case out of the statute. It would have been no bar for Ober, who never resided in Virginia; and if not a good bar for Ober, it was not for Koontz. The plea does not state that Ober, the other partner, did not promise within 5 years.

Taylor, contra.

There is nothing in the replication or the evidence to take the case of the statute. The only question, then, is whether the statute is a good plea in a suit in chancery. This is not properly a case of equity-jurisdiction. It is simply an action at law upon a promissory note. Nothing gave jurisdiction to the court as a court of equity, but the circumstance that the defendant was a resident of Virginia and had effects in the *hands of residents in this [***205** district. The defendant having appeared and given security, so as to discharge the attached effects, nothing remains to be decided but the sheer law of the case; and when a court of equity gets possession of a case which is a mere case at law, if it is allowed to proceed at all, it must decide the case as a court of law would decide it.

If a bill charge fraud or trust, it is admitted that the defendant must answer to the fraud or trust before he can plead the statute of limitations. But this bill charges no fraud nor trust, nor seeks any discovery from the defendant. He is therefore not bound to answer, but may rely entirely on his plea. (3 P. Will., 144, *The South Sea Comp.* v. *Wymondsell;* 2 Com. Dig., 261; 2 Atk., 51.) If the complainant thinks the plea bad he may demur, or except. But here is neither exception nor demurrer. (Laws of Virg. Rev. Code, 73, § 40.)

March 10th. *All the judges being present,*

MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect:

This is a suit in chancery, and the defendant pleads the act of limitations. The plaintiff by his replication attempts to bring the case within the exception contained in the 14th section of that act; but it seems essential, under that section, that the complainant should have been actually defeated or obstructed in bringing his action by the removal of the defendant. There is no evidence of his intention of bringing his action sooner than he did, or that he was delayed by the defendant's removal from the county. The court is therefore of opinion that the circumstance of removal is not sufficient to take the case out of the statute.

It is objected that the plea of the statute of limitations is not good unless the defendant answer also and deny the debt, or aver it to be paid. But if this be a valid objection, it ought

to have been taken at the time of offering the plea, and before the issue was joined. It is now too late.

If it be a good objection in cases within the **206***] general *jurisdiction of a court of equity, yet it is not valid in a case like the present, which is really a case at law as between the present parties.

The Court is of opinion that the plea is a good bar, and that the decree should be affirmed.

RIDDLE *v.* MOSS.

Present—All the Judges.

The principal obligor in a bond is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs in case the judgment should be against him.

ERROR to the Circuit Court for the District of Columbia.

This was an action of debt on a joint bond given by John Welch as principal obligor and the defendant Moss as his surety. The suit abated as to Welch by the return of the marshal, that he was no inhabitant of the district. The defendant, Moss, pleaded specially certain facts in avoidance of the bond as to him alone; upon which issue was joined; and upon the trial the defendant, Moss, offered, as a witness, the said John Welch the principal obligor who was permitted by the court below to testify for the defendant, and upon his cross-examination confessed that he had made over to Moss all his property as security to indemnify him against the event of this suit.

The plaintiff took a bill of exceptions, and the verdict and judgment being against him, brought his writ of error to this court.

E. I. Lee and *Jones*, for the plaintiff in error.

Welch was clearly an interested witness. By relieving Moss from this suit, he would relieve his property from the lien which Moss held upon it. If the plaintiff recovered against Moss, the latter could immediately recover judgment against Welch for the whole debt, together with the costs of this suit. (Laws of Virg. Rev. Code., 292; 5 T. R., 578, *Buckland* v. *Tankard;* Bull. N. P., 283; 5 Bur., 2727; 3 Atk., 402; Day., 81.)

207*] *Welch is also interested to the amount of his legal fees for attendance as a witness. It appears upon the record that he was regularly summoned and is by law entitled to demand of Moss one dollar and a quarter *per diem*. If the plaintiff should be defeated he will retain this to his own use, but if the plaintiff should recover judgment he will have to refund it to Moss.

C. Lee, contra.

The defense set up by Moss did not affect Welch's liability upon the bond. He was bound at all events. He was not a party to this suit. Neither the verdict nor judgment could affect him. He would be obliged to pay either Riddle or Moss and it was immaterial to him which of them should recover against him. If the plaintiff should be defeated by Moss, he would sue Welch and recover judgment with costs—so that it was immaterial to him whether he paid costs to one or the other. He therefore stood indifferent as to interest. In chancery one defendant is a good witness for another, and it would be as good a rule at law.

Courts of law have, of late, inclined to refer all cases of doubtful interest to the credibility, rather than to the competency of the witness. The interest should be immediate and direct, in order to exclude the witness. (3 Esp. Rep., 60.)

The statute of Virginia which gives to a surety a remedy against his principal does not alter the case. He had an equal remedy before.

In the case of *Pawling* v. *The United States*, (4 Cranch, 219,) the point was made by a bill of exceptions to the refusal of the District Court of Kentucky to admit a co-obligor as a witness, but was not decided, the judgment having been reserved upon other grounds.

March 10th. *All the judges being present,*

MARSHALL, *Ch. J.*, delivered the opinion of the court to the following effect.

The court is of opinion that Welch, the co-obligor, was interested, and was therefore an incompetent witness. *It was a con- [***208** sideration of some importance that he had given Moss a deed of trust of his effects to indemnify him against this suit; but the principal circumstance was, that Welch's liability would be increased, to the extent of the costs of this suit, if the judgment should be against Moss.[1]

Judgment reversed.

Distinguished—2 Sum. 458.
Cited—1 Cranch, C. C. 582; 11 Pet. 95.

SHEEHY *v.* MANDEVILLE.

Present—All the Judges.

A note payable at 60 days cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. The variance is fatal.

Upon executing a writ of inquiry in Virginia in an action of *assumpsit* upon a promissory note, it is necessary to produce a note corresponding with that stated in the declaration; but it is not necessary to prove the note.

The plaintiff cannot give evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

This cause having been sent back to the Circuit Court, by the mandate of this court, at February term 1810,[2] commanding that court to render judgment for the plaintiff on his first count and to award a writ of inquiry of damages, upon executing that writ of inquiry the plaintiff produced the following note.

"Alexandria, 17th July, 1804.

"Sixty days after date, I promise to pay to "Mr. James Sheehy, or order, six hundred and

1.—The same point was also decided in the case of the Governor of Virginia v. Evans and others, at this term; which was the case of a bond with collateral condition. It was a joint action; and all the defendants were taken, but pleaded separately.

2.—Ante, vol. 6, p. 253.

"four dollars and ninety-one cents, for value "received, negotiable in the Bank of Alexan- "dria. R. B. JAMESON."

The note was thus described in the declaration, "And whereas the said defendants under "the name, firm and style aforesaid, did on the "said 17th of July, 1804, make their certain "note in writing called a promissory note, sub- **209*]** "scribed *by them under the name, "style, title and firm of Robert B. Jameson, "bearing date the same day and year, and then "and there delivered the said note to the plaint- "iff, and by the said note, did, under their firm "aforesaid, promise to pay to the said plaintiff, "or to his order, six hundred and four dollars "and ninety-one cents for value received, nego- "tiable at the bank of Alexandria, by reason "whereof and by virtue of the law in such "cases made and provided, the said defendants "became liable to pay to the said plaintiff the "said sum contained in the said note according "to the tenor and effect of said note," and being so liable, &c.

Which note the court below refused to suffer the plaintiff to read in evidence to the jury, because it varied from that set forth in the declaration. To this refusal the plaintiff excepted. The plaintiff then contended before the jury that the existence, the execution, the amount, and the validity of the note set out in the declaration, were determined by the judgment of the court upon the demurrer, and claimed damages to the full amount of that note without producing it. But the court, upon the motion of the defendant, instructed the jury that it was necessary for the plaintiff to produce the note, or sufficiently account for its non-production, otherwise the jury may and ought to presume that the note has been paid, or has been passed away by the plaintiff to a third person for value received, and in such case ought to assess only nominal damages. To this instruction the plaintiff also excepted.

The plaintiff, then, in order to rebut the presumption that the note mentioned in the declaration had been paid or passed away to a third person for a valuable consideration, produced and offered to show to the court and jury the record and judgment on the defendant's first and second pleas, which had been adjudged bad upon demurrer, and also the same note in the said pleas mentioned to have been the foundation of the suit and judgment set forth in the said pleas (which was a separate suit and judgment against R. B. Jameson upon the same note as the sole note of Jameson, and which judgment Mandeville had pleaded in bar to the present action, averring the note to be the same, **210*]** but which *plea was by this court adjudged bad on demurrer), and also the *fieri facias* issued against Jameson upon that judgment with the return of *nulla bona;* and also offered to prove by a competent witness that the promissory note produced to the jury, and in the said record of the suit against Jameson mentioned, is the same promissory note upon which the present declaration was founded, and the same which was intended to have been therein set out and described, and that the omission to state in the declaration the time in which the said note was originally made payable, arose from a mere oversight of the attorney who drew the declaration, and that there was no other note ever intended to have been described in that declaration or answering the description therein contained, but the court rejected the whole of the said evidence as incompetent; to which the plaintiff also excepted.

The jury assessed the plaintiff's damages, and judgment was rendered accordingly at one cent only; whereupon he brought his writ of error.

E. I. Lee, for the plaintiff in error.

It being the prime object of courts to do justice, the court will decide in favor of the plaintiff if the justice of the case be with him, unless there be some technical rule so strong as to leave the court no ground in his favor.

1. The first question is, whether there be any variance between the note declared upon and that produced before the jury on the execution of the writ of inquiry.

What is, in law, a variance? The rule is that the *allegata* and *probata* must correspond in all material points.

The note produced was payable "sixty days after date." The declaration does not state when it was payable. There is therefore no repugnance, no inconsistency, between them. To have made it a variance, the declaration should have expressly averred that the note was payable on demand. The omission to state a fact, without a direct averment of a different fact, is not a variance. (1 Bos. and Pul., 225.)

*The declaration leaves it uncertain [***211** when the note was payable; but the note itself renders that certain which had been left uncertain on the face of the declaration.

An averment is a positive statement; and is used in opposition to argument, or inference. (Cowp., 683, 684.)

From the statement in the declaration, it is only matter of inference that the note was payable on demand. But there is no variance between the *assumpsit* laid and the note offered. The statement of the note in the declaration is only inducement; but in the *assumpsit* it does not say when the money was to be paid.

In setting forth the matter of inducement, exact certainty is not required. (5 Com. Dig., 35, C. 30.)

The declaration states what, in law, is considered as a parol agreement—and the action is a general and not a special *indebitatus assumpsit.* Under the count of general *indebitatus assumpsit*, any evidence substantially corresponding with the cause of action set forth in the declaration may be given in evidence.

There is no variance whenever the time or date is uncertainly set forth or omitted. It may be supplied by pleading, or by finding, and therefore, in order to render, by finding, that certain which is omitted, or which does not correspond with the statement in the narration, evidence must be heard. (*Cromwell* v. *Grunsden*, 1 Lord Ray, 335.) If a patent be pleaded without a date, and the one produced has a date it is not a variance. (5 Com. Dig., 395.) Everything is form, without which the right of action appears to the court. (Hob., 233–5; Com. Dig., 139.) This suit was brought after the note became due, therefore the time of payment was then not material to the plaintiff's right of action. The promise, for a valuable consideration, gives the right of action. The time of payment was not material and could

not have been put in issue. (5 Com. Dig., 27.)

The omission is eured by the statute of jeofails. (Virg. Laws, 112, seet. 26.)

If, after verdiet, the plaintiff eould not be re-
212*] quired to *show sueh a note as is set forth in the deelaration—so upon a judgment by confession, *nil dicit*, or *non sum informatus*—he is not bound to show sueh a note.

2. If there be a variance, it is not a material one. (1 Wash., 72, *Evans* v. *Smith*.) In the bond, in that ease, the obligor was stated to be "of the eounty of Essex," which part of the description was omitted in the deelaration, and it was held to be an immaterial varianee.

It is only neeessary to prove substantially the cause of aetion declared upon. (1 Wash., 199, *M' Williams* v. *Willis*.) In that case the agreement was made by Willis, "as treasurer of the joekey club." The declaration omitted this descriptiou, and it was holden no varianee. The reason was that he was equally liable whether he contraeted as treasurer or not. So in this ease the defendant was equally liable whether the note was payable in sixty days or ou demand. the sixty days having expired before the suit was brought.

In the ease of *Peter* v. *Coeke* (1 Wash., 257), the suit was upon a bond given to U. P., "of the county of Surrey, on aeeount of Messrs. G. &. P., merehants in Glasgow." The deelaration stated the bond to be given to W. P., without stating on whose aeeouut; yet it was holden no varianee.

In the ease of *Wroe* v. *Washington and others* (1 Wash., 357), the deelaration stated an agreement by whieh the appellant was to rent and furnish a house in Leedstown, and entertain one of the appellees, two of their storekeepers and a servant with meat and drink for one year, for whieh the appellees agreed to pay him for the three first, £25 each, and for the last, £8.

The evidenee offered did not show any agreement respecting the renting of a house at Leedstown; but it showed an agreement to pay £83 in gross. Held no varianee.

The date of a deed is not of its substance. (2 Co., 5 [a], *Goddard's* ease.) Upon the same prineiple the time of payment is not of the substanee of a contract.

A variance between the date of the bond de-
213*] clared *upon, and that cited in the award, is not fatal, if they agree in every other partieular. (3 Call., *Ross* v. *Overton;* 3 Hen. and Mun., 237, *Lyons* v. *Gregory*.)

In the case of *Baptiste* v. *Cobbold* (1 Bos. and Pul., 7). the eontraet stated in the deelaration was for £52 10*s*. 0*d*. for rum money; the evidence was a note by whieh the defendant agreed to allow the plaintiff the above sum; together with a pint of rum per day; and held no varianee.

The grounds upon which the law requires that the *probata* should agree with the *allegata*, are, 1. To apprize the defendant of the nature of the eharge; and, 2. To enable him, by a referenee to the record itself, to plead the judgment in bar of another action for the same cause. The deelaration in this case did apprize the defendant of the nature of the charge; for he appeared and pleaded to the aetion, and by his plea identified the note. The second object is obtained by the reeord, by which it appears that the note offered in evidence is that which was deelared upon. If this note had been received in evidence, it would have been filed and formed a part of the proeeedings whieh the clerk is bound, by the statute of Virginia, to retain.

If the reason of the rule requiring the *allegata* and *probata* to eorrespond, is attained in this ease, and if there was no danger of a second suit being maintained upon the same cause of action agaiust the defendant, the varianee cannot be material.

3. The plaintiff was not bound to produce, upon the exeeution of the writ of inquiry, the note or the evidenee of the debt.

Where there is judgment by default in an aetion upon the case on a promissory note, the eourt will (without a jury) direct the clerk to aseertain the damages. (1 H. Bl., 252, 529, 541.) These cases were deeided upon the ground that the amount elaimed in the declaration is admitted in the same manner as if the aetion was debt; beeause a sum eertain is demanded, and it is not like the case where the cause of action sounds in damages, and not in eontract, ascertaining on its face the amount elaimed.

*Upon executing a writ of inquiry, [***214** the plaintiff is not bound to prove his eause of action, beeause it is admitted as laid. (Cro. Jac., 220.)

If the eause of aetion is admitted, and the note not required to be proved, and it is to be produced for no other purpose than to see whether there is any eredit on it, and there should be a difference in the date; yet it is not a varianee, beeause a varianee can exist only where proof is to be made.

The ease of *Green* v. *Hearne* (3 T. R., 301) shows, that upon a writ of inquiry it is not necessary to prove the bill of exehange; that a varianee between that deelared upon and that produeed is not material, and that evidence *dehors* the bill is admissible to prove that the bill produeed is that whieh was deelared upon. (Bayley on Bills, appendix No. 7, p. 74, *Mills* v. *Lyne;* Kyd on Bills, 155; 2 W. Bl., 748; 2 Stra., 1149; Bayley, 66, 67, *Bevis* v. *Lindsell*.) All these cases show that after judgment by default a promissory note set out in a declaration need not be produced. Sayer on Damages, 112, 113, says, where there is judgment upon demurrer the justices may award damages; the amount of the damages laid in the declaration is admitted.

4. The eourt erred in directing the jury that they were bound to presume from the non-produetion of the note deelared upon, that it was paid or had been assigned away by the plaintiff to a third person for a valuable eonsideration, unless the non-produetion was sufficiently aecounted for.

The non-production of the note was only a circumstanee to be left to the jury to draw such inference from as they should thiuk proper, under the whole of the eircumstanees attending the case. The eourt undertook to decide on the weight and effeet of this negative kiud of evidenee. Presumptive evidenee is always left to the jury. (*Hull* v. *Horner*, Cowp., 109).

5. The court ought to have admitted the evidence offered to show that this was the note intended by the deseription in the declaration—especially the defendant's own pleas, in which

215*] he affirms the note described *in the declaration to be the same note upon which judgment was obtained against Jameson, which is the same note which was produced to the jury in the execution of this writ of inquiry.

In the former opinion, the court admitted the principle that it was competent for the plaintiff to account for the non-production of such a note as is described in the declaration; and yet, when the plaintiff offers evidence to account for its non-production, the court reject it.

A finding by a special verdict, or an admission in former pleadings is good evidence, unless the contrary appears. (*Lee* v. *Booth*, 1 Keble, 720, pl. 50).

Swann; contra.

No time of payment being mentioned in the note, it is to be taken as a note payable on demand. The note produced was payable at 60 days. Such a variance is fatal upon an issue. (3 Selwyn's *Nisi Prius*, 999.)

The principle question is, whether it be necessary to produce the note on the execution of a writ of inquiry.

The practice in Virginia is to produce the note. Such also is the practice in England. (Esp. N. P., 180; Tit. Assumpsit, Str., 1149.)

The cases from Bayley, &c., only show that the note need not be proved; this we admit; but still we contend it ought to be produced. The judgment upon the demurrer does not admit the amount of the damages.

Jones, in reply.

1. There was no material variance. The description of the note in the declaration, as far as it goes, is correct. The time and mode of payment are no part of the substance of the contract necessary to be set forth. It is only necessary to set forth the legal effect of the note, and as the 60 days had expired before the suit was brought, it was in effect a note payable on demand. (Doug., 670, *Bristow* v. *Wright*.)

216*] *2. Upon such special counts, for a precise sum, it is not necessary to produce proof upon the writ of inquiry. The judgment by default confesses the whole sum as well as the cause of action. In debt, and *indebitatus assumpsit*, you could not recover less than the precise sum stated in the declaration; and therefore a judgment by default confessed the whole. And although the courts have relaxed as to those counts, and you may now recover less, yet when the declaration is for a precise sum, a judgment by default carries the whole.

The rule to produce the note is only a matter of discretion—a mere rule of practice intended to prevent injustice.

March 14th. *All the judges being present,*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was instituted on a promissory note, executed by the defendant, and made payable to the plaintiff. After describing the note accurately, with the exception of the time when it became payable, which is altogether omitted, the declaration proceeds, in the usual form, to state, that the defendant being so liable, assumed to pay the sum mentioned in the note when he should be thereunto required, &c.

To this count a special plea was filed which, on demurrer, was held insufficient. Judgment, on the demurrer, being rendered for the plaintiff, a writ of inquiry was awarded.

On executing this writ the plaintiff produced a note payable sixty days after date, and offered to prove that it was the note on which the suit was instituted, and that the omission to state the day of payment in the declaration was the mistake of counsel.

The court refused to permit the note to go to the jury; and also instructed them that unless a note conforming to the declaration should be adduced, or its absence accounted for, they must presume it to have been passed away or paid. The jury under these instructions *found one cent damages, for which [***217** judgment was rendered. To this judgment the plaintiff has sued out a writ of error.

The errors assigned are, 1st. That the variance was not fatal; 2d. That on a writ of inquiry the production of the note was unnecessary.

Courts, being established for the purpose of administering real justice to individuals, will feel much reluctance at the necessity of deciding a cause on a slip in pleading, or on the inadvertence of counsel. They can permit a cause to go off on such points only when some rule of law, the observance of which is deemed essential to the general administration of justice, peremptorily requires it.

One of these rules is, that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. The reason of this rule is too familiar to every lawyer to require that it should be repeated.

It is not necessary to recite the contract in *hæc verba*, but if it be recited the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated. If there be a failure in the one respect, or the other, an exception, for the variance, may be taken, and the plaintiff cannot give the instrument in evidence.

The plea of *non assumpsit* denies the contract; and an instrument, not conforming to the declaration either in words where it is recited, or according to its legal effect where the legal effect is stated, although proved to be the act of the defendant, is not the same act, and therefore does not maintain the issue on his part.

In this case, the legal effect of the promissory note is stated; and that effect on a note, having no day of payment, would be that it was payable immediately. This declaration goes on that idea, and avers a promise to pay when required. A note payable sixty days after date is a note different from one payable immediately, *and would not support [***218** the issue had *non assumpsit* been pleaded and issue joined on this plea.

Now, what difference is produced by the default of the defendant? He confesses the note stated in the declaration, but he confesses no other note. The necessity, then, of showing a note conforming to the declaration, is precisely as strong on executing a writ of inquiry as on trying the issue. No reason is perceived why a variance which would be fatal in the one case would not be equally fatal in the other.

The cases cited by the plaintiff's counsel

have been considered, but they do not come up to this. They are not cases where the legal effect of the written instrument, offered on executing the writ of inquiry, has differed from that of the instrument stated in the declaration.

The court is also of opinion that the production of the note, on executing the writ of inquiry, was necessary. The default dispenses with the proof of the note, but not with its production. In England damages have in some circumstances been assessed without a jury, but it is not stated that those damages have been assessed without a view of the note. The practice of this country is to require that the note should be produced, or its absence accounted for, and the rule is a safe one.

Judgment affirmed.

S. C. 2 Cranch, C. C. 15.
Cited—4 Cranch, C. C. 11.

CONWAY'S EXECUTORS AND DEVISEES *v.* ALEXANDER.

Present—All the Judges.

If A advance money to B, and B thereupon convey land to trustees in trust, to convey the same to A, in fee, in case B should fail to repay the money and interest on a certain day, and if B fail to repay the money on the day limited, and thereupon the trustees convey the land to A, B has no equity of redemption.

THIS was an appeal from the Circuit Court for the District of Columbia, sitting in chancery, at Alexandria.

219*] *Walter S. Alexander, the appellee, son and residuary devisee of Robert Alexander, deceased, filed his bill in equity against the executors and devisees of Richard Conway, deceased, to be permitted to redeem a certain tract of land which his father, Robert Alexander, had, in the year of 1788, conveyed to certain trustees, by a deed which the complainant contended was a mortgage; which land the trustees had conveyed to W. Lyles, who had conveyed the same to the said Richard Conway. The deed was by indenture, dated March 20, 1788, between Robert Alexander of the first part, W. Lyles of the second part, and certain trustees of the third part, whereby Robert Alexander (after reciting his title to an undivided moiety of 400 acres of land, holden in common with Charles Alexander), in consideration of 800*l.* paid to him by W. Lyles, and in consideration of the covenants to be performed by the trustees, bargained, granted and sold, aliened and confirmed to W. Lyles, in fee, twenty acres, being part of the said undivided moiety—and to the trustees the residue of the moiety, except part thereof conveyed to B. Dade on the 1st of January, 1788; which residue was supposed to contain 140 acres. To have and to hold the 20 acres to W. Lyles, his heirs and assigns, to his and their use forever—and the said residue of the said moiety to the trustees and the majority of them, and the survivors and survivor of them, in trust as follows, to wit: "To convey the said residue of the said moiety, "except as before excepted, unto him the said "W. Lyles, his heirs and assigns forever, by "good and sufficient deeds in law for that pur- "pose, at any reasonable time after the first "day of July, which shall be in the year one "thousand seven hundred and ninety, unless "the said Robert Alexander, his heirs, execu- "tors or administrators, shall pay, or cause to "be paid to the said W. Lyles, his heirs, exec- "utors or administrators, the sum of 700*l.* cur- "rent money of Virginia, in gold or silver "coin, with lawful interest thereupon, from "the date hereof, on or before the first day of "July, which shall be in the year of our Lord "seventeen hundred and ninety. And if the "said Robert Alexander, his heirs, executors, "or administrators, shall pay, or cause to be "paid to the said W. Lyles, his heirs, executors "or administrators, the said sum of 700*l.* cur- "rent money of Virginia, in gold or silver coin,

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NOTE.—Generally, when a deed or contract is made upon a negotiation for the loan of money, a court of equity will construe the conveyance to be a mortgage, whatever may be the form of the contract, if the person to whom the application for the loan is made agrees to receive back his money, with interest, or a larger amount, within a specified time, and to reconvey the property. Holmes v. Grant, 8 Paige, 243.

But a mere agreement to re-convey the premises within a limited period, upon the repayment of the consideration money, or any other sum, where there is no subsisting debt, or continuing liability of the grantor for the payment of the money, either express or implied, is not sufficient to convert such a conditional sale into a mortgage. Holmes v. Grant, 8 Paige, 243.

Where a creditor cancelled securities of his debtor and loaned him more money, all of which amounted to $2,500, upon the debtor giving him an absolute deed of the land, the debtor taking a lease of the land for five years, agreeing to improve it, and the creditor agreed to re-convey in five years, on receiving $2,800, and took the debtor's indorsed note for $200 as security that $2,800 should be realized from the land. *Held*, a mortgage and usurious. Brown v. Dewey, 1 Saud. Ch. 56; Barton v. May, 3 Sand. Ch. 450.

Where there is no debt or loan, an agreement to re-sell does not change an absolute conveyance into a Mortgage. Glover v. Payn, 19 Wend. 518; Reading v. Weston, 7 Coun. 143, 409; 8 Conn. 117.

A conveyance in consideration of discharge of previous debts, with an agreement to re-convey, for a sum certain, and the value of any improvements made, at end of year, is an agreement of sale and repurchase, and not a mortgage. Robinson v. Cropsey, 6 Paige, 480; Aff'g. S. C. 2 Edw. 138.

So, an agreement given back that if the vendor finds a purchaser in a year, he should have all the purchase money beyond the debt and interest, does not make the transaction a mortgage. Holmes v. Grant, 8 Paige, 243.

Nor where an absolute conveyance is given in payment of the debt, the creditor agreeing to convey within a year, retaining only a certain amount of the debt and interest, and that if the land be not sold within the year, he would pay the debtor such further sum as should be awarded by arbitrators, is not a mortgage, but a sale, and cannot be avoided by proof of usury. Baker v. Thrasher, 4 Den. (N. Y.), 493.

A conveyance to one who agreed to pay off incumbrances, and to reconvey on being repaid, held, not a mortgage. Grimstone v. Carter, 3 Paige, 421; Flagg v. Mann, 14 Pick. 467.

But where the debt continues from the vendor to the vendee, held, a mortgage. Jones v. Brittan, 1 Woods, 667; Hall v. Van Cleve, 11 N. Y. Leg. Obs. 281; Farm. L. & T. Co. v. Carroll, 5 Barb. 613; Lawrence v. Farm. L. & T. Co. 13 N. Y. 200, 642.

A transfer as security for the payment of money, or as security for a debt, is a mortgage. Breese v. Bangs, 1 E. D. Smith, 474; Parks v. Hale, 2 Pick. 206,

220*] "with lawful interest thereupon, *at "any time on or before the said first day of "July, which shall be in the year 1790, in "trust, immediately upon the payment being "made, to reconvey to him the said Robert "Alexander and his heirs forever, by good and "sufficient deeds in law, all the title which by "virtue of these presents passeth to them the "said" (trustees) "or any of them, of, in and "to the said residue of the said moiety, except "as before excepted, herein before granted and "confirmed unto them." Robert Alexander then covenants that he has good title in fee-simple to the land conveyed; and that the 20 acres shall be laid off in a certain situation contiguous to other land of Lyles, and by certain metes and bounds therein described. The trustees then covenant, that they will well and truly execute the trusts reposed in them, by reconveying the land to Robert Alexander, if he should pay the money and interest on or before the 1st of July, 1790, or by conveying it to Lyles, if Robert Alexander should not pay it by that day. Robert Alexander then covenants with Lyles, that he will make further assurance, &c., both as to the 20 acres and as to the residue of the moiety, if the trustees should convey it to him. He then covenants to warrant the 20 acres to Lyles against the claims and demands of all persons whomsoever. This deed did not contain any covenant on the part of Alexander to pay the 700*l.*

On the 19th of July, 1790, the trustees, by deed of that date, reciting the deed of the 20th of March, 1788, and that Lyles had represented that R. Alexander had not paid the money, and had required them to execute the trust, conveyed the residue of the undivided moiety in fee to Lyles, in consideration of the covenants, agreements, and trusts in the former deed contained on their part to be performed, and in consideration of 700*l.* mentioned in the said former deed to have been paid by Lyles to Alexander.

On the 23d of August, 1790, Lyles, by deed of that date, after reciting the title of Robert Alexander to the undivided moiety of the 400 acres of land, and his deed of the 20th of March, 1788, to Lyles and the trustees, and that Alexander failed to pay the 700*l.* on the 1st of July, 1790, and that the trustees, by their *deed [*221 of the 19th of July, 1790, had conveyed the land in question to Lyles, in consideration of 900*l.* paid him by Richard Conway, conveyed the 20 acres, and the residue of the undivided moiety of the 400 acres, and all his right, title, interest, use, trust, property, claim, and demand, in and to the same, by force of the said indenture, and all deeds, evidences and writings in any manner or way touching the same, and the right and privilege of proseeuting in the name of Lyles (if at any time judged necessary by Conway, his heirs or assigns), any actions at law for the breach of any of the covenants in the said indenture contained: To have and to hold all and singular the premises thereby granted, with the appurtenances, and all the estate, right, title, use, trust, interest, property, claim and demand of him, the said W. Lyles, thereto, by force and virtue of the aforesaid indentures to Conway, his heirs and assigns, to his and their use forever; with a special warranty against the claims of Lyles and his heirs and assigns only.

On the 17th of January, 1793, Robert Alexander made his will, and after devising specifically a number of tracts of land and moieties of tracts by name and description, to his son Robert, devised all the rest and residue of his estate, real and personal, to his son Walter, the complainant. Robert Alexander, the testator, died in February, 1793. The land in question was not specifically devised by his will, and Walter, the complainant, obtained title under the will to several other tracts not specifically devised.

The complainant became of full age in November, 1803, and brought this suit in 1807. The deposition of W. Lyles was taken on the part of the defendants. He testified, that Robert Alexander was not indebted to him at the time of the contract for the land. No part

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211; Fowler v. Rice, 17 Pick. 100; Betton v. Avery, 2 Root, (Conn.) 279; Carr v. Carr, 4 Lans, 314; Aff'd. S. C. 52, N. Y. 251; Stoddard v. Whiting, 46 N. Y. 627; Genet v. Davenport, 56 N. Y. 676; Odell v. Montross, 68 N. Y. 499; Peugh v. Davis, 6 Otto, 331; Andrews v. Hyde, 3 Cliff. 516; Amory v. Lawrence, 3 Cliff. 523.

Parol evidence admissible to prove absolute deed to be a mortgage. Peugh v. Davis, 6 Otto, 331; Andrews v. Hyde, 3 Cliff. 516, 523; Clark v. Henry, 2 Cow. 324; Slee v. Manhattan Co. 1 Paige, 48; Whitbeck v. Kane, 1 Paige, 202; Van Buren v. Olmsted, 5 Paige, 9; Washburn v. Merrills, 1 Day, 139.

An absolute deed and a defeasance executed at same time, or as part of same transaction, constitute a mortgage. Weed v. Stevenson, Clarke, (N. Y.) 166; Lane v. Shears, 1 Wend. 433; Harrison v. Philips' Academy, 12 Mass. 456; Newhall v. Burt, 7 Pick. 157; Rice v. Rice, 4 Pick. 349; Erskine v. Townsend, 2 Mass. 493; Scott v. McFarland, 13 Mass. 309; Nugent v. Riley, 1 Met. 117, 119; French v. Lyon, 2 Root, (Conn.) 69; Decker v. Leonard, 6 Lans, (N. Y.) 264; Wright v. Shumway, 1 Biss. 23; Brockway v. Wells, 1 Paige, 617.

Where land is conveyed and consideration paid, a written agreement, by the grantee, as part of the transaction that he will account to the grantor for a portion of the profits realized by him on a resale of the land within a certain time and requiring him to sell if a specified price can be obtained, does not constitute the transaction a mortgage. Macauley v. Porter, 71 N. Y. 173.

That a deed absolute in its terms was intended as a mortgage, may be shown, not only by a defeasance in writing, but by parol evidence, as declarations of grantee. Peugh v. Davis, 2 McArthur, 14; S. C. 6 Otto, 331.

A deed, with power of sale, to secure payment of a debt, whether made to the creditor or a third person, is, in equity, a mortgage, if there is left a right to redeem on payment of such debt. Shillaber v. Robinson, 7 Otto, 68.

A person holding an absolute conveyance, with no other right than a lien for a given sum, who sells the land to innocent purchasers, must account to the owners of the equity of redemption for all he receives beyond that sum. *Idem.*

An action to have a deed declared a mortgage, and for a reconveyance on payment of the debt, will lie. Marvin v. Prentice, 49 How. Pr. R. (N. Y.). 385.

If conveyance be absolute on its face, though it be a mortgage as between the parties, a *bona fide* purchaser from the mortgagee, who has paid the purchase money will be protected. The mortgagor's remedy is against the mortgagee. Whittick v. Kane, 1 Paige, 59; Grimstone v. Carter, 3 Paige, 421.

But a subsequent purchaser with notice that deed is intended as a mortgage, has no greater interest than the equitable mortgagee has. He stands in place of the equitable mortgagee. Williams v. Thorn, 11 Paige, 459; Amory v. Lawrence 3 Cliff, 523.

of the money was advanecd by him as a loan to be secured by mortgage. He was no lender of money, and would not have lent Alexander the money on mortgage. Alexander was generally reputed not punetual in paying his debts, and rather too fond of law, and at the time of the contract for the land was confined in jail for a large debt, and sent several times to Lyles, and urged him to buy the land. Lyles then resided 222*] *on land adjoining the twenty aeres; and his house was very near the line. He wanted the addition of about 20 acres, and was not anxious to have any more. Alexander was more willing to sell his whole residue of the moiety of 400 aeres than to sell a part, his objeet being to raise a eonsiderable sum to pay the debt for which he was in prison. It was agreed that the 20 acres should be sold absolutely, and the residue should be sold eonditionally, as otherwise Lyles would not advanee the money. The 20 aeres were purehased absolutely, to suit the eonvenienee of Lyles, and the residue was purchased conditionally, to suit Alexander. Lyles was determined to advanee no money on any bargain which should make it necessary to go into eourt to get it baek. The eondition was understood by both to be, that if he paid the money by the time limited, the trustees were to reeonvey the land to Alexander, but otherwise they were to eonvey it to Lyles in fee-simple, and he was to have the land thereafter absolutely to his own use forever. He sold it as soon as he eould after he left Alexandria, to get baek his money. He received from Conway 900*l.* at the date of the eonveyanee, or a few days after. Alexander never made any claim upon Lyles for any part of the land, and never expressed to him any dissatisfaction with the sale although he saw him frequently afterwards. Alexander was not in confinement when the trustees made their deed to Lyles. No part of the land was cultivated, and no formal possession delivered.

The deposition of Ch. Lee, Esq., who drew the deeds of the 20th of March, 1788, and the 19th of July, 1790, stated that Lyles eonsulted him about the bargain with Alexander, and represented that Alexander wanted a eonsiderable sum of money to pay a debt which was pressing, and offered to sell some land, but would not sell the whole of it absolutely, but was willing to sell part of it absolutely, and the residue was to be conveyed to trustees, in trust, to convey the fee to Lyles, if a eertain sum of money was not paid by a certain day; and if it was, the trustees were to reconvey to Alexander. The deponent was asked if such a eontract was lawful, or would be deemed in law only a mortgage; and gave it as his opinion that the parties might make such a eontract, and that it eould not be considered a mortgage. Lyles intimated that if that was 223*] not very clear, he *would not have anything to do in the business. That he would not, on any terms, make a bargain with Alexander, if he should be obliged to go into a court of equity about it, which might be the case if there should be a mortgage; that Alexander was well known to be troublesome and fond of law. The deponent was requested to draw such instruments as would place the eontraet in the state of a conditional purehase of a part of the land, and with this view he drew the writing. He is certain that Lyles consulted him as to the nature and effeet of the contract, and did not intend to have a deed in the nature of a mortgage, but of absolute sale of a part, and of a eonditional sale of the other part of the land, and such was the deponent's intention when he drew the deed. That he afterwards drew a deed of conveyance from the trustees to Lyles, to carry into effeet their trust, and delivered it to Lyles to carry to the trustees. Lyles informed him that one of the trustees refused to exeeute the deed, unless Alexander would signify his eonsent, and asked whether a verbal consent would not do. The deponent sketched a note in writing for Alexander to sign, signifying his consent, and was afterwards informed that the trustees were satisfied, and did execute the deed, but he does not know whether Alexander gave his consent. Lyles was not easy in his pecuniary affairs, and he never knew him lend a large sum upon mortgage. Alexander was a bad manager of his estate, was generally needy of money, and not punetual in payment of his debts, though his landed estate was really of great value.

The answer of the executors does not admit the deed to be a mortgage, and states that Conway began to make expensive and permanent improvements on the land in the summer of 1791; that Alexander had an opportunity of seeing part of them, and probably did see them, and made no objeetion as they believe.

It appeared in evidence that the land had lately been sold for more than 20,000 dollars; but that it was very poor, much broken by gullies and exhausted, when Conway began his improvements. There was also evidenee tending to show that it was then worth more than he gave for it.

The eourt below being of opinion that the deed was *to be considered as a mort- [*224 gage, directed an account to be taken of the value of the permanent improvements, and the original sum advanecd by Lyles and interest, and of the rents and profits, which being done, it appeared that the complainant would have to pay the sum of 4,943 dollars to redeem the land; and the eourt aeeordingly decreed a release upon the payment of that sum.

From this deeree the defendants appealed to this eourt.

C. Lee, for the appellants.

The only question is, whether this is a case of mortgage. The bill does not state fraud or oppression. 1. As to the deed itself, the question is whether it be a defeasible purehase or a redeemable mortgage.

It sets forth the eonsideration of 800*l.* as one entire sum. There was no prior debt due to Lyles. That allegation of the bill is disproved; and unless there was an old debt, or an aetual loan, there eould be no mortgage. It may as well be a mortgage of the 20 acres as of the residue. If both eontraets were not aetual purehases, the parties would have required different instruments. All instruments are to have a reasonable eonstruetion aeeording to the intent of the parties. One distinguishing mark of a mortgage is a eovenant for the repayment of the money. But this deed contains no such eovenant. It was purposely omitted, that it might not be a mortgage. The whole question is as to the intention of the parties. Lyles had

no personal remedy. If the land should fall in value, it was his loss. If there had been a valuable house upon the land, which had been destroyed by fire, it would have been the loss of Lyles. It was not reasonable that Alexander should have the chance of gain, but uot of loss. It was in his power to compel Lyles to take the land, by neglecting to pay the money on the day. Another circumstance showing the inteution of the partics is, that Alexander covenanted to make further assurance, if required, whenever the trustees should have conveycd the land to Lyles.

225*] *It was not inteuded as a security for money to Lyles, but a mere right in Alexander to repurchase until a certain day. A court of equity cannot change the agreements of parties.

Iu the case of *Tasburgh* v. *Echlin* (4 Br. Parl. Ca., 242), cited in Powell on Mortgages, 174, there had been a bill to foreclose, which clearly showed the intention of the purchaser to consider it as a mortgagc. But the House of Lords decided it to be au irredeemable purchase, and not a mortgage. That was an assignment, by lease and release, of a revcrsion expectaut on a lease for years, of which 43 were yet to come, in consideration of 200*l.* paid by Sir John Eustace to Charles Tasburgh, in trust for John Tasburgh, dated in 1681. In the indeuture of release thcre was a proviso, that if Sir John Eustace should pay Charles Tasburgh, at the cnd of 5 years, 200*l.* with interest, it should be lawful to him to re-enter and enjoy in his former right ; but if he should fail to pay within the time limited, the estate of Charles should be absolute as well in equity as in law, and that Sir John and his heirs should be forever debarred from all right and relief in equity, against the tenor of the said release; and Sir John did thereby, for himself and his heirs, release to Charles Tasburgh, his hcirs and assigns forever, all his right in equity to redeem thc premises, iu case of failure of payment as aforesaid ; and there was no covenant in the deed for the repayment of the money, or the interest by the grantor, as is usual in mortgages.

After the 5 ycars, John Tasburgh exhibited a bill, in 1687, against Sir John Eustace praying payment at a ccrtain day, or that the conditional estate of Charles (in casc it should be adjuged a defeasible or redeemable cstate), should be made absolute, and that Sir John might be foreclosed of all equity of redemption. This bill was takcn for confessed, and a decree in December, 1688, that he should be foreclosed, unless payment were made of principal, interest and costs, before December, 1689.

Sir John acquiesced undcr this dccree for 18 years, when he died. John Tasburgh died in 1691, and Henry Tasburgh succeeded to his **226***] estate, and in 1722 demised *the premises to M'Namara. In 1723, the heirs of Sir John Eustace exhibited a bill, alleging that the decree for foreclosure had becn obtained by surprise, fraud and imposition, and praying it might be reviewed and reversed, which was done by the Court of Chancery in Ireland, who decrced that Henry Tasburgh should release to the heirs of Sir John, upon payment of the principal, interest and costs. From this decree Heury Tasburgh appealed to the House of Lords, who reversed it and dismissed thc bill.

The principle upou which this case was decided by the House of Lords is supposed by Powell to be, that the contract was to be considered as a couditional purchase, and not a mortgage.

And in the case of *Barrell* v. *Sabine* (1 Vern., 268), the Lord Keeper said, "he thought, that "where there was a clause or provision to re-"purchase, the time limited ought to be pre-"cisely observed."

In the case of *Chapman* v. *Turner*, (1 Call. 192,) Judge Pendleton, in delivering his opinion, said: "As on the oue hand the Chancellor "will not permit a real mortgage to be made "irredeemable by the act of the scrivcner, so "neither on the other hand will he suffer real con-"ditional or defeasiblc sales to be changed into "mortgages by the like acts. The real intention "of the parties governs him. Iu a defeasible pur-"chasc, the condition must be strictly per-"formed at the day, or no relief will be granted; "because it docs not admit of compensation "for the risk. If the thing pcrish the next day, "it must be the loss of the purchaser, he having "no covenant, or even implied promise, to re-"turn the money iu that event; and we are "taught by a maxim in equity, that in these "casual cases eventual loss or gain must accrue "to, or fall on him who runs the risks."

In the preseut case, both parties confided in the trustees. Their deed, after the failure of Alexander to pay the ready money, was as valid as if he himself had theu released all equity of redemption, or had made an absolute deed to Lyles.

2. As to the evidence in the case. It appears that *the trustees refused to execute [***227** the deed until they had the consent of Alexander. A writing was drawn for him to sign, signifying his assent. The trustees executed the deed. The probability is that they had his assent in writing. He knew that the deed had beeu executed and he acquiesced. He saw the expensive improvements madc by Conway, and he was silent. Conway contiuued makiug substantial and permanent improvements for 17 years, without keeping any account either of the cost of his improvements, the expenses of cultivation, or the value of the crops. It has now become impossible to account. Justicc cannot uow be done. In 2 Eq. ca. ab., 599, it is said, that "Equity will not enlarge the time "for the mortgageor to redeem after six years "acquiescence undcr a forfeiture by his own "consent, especially if there be auy improve-"ment on the estatc." And again, "There "shall be no redcmption after long possession, "settlements made, aud estate improvcd."

In the case of *Hollingsworth* v. *Frye*, Judge Patcrson, in delivering his opiuion, said, that the time of payment was material, a cardinal poiut; and the party ought not to be suffered to lay by aud take the chance of the rise of value.

Lyles's giving a special warranty only is no evidencc that he considered it as a mortgage. The boundary was unsettled, and then in a course of litigation, which was a sufficient reason for his not giviug a general warranty. And that Alexauder did not consider it as a mortgage is evident from the circumstance that he did not mention this laud iu his will, although he specified almost every tract of

land in which he had any interest, especially that part of this very tract which he had previously contracted to sell to Baldwin Dade.

This deed, therefore, was neither a mortgage *per se*, nor was it the intention or understanding of either of the parties that it should be so considered; but conveyed a good, absolute, and indefeasible estate, both at law and in equity, to W. Lyles, and his heirs and assigns.

Taylor, contra,

Admitted the distinction between an agree-
228*] ment to *repurchase, and a mortgage. But in this case, if it be not a mortgage, it was a most unconscionable bargain. The evidence shows that at the time of the bargain, other land less advantageously situated, and not better in quality, was worth three or four times the price which Lyles paid for this.

As to the question of mortgage. "Every "contract for the receiving of money, by the "conveyance of a real estate to the lender, not "made in contemplation of an eventual arrange-"ment of property, is, in equity, deemed a "mortgage." (*Mellor* v. *Lees*, 2 Atk. 495.) And all provisos and stipulations between the parties, tending to alter, in any subsequent event, the original nature of the mortgaged interest, or prevent the redemption of the estate pledged, upon payment of the money borrowed, with interest, are void. For were any such agreement suffered to prevail, they would put it in the power of every mortgagee to take advantage of the necessities of the mortgageor by inserting restrictive clauses to prevent a redemption of the estate pledged, unless upon terms injurious to the latter. In equity, therefore, the right of redemption is considered as inseparably incident to every contract founded on a mortgage, and can no more be restrained than the power of tenant in fee-simple to alien generally, or of tenant in tail, to suffer a recovery; it being a maxim in equity, that the same estate or interest cannot be a mortgage at one time, and at another time cease to be so. (Powell on Mortgages, 146). Nor will an agreement to make the conveyance absolute upon payment of a further sum, if the money lent be not paid at the day appointed, alter the case; such stipulations being deemed unconscionable; because a man ought not to have interest for his money and a collateral advantage besides; nor may he clog the redemption by any bye agreement. (1 Vern., 488, *Willet* v. *Winnel;* Powell, 152.)

Powell, in concluding his observations upon the case *Tasburgh* v. *Echlin* (p. 183), says: "But in all these cases where the equity of redemption is rebutted by agreements of this kind, and the transaction is considered as a conditional purchase, the intention of the parties at the time of contracting must, I apprehend, be clearly proved or necessarily implied from the circumstances
229*] *attending it; otherwise the general rule will not be departed from."

It is not necessary, to constitute a mortgage, that it should contain a covenant for the repayment of the money. 3 Atk. 280, *Lawley* v. *Hooper;* where the Lord Chancellor says that all Welch mortgages are without this covenant, and so are most copyhold mortgages. So in the case of *King* v. *King* (3 P. Will. 358), it was decided that every mortgage, although there be no covenant nor bond to pay the money, implies a loan, and every loan a debt; as in the case of the mortgage of a ship, which was taken at sea, although there was no covenant to pay the money, yet the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. And the Lord Chancellor said it was so in the case of Welch mortgages, where no day certain is appointed for the payment, but the matter left at large. The case of *Howell* v. *Price* (1 P. Will. 291), was upon a Welch mortgage, viz.: conveyance in fee of an estate in Wales, worth 52*l* per annum, under a proviso to be void if the mortgageor, his heirs or assigns should pay to the mortgagee or his heirs, 300*l*. on any Michaelmas day, giving six months' notice, and the mortgagee to have the rent which should then be in arrear; but there was no bond or covenant to pay the money. Yet it was decreed that it was a debt which the executors should pay. The case of *Ross* v. *Norwell* (1 Wash. 14) shows that a covenant to pay is not essential.

A deed of trust is a modern invention by which the equity of redemption is supposed to be foreclosed, without the aid of a court of chancery. But the present differs from the modern deed of trust. In that there is a public sale, and the surplus is paid to the mortgageor, which, if the sale is fairly and judiciously made, may be considered as the fair value of his equity of redemption. Yet the efficacy of such a sale as that to pass an irredeemable estate is doubted. (Powell, 19.) But here, the trustees were the mere instruments to convey. They had no powers to do anything but convey, upon the payment or non-payment of the money. Here was no provision made, to ascertain the value of the equity of redemption, or mitigate the severity of the contract. The intervention of the trustees did not alter the case, *or make [*230 it more or less a mortgage than it would have been without them.

It is in effect the same as if the deed had been directly from Alexander to Lyles, with a proviso that it should be void if Alexander should pay the money on the day appointed. Such a deed would unquestionably have been considered as a mortgage. It has been shown above, that a covenant to pay was not necessary; and a covenant for further assurance is usual in mortgages, and is therefore no evidence that this conveyance is not to be considered a mortgage. If, then, it is to be considered as a mortgage upon the face of the instrument, is the extrinsic evidence so clear as to rebut the equity of redemption?

Why was there a distinction made between the conveyance of the 20 acres and that of the 140? Why were the 20 conveyed to Lyles, and the 140 to the trustees? The answer apparent upon the face of the transaction, and expressly avowed by Lyles himself in his deposition, is, that Lyles did not want to purchase, and Alexander did not want to sell, more than 20 acres. Lyles says that the 20 acres were conveyed absolutely to suit his convenience, and the residue was conveyed to the trustees to suit Alexander. As to the 140 acres, then, Lyles did not wish to purchase them, nor Alexander to sell them. If a sale and disposition of the land were not the object of the transaction, it could be nothing but a loan of money by Lyles, and a security upon the land by Alexander. This was evidently the substance of the negotia-

tion. And wherever there is a loan of money upon the seeurity of land, however, the transaetion may be disguised by the writings, it is substantially a mortgage. Lyles indeed admits his object to have been a loan of money, but says his intention was to have the means of getting back his money without going into a eourt of chaneery; that is, he wished to loan his money upon a real seeurity without allowing his debtor the right of redemption. It was an attempt to do that whieh eourts of equity have uniformly diseountenaneed; to devise a mode to defeat the equity of redemption where the transaction was really a loan of money upon a mortgage.

231*] *It is said Lyles had no personal remedy against Alexander, beeause there was no eovenant to repay the money. But the authorities already cited show that wherever the transaetion is really a loan, and the seeurity is inadequate, there is a personal remedy.

That Lyles eonsidered the land as a seeurity only, is evident from the eireumstanee that he received from Conway only his prineipal and interest, and assigned to Conway his right and title only, together with the title papers, and expressly assigned all his right of aetion against Alexander.

There is no evidence of acquieseence on the part of Robert Alexander, in the idea that this was an absolute sale. He died in January, 1793. Mr. Lyles himself states that he does not know whether Alexander knew of the deed of the 19th July, 1790. Conway's agreement with Charles Alexander respeeting a division of part of the land which they held in common, was in April, 1791. No improvements eould have been made before that date. One of the witnesses states that he began to diteh the land in March, 1791. It is probable he meant Mareh, 1792. If so, there were only ten months in which Alexander eould have seen any improvement on the land; and what he did see was not ineonsistent with the nature of the estate of a mortgagee in fee in possession. The buildings, &e., were not ereeted until after Alexander's death. The digging of a ditch and ereeting of a post and rail fenee upon a part of the land was not decisive evidence that Conway elaimed an irredeemable estate; and there is no evidence that even that small improvement was seen by Alexander. It is only stated by the witnesses that he might have seen it at a distance as he passed along the road from his house to Alexandria. The complainant did not become of full age until November, 1803, and brought suit in 1807. His guardian did not know the nature of Conway's title. The length of time is no bar to the eomplainant because he has been under a legal disability. (Powell, 407, 8, 11, 12.)

It is said that Robert Alexander did not speeify this land in his will, although he mentioned that part of the traet which was in the pos-

232*] session of Baldwin Dade; *and from this circumstance an infcrenee is drawn, that he eonsidered it as an absolute sale, and not a mortgage. But the reason why he mentioned that part of the land which was in possession of B. Dade was, that he devised it to his son Robert—and it will be perceived by his will, that he specified everything by name whieh he devised to Robert, but nothing whieh he devised to Walter, the complainant—for after making speeifie devises to Robert, he says: "I "give to my son Walter, and his heirs, forever, "all the rest and residue of my estate both real "and personal." So that if his not specifying this land be evidenee that he thought he had no interest in it, his not specifying the half of his estate which he intended for his son Walter, is evidence that he thought he had no interest therein. No sueh inferenee can be drawn from his silenee as to this land, which would not apply to one half of his estate.

There is no evidenee of Alexander's understanding of this transaetion. His eireumstanees were embarrassed up to the very time of his death, so that he never had it in his power to make an offer to redeem, It is evident from the deed itself that he expeeted to be able to redeem in about two years from the date of that instrument; and the insertion of sueh a clause was evidently intended for his benefit, and shows that he did not wish to sell. He was in prison for debt. His objeet was to get money to relieve him from eonfinement; and the stipulation for a time of payment is evidenee that he meant to borrow.

There is no evidence that this was not a negotiation for a loan of money. Mr. Lyles, in his deposition, does not say that the money was not advanced by him as a loan; but says it was "not advaneed as a loan to be seeured by mortgage;" and that he would not have loaned him money "on any mortgage by him." That he "was determined to advance no money on any "bargain whieh should make it neeessary to go "into court to get it back." That he sold the land as soon as he eould after he left Virginia, "for the purpose of getting baek his money." All this shows that he had no objection to lend the money, but he wished to get real security without any equity of redemption. And it appears he employed eounsel to devise a plan for that purpose; a *purpose which is never [***233** eountenaneed in a eourt of equity.

The ease of *Chapman* v. *Turner*, which has been eited, was a eontract respecting personal property, and depended upon its own peeuliar circumstanees, none of whieh resemble the present.

The ease of *Tarsburgh* v. *Echlin* was a sale or mortgage of a reversion. There had been a decree of forelosure, and a long aequieseenee under it. It does not appear upon what grounds the House of Lords refused to review that deeree; whether it was beeause it had been so long acquiesced under, or whether upon the eonstruction of the original conveyanee. But the decision of the Court of Chaneery in Ireland was elearly upon the ground of its being a mortgage.

In the case of *Robertson* v. *Campbell & Wheeler* (2 Call., 428), Judge Pendleton, in delivering the opinion of the Court of Appeals of Virginia, says: "It must often happen, in disquisitions "of this sort, that there will be a difficulty in "drawing the line betweeu these two sorts of "eonveyances" (mortgage and conditional sale.) "The great *desideratum* which this court has "made the ground of their decision is, whether "the purpose or the parties was to treat of a "purchase, the value of the commodity con-templated, and the priee fixed? Or, whether "the objeet was the loan of money and a secur-"ity, or pledge, for the repayment, intended."

The cases cited from 2 Eq. ca. ab. only show that a court of chancery will not decree a redemption after a forfeiture by consent of the mortgageor, and improvements by the mortgagee, and acquiescence by the mortgageor.

Upon the whole, then, this case appears to have been originally a loan of money upon real security, with an attempt to defeat the equity of redemption; and not a real bargain, with a view to the purchase of the land. The want of a covenant to repay the money does not alter the nature of the original transaction, and the same evidence which appears in this case would **234***] have *supported a personal action by Lyles against Alexander upon the loan of the money, in case the title of the land had failed, or it had by any other means become an inadequate security.

Jones, in reply.

It must be admitted, that it was competent for the parties to make a conditional sale, and the only question is, whether they have done so. The depositions of Mr. Lyles and Mr. Lee show, that it was their intention to make a conditional purchase, and not a mortgage. If the instrument does not create a conditional sale, it must have been the mistake of the person who drew the deed.

It is true that no covenant in a mortgage can clog the equity of redemption. But if the transaction be not a mortgage, that principle does not apply. Wherever a deed is as collateral security, there must be a personal remedy. And it is no mortgage, unless it contain a personal obligation, or show it to be a loan. In the present deed there is no recital acknowledging a debt, and no covenant to pay; but the money is expressly acknowledged to be received as purchase money. It was entirely within the discretion of Alexander to pay the money or not at the time.

The evidence justifies the inference that the deed from the trustees to Lyles was made with the consent of Alexander; and being by consent, it is equivalent to a foreclosure by a court of equity. Even if it were a mortgage originally, it might by subsequent assent become absolute. And if at the time of the release of the equity of redemption, a note be given that the releaser should have the lands conveyed to him, upon payment of what was given for the lands within a year, such payment having been neglected for several years, there shall be no redemption. (*Endsworth* v. *Griffith*, 2 Eq., ca. ab. 595, c. 6.)

In all the cases cited to show that a covenant to pay the money is not necessary in a mortgage, there is some other circumstance showing a loan **235***] of money, or designating *the instrument to be a mortgage. But in the present case there is no such circumstance.

March 14th. *All the Judges being present,*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison of the third part. Robert Alexander, after reciting that he was seized of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of 700*l.* with interest from the said 20th of March, 1788. And if the said Robert Alexander shall pay the said William Lyles, on or before that day, the said sum of 700*l.* with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants, that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of 700*l.*; and to re-convey to Robert Alexander in the *event of payment. Rob- [***236** ert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of 700*l.*, convey the said land in fee to William Lyles.

On the 23d of August, 1790, William Lyles, in consideration of 900*l.*, conveyed the said 20 acres of land and 140 acres of land to Richard Conway with special warranty against himself and his heirs.

On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land.

Soon after this deed of partition was executed, Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense.

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade, but does not mention the land sold to William Lyles.

The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is, whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed, by that deed, to trustees, which sale became absolute by the non-payment of 700*l.* with

interest on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed.

To deny the power of two individuals, capa-
237*] ble of *acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action, at law, for the recovery of the money, certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a
238*] mortgage, clear proof to *the contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the 700*l.* on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, s not to be entirely disregarded, that the 20 acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as at least possible that a division might be useless.

Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage.

It is certain that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction.

The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage.

The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a *syllable in [*239
the cause intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction, respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource.

To this circumstance the court attaches much importance. Had there been any treaty—any conversation respecting a loan or a mortgage—the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a court of chancery will invariably defeat.

His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles without some communication with Robert

Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mort-
240*] gage, he would *naturally have resisted the conveyance, and it is probable that the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale, on the part of Alexander, was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional, implies an expectation to redeem.

241*] *A conditional sale made in such a situation at a price bearing no proportion to the value of the property would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistable proof that a sale could not have been intended. If lands were sold at 5*l.* per acre conditionally, which, in fact, were worth 15*l.* or 20*l.* or 50*l.* per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated.

The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times that these sales cannot be taken as a sure guide.

That twenty acres, part of the tract, were sold absolutely for 5*l.* per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court that the decree of the Circuit Court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.

Decree reversed.

Cited—11 Pet. 405; 12 How. 147, 148, 151; 19 How. 299; 2 Curt. 398; 2 Wood. & M. 384, 443, 446; 3 Wood. & M. 295; 1 McLean 182; 2 Sum. 534, 537.

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*DUNLOP *v.* MUNROE. [*242

Present—All the Judges.

When the issue is taken upon the neglect of the postmaster himself, it is not competent to give in evidence the neglect of his assistant. When it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office. In order to make a postmaster liable for negligence, it must appear that the loss or injury sustained by the plaintiff was the consequence of the negligence.

Parol evidence cannot be given that one set of written instructions from the Postmaster-General, superseded another set of written instructions.

ERROR to the Circuit Court for the District of Columbia, sitting at Washington, in an action wherein James and John Dunlop were plaintiffs, and Thomas Munroe, the deputy-postmaster at Washington, was defendant.

The declaration, after having been several times amended, contained nine counts.

1. The first count was as follows: Thomas Munroe, late of Washington county, gentleman, was attached to answer unto James Dunlop and John Dunlop in a plea of trespass on the case, &c., whereupon the said James and John, by Francis S. Key, their attorney, complain, that whereas, by the laws of the United States of America, relative to the post-office establishment of the United States, and of the post-roads within the United States, it was enacted,

NOTE.—Postmaster-General not liable for the loss of a letter, containing exchequer bills, by the negligence of his deputies. Lane v. Cotton, 1 Ld. Raym. 646; S. C. 12 Mod. 482. Nor for money stolen from a letter by one of the sorters of letters. Whitfield v. Despencer, Cowp. R. 754; Schroyer v. Lyneh,

that there should be established, at the seat of the government of the United States, a general post-office, under the direction of a Postmaster-General, and that post-offices should be established; and that postmasters should be appointed by the said Postmaster-General, at all such places as should appear to him expedient, on the post-roads which then were, or might thereafter be established, and the carriage of the mail on all such post-roads provided for; and that every postmaster, so appointed by the said Postmaster-General, should keep an office, in which one or more persons should attend for the purpose of performing the duties thereof; and a post-road was directed to be established from Passamaquoddy, in the District of Maine, to St. Marys, in Georgia, within the said United States; and the city of Philadelphia, in the state of Pennsylvania, and the city of Washington, in the District of Columbia, and the town of Petersburg, in the state of Virginia, were places through which the said post-road was directed by law to pass. And whereas, in pursuance of the said laws, a general post-office was established at the seat of government of the United States, under the **243***] *direction of a Postmaster-General, duly appointed and qualified, and a post-road established within the United States from Passamaquoddy, in the District of Maine aforesaid, to St. Marys, in Georgia aforesaid; and the said city of Philadelphia, and the said city of Washington, and the said town of Petersburg, were places through which the said road did pass, and post-offices were duly established at the said places, so as aforesaid on the said post-road, by the said Postmaster-General; and postmasters by him duly appointed and qualified to attend to the duties of the said post-offices, and the carriage of the mail of the United States on the said post-road provided for by the said Postmaster-General agreeably to law; and the said Thomas Munroe was, by the said Postmaster-General, duly appointed and qualified the postmaster at the said office, so as aforesaid established at the said city of Washington on the said post-road, and between the city of Philadelphia and the town of Petersburg aforesaid, also on the said post-road, and as such was bound to attend to and perform all the duties thereof, and to receive, make up, and distribute and forward the mails of the said United States, and all the letters and packets contained therein which should arrive or come to his said post-office so by him kept as aforesaid at the said city of Washington, to all such places on the said post-road to which the same were directed and addressed; and the said Thomas so being, as aforesaid, postmaster at the said post-office, so as aforesaid lawfully established at the said city of Washington, on the post-road so as aforesaid also lawfully established, and post-offices being, also, in like manner, lawfully established at the said city of Philadelphia, and the said town of Petersburg, on the said post-road, and postmasters duly appointed and qualified, and attending to the duties of the said post-offices, on the thirtieth day of July, in the year eighteen hundred and six, the said James and John being possessed of a large sum of money, to wit: the sum of two thousand dollars current money of the United States of their own proper money, and being so possessed thereof, on the same day and year, did inclose the same in bank notes by means of their agents in that particular, (a certain Walker and Kennedy,) in a letter sealed, and directed to the said James and John at Petersburg, in Virginia aforesaid, on the post-road aforesaid, and the said sum of money, so sealed and inclosed in *said letter so directed, did place in the [***244** post-office in the said city of Philadelphia, so as aforesaid established on the said post-road, to be forwarded on the said post-road, in the mail of the United States to the said town of Petersburg on the post-road aforesaid, and the said letter, directed as aforesaid, and the money in bank notes as aforesaid, to the said amount, inclosed in the same, were accordingly, by the said postmaster at Philadelphia, and from the office there established as aforesaid on the said post-road, sent on and forwarded in the mail of the United States, on the day and year aforesaid; and did afterwards, to wit: on the first day of August, in the year aforesaid, arrive at the post-office of the said Thomas, postmaster, as aforesaid, in the said city of Washington, on the said post-road, in the mail of the United States, on the route to the post-office at Petersburg aforesaid, on the post-road aforesaid, and was, on the day and year last mentioned, at the county of Washington aforesaid, received by the said Thomas to be by him sent on and forwarded in the mail of the United States, on the said post-road, to the said James and John, at Petersburg, to whom the same was directed and addressed; yet the said Thomas, regardless of his said duty as postmaster, and wholly neglecting the same, did not send on the said letter, and the sum of money contained and inclosed in the same, to the said town of Petersburg, on the said post-road, in the mail of the United States, to the said James and John to whom the same was directed, as it was his duty to do; but the same letter and the said sum of money therein contained as aforesaid, were fraudulently and improperly secreted, withheld, and taken, in the said post-office, at the city of Washington aforesaid, by the said Thomas, or some other person employed by him, in his said office, so that the said James and John were prevented from receiving the same, and

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8 Watts, 453; Supervisors of Albany v. Dorr, 25 Wend. 440. Nor for the non-feasance of a deputy-postmaster, appointed by him. Martin v. Mayor, 1 Hill, 545.

A postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies, nor for the contents of a lost letter, unless he has been guilty of negligence, and the loss was the consequence of such negligence. Wiggins v. Hathaway, 6 Barb. 632.

Deputy-postmasters are not liable, except for loss caused by their own fault or negligence; and for that they are liable. Rowning v. Goodchild, 3 Wils. 443; Maxwell v. Mellory, 2 Bibb. 211; Christy v. Smith, 23 Vt. 663; Bolan v. Williamson, 2 Bay. 551; S. C. 1 Brevard. 181; 2 Pars. on Cont. 144.

A letter received by mail at a post-office, addressed to a young lady over eighteen, but under 21 years of age, which is claimed by her and also by her guardian, should be delivered to her. 13 Op. Att'y-Gen. 481.

Trover may be maintained in a justice's court, against a postmaster who improperly detains a newspaper, although the detention may be under color of the laws of the United States, and the regulations of the post-office department. Teall v. Felton, 1 Comst. N. Y. 537; affirmed, 12 How. 284.

the same letter, and sum of money, have been wholly lost to the said plaintiffs.

2. The 2d count was like the first in every particular, except that it states that the plaintiffs placed the letter inclosing the money in the post-office at Philadelphia, to be forwarded "without delaying the same a single post," and that it was received by the defendant at his office in Washington on the 1st of August, 1806, to be by him sent on and forwarded, without **245***] delaying the same a single *post, in the mail of the United States, &c., "yet the said "Thomas, regardless of his said duty as post-"master, and wholly neglecting the same, did "not, on the first day of August in the year "aforesaid, send on the said letter and the sum "of money contained and inclosed in the same, "to the town of Petersburg on the said post-"road, in the mail of the United States, which "left the city of Washington on the said first "day of August, in the year aforesaid, for "Petersburg aforesaid, as it was his duty and "in his power to have done; but the same let-"ter, and the said sum of money therein con-"tained as aforesaid, were by the negligence, "carelessness, and misconduct of the said "Thomas, in his said office aforesaid, utterly, "afterwards to them, the said James and John, "lost; by reason whereof the said James and "John, the sum of money so as aforesaid, con-"tained and inclosed in the said letter directed "and addressed as aforesaid, and the use and "possession of the same, have entirely lost; to "the great damage," &c.

3. The third count was like the first in every respect, except that instead of averring that the plaintiffs were possessed of a large sum of money, it avers that they were possessed of "certain property of great value, to wit: of "certain bank notes for the payment of money "to the amount of the value of two thousand "dollars, current money of the United States, "as their own property, and inclosed the same bank notes," &c., using the words "bank notes," in lieu of the words "sum of money" in the residue of the count. It contains also an averment of a demand and refusal of the defendant to deliver the letter and bank notes, whereby the same have been totally lost to the plaintiffs, whereof the defendant had notice.

4. The fourth count was like the first, except that it uses the terms "bank notes," instead of "sum of money in bank notes;" and instead of averring, that the letter and sum of money were "fraudulently and improperly secreted, "withheld and taken, in the said post-office," it avers that "the same letter and bank notes "were, by the negligence, carelessness, and mis-"conduct of the said Thomas in his said office, "lost," &c., and avers a demand and refusal to deliver them, whereby they have been totally lost to the plaintiffs, whereof the defendant had notice, &c.

246*] *5. The fifth count varied from the others considerably in the recital, respecting the establishment of post-roads and post-offices; but the principal difference consisted in an averment, that the postmasters, appointed by the Postmaster-General, were to perform their duties according to law, "and to the instructions of the Postmaster-General relative to their duty." That the post-office at Washington was a distributing office, and that it was the duty of the defendant, according to the instructions of the Postmaster-General then in force, to open the mail addressed "Southern;" and to distribute and re-mail the letters and packets into proper mails before the departure of the mail; and on no account to delay them a single post, by which it was in his power to send them in the regular course of the mail. It then avers, that the letter and post-notes were put into the post-office at Philadelphia on the 30th of July, and were from thence forwarded in the mail on the 31st, and arrived at Washington on the 1st of August, and were in the usual manner delivered and placed in the post-office at Washington, kept by the defendant, to be, by him, re-mailed, and sent on and forwarded in the mail of the U. S. to Petersburgh, to the plaintiffs; and were delivered and placed in the usual and regular course of the mail at and in the post-office at Washington aforesaid, "in time to be "re-mailed and sent on, according to the in-"struction and direction aforesaid of the Post-"master-General aforesaid, in the same day of "the arrival aforesaid, and by the same mail "which thereafter, and on the same day, de-"parted from the post-office aforesaid, in the city "of Washington aforesaid, with letters for the "town of Petersburgh aforesaid; by virtue of "which premises it was the duty of the defendant "on the said 1st day of August, in the year 1806, "at," &c., "to have distributed, re-mailed, and "sent on, or caused to have been distributed," "&c., "the said letter, containing the said bank "notes, to the town of Petersburgh aforesaid, in "the mail of the U. S. aforesaid, on the same 1st "day of August, in the year aforesaid, which "it was in the power of the defendant to have "done in the usual and regular course of the "business of his said office; nevertheless, the "said defendant, on the 1st day of August, in "the year aforesaid, at the county aforesaid, "regardless of his duty as postmaster as afore-"said, did not send on or forward, or cause to "be sent on or forwarded, *on the said [***247** "first day of August, in the year aforesaid, "the said letter containing the bank notes "aforesaid, to the town of Petersburgh afore-"said, in the mail of the U. S. aforesaid, which "left the said city of Washington on the said "first day of August, and which ought to have "received and carried the said letter, and bank "notes inclosed therein, to the post-office in the "said town of Petersburgh, but by reason of "his negligence and misconduct aforesaid, in "his said office on the said first day of August, the "said letter, and the said bank notes inclosed "therein as aforesaid have been afterwards "utterly, and ever since, lost to the plaintiffs."

6. The sixth count was like the fifth, excepting that it averred that the letter with the bank notes inclosed was received at the post-office in Washington, on the 1st of August, "by Henry "Whetcroft, then and there agent and clerk of "the defendant, duly authorized to perform "the duties of the said office for the defendant, "to be re-mailed and sent on," &c. "By vir-"tue of which premises, it was the duty of the "said defendant, postmaster as aforesaid, by "himself, his said agent, or some other per-"son, on the first day of August aforesaid, to "have distributed, re-mailed, and sent on the "said letter," &c., "in the mail of the U. S. "on the same 1st day of August, which it was

"in the power of the defendant, by himself or his "said agent and clerk, to have done,"&c. "Nev- "ertheless, the said defendant, on the said 1st "day of August," "regardless of his said duty "as postmaster, as aforesaid, did not by himself, "or his said servant and clerk, or any other per- "son, send on and forward, on the said 1st day "of August, the said letter," &e. "But by "reason of the negligence and miseonduet "aforesaid, in transacting the business of the "said offiee on the said 1st day of August," &c., "the said letter," &c., "have been afterwards "utterly, and ever sinee, lost to them, the said "plaintiffs," &c.

7. The seventh eount was like the sixth, excepting that it averred that the letter, &e., were received at the post-offiee in Washington, by William Hewitt, another agent, servant or clerk of the defendant.

8. The eighth eount charged, that the letter, **248***] &c., was *duly, by the earrier of the mail, plaeed in the office of the defendant at Washington, on the 1st of August, 1806, in time to be re-mailed and sent on by the mail of the same day, and that it was his duty, by himself or by his agents, or some of them, to have re-mailed and sent it on aeeordiugly by that mail, which he did not do, or cause to be done; but by reason of the negligenee and miseonduct aforesaid, iu his said offiee, on the said first day of August, the letter, &c., have been afterwards utterly, and ever sinee, lost to the plaintiff.

9. The niuth eount was like the eighth, excepting that it averred that the mail whieh left Washington for Petersburgh on the 1st of August (and which ought to have carried the plaintiff's letter), arrived safely at Petersburgh with all its letters, &e., "but the said defend- "ant did unduly, improperly, and negligently "delay, detain, and keep the letter aforesaid, "eontaining," &e., "in his said post-office uu- "til and after the departure of the mail afore- "said, whieh ought, as aforesaid, by the laws "and Postmaster-Geueral's instruetions afore- "said, to have earried and eontained the same "on the said 1st day of August; and the let- "ter and bank notes aforesaid, so as aforesaid "unduly detained, the said defendant did de- "lay, and keep in his said office for a long "spaee of time, to wit, until the departure of "the mail, whieh thereafter, to wit, on the 3d "day of August next following, left his said "office for the town of Petersburgh aforesaid, "but which never did arrive at the post-office "in the said town of Petersburgh, but was, "together with the letters and paekages con- "tained therein, and with the letter and bank "notes aforesaid of the said plaintiffs, thus im- "properly delayed and unduly forwarded, whol- "ly and entirely lost on its said route to the town "of Petersburgh aforesaid, and before its ar- "rival at the said post-office in the said towu of "Petersburgh; by reason of which said uudue, "improper and unlawful delay and detention, "negligence and miseonduet of the said Thomas "Munroe in his said post-offiee, the letter and "bank notes contained therein as aforesaid, "have been then, and ever since, utterly lost "to the plaintiffs."

To these nine eounts, there were eighteen pleas in bar.

249*] *1. The 1st plea was the general issue of not guilty, pleaded to all the counts.

2. The 2d plea was also pleaded to all the counts, and was, "that the said letter eontaining," &c., "was not brought to and delivered, "nor in any manner given in charge at the "said post-office at Washington, in the mail "of the United States, which, on the 31st of "July, 1806, left the post-offiee at Philadelphia, "and which, on the first of August uext en- "suing, arrived at the post-offiee in Washing- "ton, in manner and form," &c.; and of this he puts himself on the country, and the plaintiffs likewise.

3. The 3d plea was to the 1st, 2d, 3d, and 4th counts, and denied that the letter, &c., was received by the defendant, in manner and form, &e. Upon this plea issue was joined.

4. The 4th plea was to the 1st and 3d eounts, and denied that the letter, &e., was fraudulently seereted, withheld and taken, by the defendant, in manner and form, &c. Upon this plea also the plaintiffs joined issue.

5. The 5th plea was also to the 1st and 3d counts, and averred, that as to the defendants having personally received the said letter, &c., and as to his having fraudulently secreted, withheld, and taken the same, &c., he was not guilty; and of this he put himself upon the country, and the plaintiffs likewise. And as to the residue of the allegations, charges, and complaints of fraud and misconduct, in the two last-mentioned counts of the said declaration above, supposed to have been committed in the said post-office at Washington by some other person employed by the defendant in the said office, he says that the plaintiffs, their action aforesaid, to have, &e., ought not, because he says, that at the time when, &c., and always before and ever since, the defendant, in pursuanee of regulatious and instruetions duly made and issued by the Postmaster-General, took due precaution and exercised all reasonable eare, diligence and eireumspeetion, to eause all mails, letters and packets brought to the said office, to be duly sent on and forwarded aeeording to the destination of the same, and to prevent all frauds and embezzlements in the said *office, by selecting, [***250** appointing, and employing as clerks and assistants in the said offiee, and to attend in the said offiee at the regular hours directed by the Postmaster-General, for the purpose of perforuing the duties of the same, none but persons of competent skill and knowledge, of fair character, of known good repute for fidelity and honesty, and who, upon beiug so appointed and employed, and previous to entering upon the duties assigned them as aforesaid, or the execution of their trust aforesaid, had in pursuance of the act of Congress in such case made and provided, and in obedienee to the express instructions of the Postmaster-General, respectively taken and subseribed, before a magistrate, in due manner and form, the oath prescribed by the said aet of Cougress, and also the oath, in due mauner and form, as direeted by the Postmaster-General aforesaid; that is to say, an oath to support the eonstitution of the United States, and had respeetively transmitted to, and caused to be duly filed in the general post-office certificates, iu due form, of the said oaths so taken and subscribed as aforesaid. Aud the said defendant in fact says, that at the time when, &c., and for a long time before and after,

he had with due precaution and circumspection, and with all reasonable care and diligence, and in pursuance of regulations and instructions duly made and issued by the Postmaster-General of the U. S. selected and duly appointed and employed, two persons of competent skill and knowledge, of fair character and of known good repute for fidelity and honesty; that is to say, one Henry Whetcroft and one William Hewitt, as clerks and assistants in the said post-office, and to attend regularly, &c., for the purpose of performing the duties of the said office, and to whom, and to no other person or persons, were then and there entrusted, by the said defendant, the duties of receiving and opening the mails brought to the said office for distribution or delivery, and of receiving, distributing, re-mailing, and sending on, according to the proper destination of the same, all mails, letters, &c., there being then and there no other person or persons employed in the said office, to whom the defendant had entrusted any agency in the duties of the said office, or who were suffered by the defendant to inspect or handle any letters, newspapers, or other articles constituting a part of any mail brought, &c.; they, the said H. W. and W. H. **251***] upon being appointed and *employed as aforesaid, and previous to entering upon the duties, &c., having, in pursuance of the said act of Congress, and in obedience to the instructions and directions of the Postmaster-General aforesaid, respectively and duly taken and subscribed the oaths aforesaid, and duly transmitted to and caused to be filed in the general post-office, certificates, in due form, of the said oaths respectively so taken and subscribed as aforesaid; and the said defendant says, that if the said letter, &c., was in fact delivered and received, or in any manner given in charge at the said post-office, or was in fact fraudulently secreted, withheld, and taken by any person employed and entrusted by the defendant to attend in the said office, for the purpose of performing the duties of the same, then such fraudulent embezzlement was without any participation or connivance whatsoever of the defendant, and without any fraud, collusion, or other misdemeanor in office whatsoever, on the part of the defendant, or by him done or permitted, but altogether without his consent or knowledge, and against his will, and this he is ready to verify, &c.

To the latter part of this plea, there was a special demurrer and joinder. Because, 1. The plea is argumentative in this, that it states that the defendant has appointed competent and honest men to do the duties of the said office, and therefore infers that he himself is not liable for their negligence; and further, in this, that he states what acts he did in relation to his office, and reasons from them in his exculpation. 2. Because the plea does not confess and avoid, nor deny the allegations of the said counts or of any of them. 3. Because it does not state the nature and circumstances of error or mistake supposed to be made by his said clerks and assistants, so as to show that it did not proceed from a want of reasonable care and diligence. 4. Because the plea amounts to the general issue. 5. Because it does not set forth any matter of law proper for the decision of the court, but states facts proper to be given in evidence upon the general issue joined between the parties. 6. Because the plea tends to draw from the consideration of the jury to that of the court, matters of evidence proper to be shown only to the jury on the general issue; and is immaterial, insufficient and informal.

*6. The 6th plea was to the said 4th [***252** and 9th counts, and denies that the letter was lost by the negligence, carelessness, or misconduct of the defendant in his office; upon which the plaintiffs joined issue.

7. The 7th plea was to the 1st and 3d counts, and stated that the bank notes mentioned in those two counts were notes of the bank of Virginia, "which was a bank duly established "under a charter from the government of the "state of Virginia, and if the same were in fact "fraudulently taken, withheld and secreted by "the defendant or any person employed and en- "trusted in the said post-office at Washington, "then, according to the form of the several "statutes in force within the county of Wash- "ington aforesaid, every person so acting and "doing became guilty of a felonious embezzle- "ment of the same letter and bank notes, and "liable to suffer the pains and penalties of "felony, and ought to have been prosecuted "for such crime accordingly; yet the defend- "ant in fact saith, that no criminal prosecution "whatsoever has been commenced, nor any "conviction had against any person or persons "whatsoever, in the said two counts of the said "declaration, supposed to be guilty as aforesaid "and this he is ready to verify," &c.

To this plea there was a general demurrer and joinder.

8. The 8th plea was to the 6th count, and denied that the letter, &c., were received by Henry Whcteroft at the post-office in Washington, in manner and form, &c.; upon which issue was joined.

9. The 9th plea was to the 7th count, and denies that the letter was received by William Hewitt at the post-office, &c., in manner and form, &c.; upon which issue was also joined.

10. The 10th plea was to the 9th count and averred that the defendant did not unduly, improperly, and negligently, delay, detain and keep in the post-office at Washington, nor anywhere else, the said letter, &c., in manner and form, &c.; upon this plea also the plaintiff's joined issue.

*11. The 11th plea was to the 5th, [***253** 6th, 7th, and 8th counts, and averred that the loss of the letter, &c., was not caused or produced by reason of the same not having been re-mailed and sent on, at and from the said post-office at Washington, on the same day of the supposed arrival of the said letter and bank notes at the said post-office, to wit, on the 1st day of August, 1806, and by the same mail which, after the said supposed arrival, and on the same day departed from the said post-office at Washington, with letters for the said town of Petersburgh, and by the said letter and bank notes being delayed by the said Thomas in the post-office at Washington, until the departure of the next succeeding mail of the 3d of August, in manner and form, &c. Issue was also joined upon this plea.

12. The 12th plea was to the 9th count, and was precisely like the 11th plea.

13. The 13th plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts and stated that the defendant, as to his having received the letter, &c., and having wilfully and negligently omitted to forward and send on the same, in the mail, according to the proper destination of the same; and as to his having unduly kept and detained the same in his office, and as to his having disregarded the duties of his said office, and as to the negligence and misconduct in office imputed to him the defendant, he is not guilty; and of this he puts himself upon the country, and the plaintiffs likewise.

And as to the residue of the allegations, charges and complaints of negligence and misconduct in the several counts last aforesaid above supposed to be committed and suffered in the said post-office at Washington, the defendant (protesting that he has in all things demeaned himself, in his said office of postmaster, as a good and faithful officer of the United States, and that he has always exercised all practicable care and diligence to have the business and duties of the said office, regularly, duly and faithfully transacted, performed and executed) says that at the time when, &c., he took due precaution, &c., by selecting and appointing proper persons, &c., &c., (as in the 5th plea), and if the said letter, &c., were delivered at his office at Washington, and if the **254***] *same were, by reason of any casual negligence, misconduct, inadvertence, oversight, error or mistake of any person or persons so employed and entrusted in the said office, not in fact duly re-mailed, forwarded and sent on, &c., such the delivery of the said letter, &c., at the said office at Washington was entirely unknown to the defendant, and every such misconduct, &c., was likewise entirely unknown to the defendant, and was not caused or produced by any misdemeanor in office of the defendant, nor willingly or knowingly suffered or permitted by him, but was caused and produced by the casual, inadvertent and unintentional mistake, error and oversight of some person or persons so appointed, &c., and altogether without the consent or knowledge of the defendant, and against his will. And so the defendant says that he took due precaution and used all reasonable care, diligence and circumspection to cause the said supposed letter, &c., (if ever in fact delivered and given in charge of the said post-office), to be duly sent on and forwarded, &c.; and this he is ready to verify, &c.

To the latter part of this plea, as pleaded to the 5th and 9th counts, the plaintiffs, by way of replication (protesting that the defendant did not use due care in selecting proper persons, &c.; and that the loss of the letter, &c., did not happen without the knowledge, consent and authority of the defendant), say, &c., that the letter, &c., regularly arrived at the post-office of the defendant on the 1st of August, 1806, and were received by him, and ought to have been sent on or caused to have been sent on by him on that day in the mail, &c., which regularly arrived at Petersburgh, and that he did not do so; and did not use due care and diligence in re-mailing and forwarding the same, and did delay and detain the same unduly, negligently and improperly, whereby the same have been lost, &c., without this, that the loss of the said letter, &c., was caused or produced by any act without the control, knowledge or authority of the defendant in his office, and which, by using due and reasonable diligence in his said office, he could not have prevented. And this they are ready to verify, &c.

To this replication the defendant demurred.

*To the latter part of the 13th plea, [***255** as pleaded to the 2d, 4th, 6th, 7th and 8th counts, the plaintiffs demurred.

14. The 14th plea was to the same counts, and was the same in substance as the 13th; and the plaintiffs demurred to it as a plea to the 2d, 4th, 6th, 7th and 8th counts, and replied to it as a plea to the 5th and 9th counts; to which replication the defendant demurred.

15. The 15th plea was to the same counts as the 13th plea, and was like it, except that it averred that if there was any error or omission, &c., it was without the defendant's knowledge and consent, and without any fraud, or wilful, or gross negligence of any person by him employed.

To this plea were the same replication and demurrer as to the 13th.

16. The 16th plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and, after protesting as in the 13th plea, and admitting that the letter, &c., were not duly re-mailed and sent on by the mail of the 1st of August as it ought to have been, avers that it was sent on by the next mail, which left Washington on the 3d of August, and after departing from the post-office at Washington, and being entirely without the care and custody of the defendant, and of every person employed in his post-office, were taken and embezzled by some person or persons as yet undiscovered and unknown, and so lost to the plaintiffs without any participation, connivance, procurement, consent, or knowledge of the defendant, or of any person employed or entrusted in his post-office.

To this plea as pleaded to the 2d, 4th, 5th, 6th and 7th counts the plaintiffs demurred; and as pleaded to the 8th and 9th counts they replied in substance that by reasonable care and diligence the letter, &c., might have been sent on by the mail of the 1st of August, and was not, and that the loss happened thereby; and concluded to the country.

To this replication the defendant demurred.

*17. The 17th plea was to the 2d, [***256** 4th, 5th, 6th, 7th, 8th and 9th counts, and was like the 16th plea in all respects, except that it concluded with the following traverse, viz.: "Without this, that the loss of the said letter "and bank notes aforesaid was caused or pro- "duced by reason of the same not having been "re-mailed and sent on, as aforesaid, in the "mail of the 1st of August, as aforesaid, ac- "cording to the Postmaster-General's instruc- "tions as aforesaid, instead of having been "delayed for the next succeeding mail of the "3d of the same August as aforesaid, and re- "mailed and sent on in that mail as aforesaid."

On this plea as pleaded to the 9th count, the plaintiff took issue upon the traverse, and demurred to the plea as pleaded to all the other counts.

18. The 18th plea was to the 5th, 6th, 7th, 8th and 9th counts, and, after protesting as in the 13th plea, averred, that according to the

duly-established regulations of the post-office, and the instructions of the Postmaster-General in the declaration mentioned, and then in full force, all letters, &c., put into the post-office at Philadelphia directed to Petersburgh, ought to have been put up in a separate and distinct mail, directed to Petersburgh, which mail ought to have been sent on through the several intermediate post-offices, from Philadelphia to Petersburgh, and which, according to the regulations and instructions aforesaid could not have been properly opened either at the post-office in Washington, nor at any other intermediate post-office on the route from Philadelphia to Petersburgh, for any purpose whatever; and no such letters, &c., ought, according to the said regulations and instructions, to have been put up and sent on in any mail, which, according to the direction of the same, and the said regulations and instructions, could have been properly opened at the post-office in Washington to be there distributed and re-mailed previous to being sent on and forwarded to Petersburgh; and that the letter, &c., ought not to have been put up and sent on from the post-office at Philadelphia in any mail to be opened, distributed and re-mailed at the post-office at Washington, but in a separate and distinct mail, directed to Petersburgh, and to be sent on through the post-office at Washington, **257***] *without being there opened, distributed or re-mailed. Whereas the said letter, &c., was not, &c., but together with all the other letters sent by the same post, and directed and destined for Petersburgh, was, contrary to the said regulations, &c., sent on from Philadelphia in a mail, which, according to the direction of the same, and the said regulations, &c., was to be opened at the post-office in Washington for the purpose of being distributed and re-mailed, &c.; and the defendant says that if the said letter, &c., had been put up in a distinct and separate mail directed to Petersburgh, it would have been duly sent on in the mail of the 1st of August, and so the delay was occasioned by the erroneous and irregular manner in which the letter was put up and sent on from Philadelphia, and not by the negligence, carelessness or misconduct of the defendant in his office: "without this that the said letter was put and forwarded in the mail at and from Philadelphia, and delivered at the said post-office in Washington in any other manner than as aforesaid, and this he is ready to verify," &c.

To this plea, as pleaded to the 5th count, the plaintiffs demurred; and as pleaded to the other counts, they replied, and (after protesting that the postmaster at Philadelphia was not bound to send on the letter in a separate mail directed to Petersburgh, &c., and protesting that the loss of the letter or the delay, &c., was not occasioned by the supposed erroneous manner in which it was put up and sent on from Philadelphia) for replication said, that the letter, &c., was put up and forwarded by the postmaster at Philadelphia, according to the said instructions of the Postmaster-General, in a mail addressed "Southern," containing the letters addressed to places in Virginia, and was thereafter duly and regularly placed in the post-office in Washington on the 1st of August to be re-mailed and sent on in the mail of that day, and that the delay and loss were not occasioned by any error or irregularity in the manner in which it was put up and sent on from Philadelphia, but was occasioned by the want of due and reasonable care and diligence in the performance of the duties of the post-office at Washington on the 1st of August; and concluded to the country.

*To this replication the defendant [***258** demurred.

All the demurrers were decided by the court below in favor of the plaintiffs.

Upon the trial of the issues of fact the plaintiffs took seven bills of exception.

1. The first bill of exception stated that the plaintiffs offered evidence to the jury that the defendant was deputy-postmaster at the city of Washington from the 1st of January, 1806, until the time of trial, and had under his management and direction the affairs and business of the post-office at that place; and the plaintiffs produced and read to the jury the printed instructions of the Postmaster-General of the United States; and proved by a witness that those were the instructions delivered to the defendant for his government in the duties of his office as deputy-postmaster in the city of Washington. The plaintiffs further produced to the jury evidence that they had $2,000 in bank notes in the hands of Walker and Kennedy, merchants at Philadelphia, and that that sum of money, in bank notes, was inclosed in a sealed letter and directed to the plaintiffs, at Petersburgh, in Virginia, the place of their residence, and put into the post-office at Philadelphia, and was by the postmaster at that place forwarded in the mail addressed to the state of Virginia on the 31st of July, 1806. That it arrived in due course of post at the post-office, in the city of Washington, under the care and management of the defendant. That it was the duty of the office at Washington, as a distributing office, to open the said mail so addressed, and to forward to Petersburgh in Virginia the said letter according to its address. That the said letter was lost and never arrived at the post-office in Petersburgh nor came to the hands of the plaintiffs, and that the same was demanded of the defendant, who denied he was liable for it. It was admitted that the course of conveying the mail from Philadelphia to Petersburgh is as follows: The Virginia mail, tied with a string and wrapped in papers, is, with many other mails similarly secured, inclosed in a locked portmanteau, and sent by stage to the city of Washington, distant 144 miles. No person or post-office between Philadelphia and Washington is legally authorized *to [***259** open the mail addressed to Virginia; but the portmanteau is unlocked and opened at the Baltimore post-office, and the various mails are there taken out of the portmanteau, in order to select the Baltimore mail. When the mail arrives at the post-office in Washington the mail addressed to Virginia is opened in said office as a distributing office, and the letters addressed to Petersburgh assorted, tied and wrapped as aforesaid, and put into a mail addressed to the post-office at Petersburgh. The said Petersburgh mail so tied and wrapped is, with many other mails, put into the portmanteau, which is locked and opened on the route only at Fredericksburgh and Richmond. But the said Petersburgh mail, wrapped in paper and tied with a string as aforesaid, though it may properly be taken

out of the portmantcau with the other mails at Fredericksburgh and Richmond as aforesaid, cannot be legally opened at any office betwcen Washington aud Petcrsburgh. Whereupon the plaintiffs' counsel prayed thc court to instruct thc jury, that if they should find the above facts to be true the plaintiffs were entitled to recover iu this case on their 2d count, unless the defendaut should prove the said letter to have been forwarded from his office in the time and mauner prescribed by law and the said instructions of the Postmaster-General; which opinion the court refused to give.

2. The 2d bill of exceptions stated the same facts, aud that thereupou the plaintiffs' counsel prayed the court to instruct the jury that if they should find those facts to be true, then the plaintiffs wcre cntitled to recover in this case upon their 4th and 5th counts, unless the plaintiff should provc the said letter to have been forwarded from his office in reasonable time, and in the manner prescribed by law and the instructions of the Postmaster-Geueral; which instruction the court refused to give.

3. The 3d bill of exeeption stated, that, in addition to thc above facts, the plaintiffs offercd evidence, under the issues joined on the 6th and 10th pleas, to prove that the letter and bank notes were lost by the negligence and carelessness of Henry Whetcroft and William Hewitt, sworu clerks and assistants employcd by the defendant in his said post-office; and also certain **260***] acts *of omission, undue delay and detention of the said letter and bank notes by such clerks and assistants of the defendant; to the competency of which evidenee to support the issues joincd on the 6th and 10th pleas on the part of plaintiffs, the defendant objccted; and the court was of opinion that under those issues such evidence was incompetent, and refused to suffer the same to be given to thc jury under thosc issues; and instructcd the jury that the dcfendant was not liable under those issues for any acts or omissions of his said clerks and assistants; to which rcfusal and opinion the plaintiffs excepted.

4. The 4th bill of exceptions stated that the plaintiffs offered evidence of the facts stated in their 5th and 8th counts, aud moved the court to instruct the jury that if they should believe from the evidence that the letter and bank notes were duly deliverod into the defendant's post-office, then it was incumbent on the defendant to prove that the same were duly forwarded. And if the jury should further believe that the same were not so forwarded and had become lost, then it was incumbent on the defendant to prove that the same werc not lost by any undue negligence or unreasonable detention of himself or any person employed by him in his office; which instruction the court refused to give, but instructed them that if the jury should believe from the evidence that the letter and bank notes were duly delivered into the defeudant's office, then it was incumbent on the defendant to prove that the same were duly forwarded; and if the jury should further believe that the samc were so delivcred and were not so forwarded, aud had become lost in consequence thereof, then it was incumbent on the defendant to prove that the same were not lost by any undue negligence and unreasonable detention of himself or any other person employed by him in his office. To which refusal the plaintiffs excepted.

5. The 5th bill of exceptions stated, iu addition to the facts before stated, that the plaiutiffs offered in evidence a copy of a post-bill from Philadelphia, of the 31st of July, 1806, (showing that a letter whose postage was one dollar and 20 cents, corrcsponding with the postage upon the letter in question, was charged in the post-bill from Philadclphia to the state of Virginia,) *and offcred to prove [**261** that the post-bill, of which it was a copy, was received at thc defendant's post-office with letters in the mail from Philadelphia. And the defendant offered evidence to prove that it never was the custom, until after the report of thc loss of the letter and bank notes in question, for the actual contents of the mails, scnt to the said office for distribution, to be compared with the contents noted iu the accompanying post-bills; except that it was customary to examine the column of paid letters in order to see whether as many paid letters, and of the same amount of postage, came on in the mail; that this was done because the deputy-postmaster had to account to the Postmaster-General for all letters sent on from his office and marked paid; whether originally put into his office, or coming there in mails for distribution; and according to the routine of office, any deficiency, appearing on the arrival of the mail, in the amount of postage marked in his post-bill as "paid," would be chargeable to him; that in no other respect was any atteution paid, or notice taken, whether the actual contents of the mail, as to any letters not marked " paid," corresponded, or not, with the post-bill. That if, by accident, any variance between the post-bill and the actual contents of the mail received for distribution, was discovercd, it would never be noted in the office, inasmuch as the printed forms, furnished to the defendant and other deputy-postmasters, from the Postmaster-Geueral for the account of mails for distribution, contained no columu for noting letters either overcharged, or undercharged, or misseut, such as are to be found in the form furnished for account of mails for delivery, and marked No. 1, in the schedule annexed to the instructions of 1804.

Whereupon the plaintiffs prayed the court to instruct the jury that if they believed from the evidence that the copy of the post-bill produced was a true copy of the post-bill sent on from Philadelphia to the Washington Post-Office, and that the same was rceeived with letters in thc mail from Philadelphia at the defendant's office, then the jury ought to presume that the letters accompanying the said post-bill corresponded therewith, unless the defendant should prove the contrary; which instruction the court refused to give as prayed, but instructed the jury that it is competent for them, from *those circumstances, so to presume, [***262** and to decide upon the force of such presumption from all the circumstances proved in the case; to which refusal and instruction the plaintiffs excepted.

6. The 6th exception was to thc refusal of the court to suffer a witness to be asked whether the printed general instructions from the Postmaster-General given to the deputy-postmasters in 1804, superseded those before given to the

postmaster in Philadelphia in 1800; both instructions having been produced and read in evidence to the jury.

7. The 7th bill of exceptions stated that the plaintiffs offered evidence to "prove the several allegations in the said declaration; and "further offered in the evidence the several "printed instructions of the Postmaster-General (thereto annexed) and also the desposi- "tions (thereto annexed and which tended to "prove the delivery of the letter and bank "notes into the post-office at Philadelphia, and "their arrival at the post-office in Washington). "And the defendant offered evidence to prove "that Petersburgh, ever since the 1st of November, 1804, was a distributing post-office as "established by the said instructions; that after "the said instructions it was the practice of "post-offices (except that of Philadelphia), in "which letters were deposited for Petersburg, "to put the same up in a separate mail address- "ed to Petersburg, and not in the Virginia "state mail. That the Philadelphia Post- "Office, since the said 1st of August, 1806, and "not before, has adopted the same practice. "That the Virginia state mail above mentioned "contained the letters directed to the several "post-offices in Virginia, except Norfolk and "Richmond, and also the letters directed to the "states of Ohio and Kentucky; and that before "the letters for Petersburgh, contained in the "said mail, could be distributed and re-mailed, "it was necessary to assort and distribute the "whole contents of the said mail.

"The plaintiffs then moved the court to in- "struct the jury, that if they should believe "from the evidence, that the letter and the "bank notes in the declaration mentioned, were "put, at the post-office in Philadelphia, in a "bundle superscribed "Virginia state mails," **263***] "and that it *had been, since the year "1800, and was the practice, in the said Phil- "adelphia post-office during the months of July "and August, 1806, to send letters for delivery "at Petersburg, Virginia, in that manner; and "that all letters in the Virginia state mail, for "Petersburgh, Virginia, brought to the de- "fendant's office, had been usually remailed, "distributed, and sent on from the post-office "kept by the defendant, to Petersburgh afore- "said; and should be further of opinion that "the said letter, containing the said bank notes, "was delivered in the said bundle superscrib- "ed "Virginia state mail," on the first day of "August, 1806, in the said office of the defend- "and, and in due time be re-mailed, distributed "and sent on by the defendant on the first day "of August, 1806, from his aforesaid office, in "a bundle addressed to Petersburgh, Virginia, "then it was the duty of the said defendant to "have re-mailed, distributed, and sent on the "said letter by the mail which left the Wash- "ington post-office on the said first day of Au- "gust, 1806; and if they further believe that "this was not so done, or caused to be done by "the said defendant, that it is incumbent on "the defendant to make out a just, reasonable "and sufficient excuse for the omission," which instruction the court refused to give as prayed; and the plaintiffs excepted.

The act of Congress of March 2d, 1799, (vol. 4, p., 505), establishes a general post-office at the seat of government of the United States, under the directions of a postmaster-general; and enacts that he shall establish post-offices, and appoint postmasters at all such places, as shall appear to him expedient, on the post-roads that are or may be established by law. And that he shall give the postmasters instructions relative to their duty; and shall obtain from them their accounts and vouchers, &c., once in three months, &c. That all persons employed in the care of the mails shall take an oath faithfully to perform the duties required of them, and abstain from everything forbidden by the laws in relation to the establishment of the post-office and post-roads within the United States. That every postmaster shall keep an office in which one or more persons shall attend at such hours as the Postmaster-General shall direct, for the purpose of performing the duties thereof, and all letters brought to any post-office half *an hour before the time of making up [**264** the mail of such office, shall be forwarded therein; except at such post-offices where, in the opinion of the Postmaster-General, it requires more time for making up the mail, and which he shall accordingly prescribe; but this shall in no case exceed one hour.

That if any person employed in any of the departments of the general post-office shall secrete, embezzle, or destroy any letter with which he shall be entrusted, or which shall have come to his possession, and intended to be conveyed by post, containing any bank note, &c., he shall, on conviction, be publicly whipped not exceeding forty stripes, and be imprisoned not exceeding ten years.

That the Postmaster-General be authorized to allow to the postmasters, respectively, such commission on the moneys arising from the postages, as shall be adequate to their respective services and expenses; not exceeding, &c.

The instructions of the Postmaster-General, issued, in pursuance of this act, to the postmasters in 1804, required that every person employed in a post-office as assistant or clerk should take the oath, and send a certificate thereof to the general post-office. That every postmaster should be responsible "for the care "and fidelity of every person so employed." That "the postmasters at distributing offices "are to distribute and re-mail all letters and "packages before the departure of the mail, "and on no account delay them a single post."

The verdict and judgment of the court below being for the defendant, the plaintiffs brought their writ of error.

F. S. Key and *C. Lee*, for the plaintiffs in error.

The 3d bill of exceptions brings into view the question, whether the negligence of the defendant's clerks can be given in evidence to prove an allegation of negligence of the defendant himself; which necessarily involves the question whether the defendant is liable for the negligence of his clerks. This bill of exceptions *arose upon the issues joined on [**265** the 6th and 10th pleas. The 6th plea was, that the letter was not lost by the negligence or misconduct of the defendant in his office; and the 10th was, that the defendant had not negligently or improperly delayed or detained the letter in the office.

The law in respect to the liability of the Postmaster-General is admitted to be the same here

as it is stated in *Ld. le Despencer's* case (Cowp., 754), to be in England. But the opinion of Lord Mansfield, in that case, clearly shows that the action lies in the present. In the case of *Brucker* v. *Fromont* (6 T. R., 659), it is decided that a declaration which charges the defendant with negligence, is supported by proof of the negligence of his servant. Where the negligence is in a post-office, it is scarcely possible, in any case, for a plaintiff to know exactly to which of the persons, employed in the office, the negligence is to be attributed. If, as the court below decided, the defendant is liable for the negligence of his clerks, it seems to be immaterial whether the declaration state the neglect to be on the part of the defendant or of his clerks; or state it in the alternative. A collector of the revenue is liable for his deputies, although they are sworn officers. Yet the Secretary of the Treasury is not liable for the collectors. So the marshal is liable for his deputies, who are also sworn officers, and who give bond for the faithful discharge of their duty. Why should there be a difference in the case of a postmaster?

The 4th exception is, that the court refused to instruct the jury, that proof of negligence and loss raised a presumption that the loss was a consequence of the negligence, unless the contrary be shown. Or, in other words, the court below decided, that proof of negligence and loss did not throw the burden of proof on the defendant, to show that the loss was not a consequence of the negligence. To oblige the plaintiffs to prove that the loss was a consequence of that negligence, was to impose upon them an impossibility in the nature of things.

The 5th exception is to the refusal of the court to instruct the jury, that they ought to **266*]** infer that the contents *of the mail from Philadelphia corresponded with the post-bill when it was received at the Washington office, unless the defendant should prove the contrary.

What a jury may infer from the facts proved, is a question of law for the court to decide. And what a jury may thus infer, they are bound in law to infer, unless the contrary be proved. The court, therefore, ought not to have left the matter entirely to the jury, but to have given the instructions thus prayed.

Presumptions are inferences of law. Thus, from long possession, the court will instruct the jury that they ought to presume a deed. So, from evidence of payment of the last ten years' rent, the jury ought to presume all the former rents were paid. So in trover, from evidence of a demand and refusal, the jury ought to presume a conversion. So, if stolen goods are found in possession of a man, the jury ought to presume that he stole them, unless the contrary be shown.

The 7th exception raises the question whether the defendant was not bound to re-mail and send on the letter, according to law, and the instructions of the Postmaster-General, although the mail arrived at his office in an irregular manner.

Upon this point the 5th section of the post-office law (vol. 4, p. 507), and the instructions, are decisive. These instructions being given in conformity with the law, become part thereof, and are equally binding.

Jones and *Morsell*, contra.

All the questions in this case are resolved into one, viz.: On which side was the burden of proof in certain stages of the trial? All the exceptions are grounded upon the idea, that it was only necessary for the plaintiffs to show negligence in the office, and a loss of the letter, without showing that the loss was a consequence of the negligence.

We admit that the defendant is liable for any loss happening by his own negligence, but we deny that he *is liable for that [***267** of his clerks. The act of Congress requires that the defendant should employ clerks, and that they should be sworn, and imposes specific penalties upon each person employed in the office for his own misconduct. They are all public officers, and liable to be charged *ex delictu officii*. The postmaster is only bound to use due care and circumspection in selecting proper clerks. He is not like a common carrier, who receives hire in proportion to the risk, and the value of the article. He has only a compensation for his trouble in the office. The liability of a master arises from his supposed assent, arising from the fact that the servant is employed for the benefit of the master. But here the clerk does not act for the postmaster, but for the public. The servant must be employed in the business of the master and for his benefit, or the latter will not be liable.

JOHNSON, *J.* It has never been attempted to assimilate him to a common carrier. He has nothing to do with the carrying of the mail.

JONES. It is decided in England, that the Postmaster-General in England is not liable for his deputies. (*Lane* v. *Cotton*, 1 Ld. Ray., 647; 1 Salk., 17.)

The instructions from our Postmaster-General to the postmasters, that they should be liable for their deputies or clerk, &c., only means that they shall be liable in accounting with him officially for the revenue. He could not make them liable to individuals.

In the case of *Rowning* v. *Goodchild* (2 W. Bl., 906; 3 Wils., 443), the principal question was, whether the postmaster was bound to send out the letters to the inhabitants; but a question incidentally arose whether the action, which was brought against the deputy-postmaster, should not have been brought against the Postmaster-General. The court, however, was of opinion, that in all cases, deputies are answerable for their own personal misfeasance, such as detaining the letter in question. And in that case the deputies were made, by act of parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such.

But if the defendant was liable for the default of his *clerks, yet the declaration [***268** ought to have shown, whether the defendant was called upon to account for his own negligence, or that of his clerks. The case of *Brucker* v. *Fromont* (6 T. R. 659), was reluctantly decided upon the authority of *Turberville* v. *Stampe* (Ld. Ray., 264), but which does not support the case of *Brucker* v. *Fromont*, which is evidently against principle; and at all events is confined to the case of master and servant. In the following cases, a discrimination is made in the declaration between the act of the master and that of his servants. (*Turner* v. *Hawkins*,

1 Bos. & Pull., 472; *Ogle* v. *Barnes*, 8 T.R., 188; *Savignac* v. *Roome*, 6 T. R., 125.)

Presumptions arising from circumstantial evidence are always to be left to the jury. Such a positive inference as will justify the court in directing the jury, that they ought to make it, can arise only from some solemn act. In the present case there was other evidence, showing that no such inference could be drawn as the plaintiffs had supposed; and therefore the court did right to leave the whole to the jury.

The 7th exception required the court to say, that the defendant was bound to send on the letter on the 1st of August, or to show a reasonable excuse for not sending it on, although the mail was made up in an irregular manner in Philadelphia. The idea of reasonable diligence is excluded, and it supposes the defendant bound at all events to send the letter on by that mail, or to give a sufficient excuse for not doing so, although he sent it by the next mail, and although the loss was not the consequence of not sending it on the 1st of August.

The defendant was not bound to show that he sent it on; it would be impossible in the course of the business of the office to prove the sending on of every particular letter. Sworn officers are presumed to have done their duty, until the contrary is proved. (3 East., *Williams* v. *E. I. Company*.

March 14th. *All the judges being present,*

JOHNSTON, *J.*, delivered the opinion of the court as follows:

269*] *It is necessary to dissipate the cloud of pleading in which this case is enveloped, in order to form a distinct idea of the questions intended to be brought to the view of the court below.

The object is to charge the postmaster with the loss of money sent by mail; and the points, which the exceptions are intended to make, are, how far he is liable for his own act or neglect, how far for the acts or neglect of his assistants, and what evidence shall be sufficient to support the plaintiff's action.

But unfortunately, as not unfrequently happens in this complex and injudicious mode of conducting a suit, with all the clerical skill displayed by counsel in multiplying their counts and pointing their bills of exceptions, the principal questions are really, at last, not brought to the view of this court.

On the first and second exceptions it is unnecessary to make any remark, as they are admitted to apply to counts which the evidence did not support, and have been, in fact, abandoned.

The third exception is intended to raise the question how far a postmaster is liable for the neglect of his assistants; but, connected with the pleadings, it presents another and a very different question, to wit, whether, when the issue is taken upon the neglect of the postmaster himself, it is competent to give in evidence, neglect in the assistant acting under him. Now, the distinction between the relation of a postmaster to his sworn assistant acting under him, and between master and servant generally, has long been settled; and although the latter relation might sanction the admission of such evidence, we are unanimously of opinion that, if it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office.

In the fourth exception, the only difference between the opinion prayed for and that given, is, that the court require the loss to be a consequence of not forwarding *the letter [***270** described in the declaration. Now, in justice to the correctness of the plaintiffs' counsel, this court hope that they meant nothing more than what the court conceded; for, certainly, if the loss was not a consequence of the state of things made out in the evidence, they were not entitled to recover.

On the fifth exception it is only necessary to remark, that if the court below erred at all, it was in conceding too much to the prayer of the plaintiff. An entry on the post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage.

The sixth exception is equally untenable. The instructions of the Postmaster-General spoke for themselves. If the one superseded or rescinded the other, the evidence was to be sought for by comparing them together.

And the seventh exception affords the court an opportunity to remark how much more conducive to the purposes of justice it would be to substitute special verdicts, and demurrers to evidence, for the tedious and embarrassing practice of the court from which this case comes up. It is a fact that this bill of exceptions claims a right of recovery without stating any loss or damage whatever. The opinion prayed for was, that if the jury believed the various facts therein detailed, then it is incumbent on the defendant to make out a just, reasonable and sufficient excuse for omitting to forward the letter described. But, unless an individual has sustained some loss or damage by an omission of that kind, why should the postmaster be held to make out a defense? Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone that the court is to decide. We cannot go beyond it and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for.

Upon the whole, the judgment below must be affirmed.

S. C. 1 Cranch C. C. 536.
Cited—7 How. 865; 15 Wall. 344; 18 Wall. 249; 3 Blatchf. 349; 2 Ware (Dav.) 375; 1 Woods, 50; 3 Wood. & M. 225.

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*HEZEKIAH WOOD [*271
v.
JOHN DAVIS AND OTHERS.

Present—All the Judges.

A verdict and judgment that the mother was born free is not conclusive evidence of the freedom of her children, unless between the same parties or privies.

ERROR to the Circuit Court for the District of Columbia, sitting at Washington.

The defendants in error, John Davis and others, were children of Susan Davis, a mulatto woman, who had obtained a judgment for her freedom in a suit which she had brought against Caleb Swanu, to whom she had been sold by Wood, the plaintiff in error.

The petition of the children stated that their mother, Susan Davis, had obtained a judgment for her freedom upon the ground that she was born free. The issue was joined upon the question whether the petitioners were entitled to their freedom.

Upon the trial of this issue, in the court below, the plaintiff in error, Wood, tendered a bill of exceptions which stated that it was admitted that the petitioners were the children of Susan Davis; and they produced the record of the judgment in favor of their mother, Susan Davis, against Caleb Swann, (in which case her petition stated that she was born free, being descended from a white woman; and the issue joined was upon the question whether she was free or a slave.) And it was admitted that Susan Davis had been sold by Wood to Swann before the judgment; whereupon the petitioners, by their counsel, prayed the court to direct the jury, that the record aforesaid and the matters so admitted were conclusive evidence for the petitioners in this cause; and the Court directed the jury as prayed; to which direction the defendant, Wood, excepted.

F. S. Key, for the plaintiff in error, contended,

1. That Wood was not a party, nor privy to any party, to the suit of Susan Davis against **272***] Swann, and *is, therefore, not concluded by the judgment in that case; and,

2. That the judgment was only proof that Susan Davis was free at the time of the judgment; not that she was born free; and therefore it did not appear that she was free at the time of the birth of the petitioners. She might have been manumitted after the birth of her children, and so entitled to her freedom at the time of the judgment, and yet the petitioners might remain slaves. The only issue ever joined in Maryland (under the laws of which state this case was tried) upon a petition for freedom, is, whether the petitioner be free at the time of issue joined—not whether she were born free. (2. Harris's Entries, 530). It is immaterial what title is set out in the petition. The petitioner is not confined to it, but may, on the trial, show any other title to freedom—the practice in Maryland is merely to state in the petition that the petitioner is entitled to freedom and is holden as a slave. The act of assembly of Maryland, of 1796, directs that the jury shall be charged to determine those allegations in the petition which may be controverted. The only allegation controverted is that the petitioner is free.

DUVAL, *J.*, stated that in all the petitions which he filed in Maryland, in the cases of the Shorters, the Thomases, the Bostons, and many others, he always stated their title at large, tracing it up to a free white woman; and after judgment in those cases, the courts always held, that the subsequent petitioners who claimed under the same title, were only bound to prove their descent.

C. Lee, contra.

The issue in Susan Davis's case is, in fact, whether she was born free. And the case of *Shelton* v. *Barbour* (2 Wash. 64) shows that the verdict is conclusive as to all claiming under the same title. Wood's title was the same as Swann's, and that of the petitioners the same as that of Susan Davis.

F. S. Key, in reply.

Wood did not claim under Swann, but Swann claimed under Wood. There was no privity between them; *as to the children. [***273** Swann could do nothing to injure Wood's title to them.

March 10th. *All the judges being present,*

MARSHALL, *Ch. J.*, stated the opinion of the court to be, that the verdict and judgment in the case of Susan Davis against Swann, were not conclusive evidence in the present case. There was no privity between Swann and Wood; they were to be considered as perfectly distinct persons. Wood had a right to defend his own title, which he did not derive from Swann.

Judgment reversed.

Cited—Hemp. 55; 1 Wood. & M. 182.

MORGAN *v.* REINTZEL.

Present—All the Judges.

In a suit against the maker of a promissory note, by an indorser who has been obliged to take it up, the plaintiff must produce the note upon the trial.

The payment of the money by the indorser after protest, is a good consideration for an *assumpsit* on the part of the maker to pay the amount of the note with costs of protest.

The maker of a promissory note, payable to order, is, under the custom of merchants, liable to refund the amount of the note and costs of protest to an indorser who has been obliged to take up the note after protest.

ERROR to the Circuit Court for the District of Columbia, sitting in Washington, in an action of *assumpsit* brought by Reintzel against Morgan upon a promissory note made by Morgan, payable to Reintzel, or order.

The declaration contained three counts: 1st. Upon the promissory note in the usual form under the statute of Anne; 2d. For money paid, laid out, and expended; and, 3d. The following special count, viz.:

"And whereas also afterwards, to wit, on," &c., "the said William Morgan, according to the custom and usage of merchants, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date on the day and year aforesaid (August 9th, 1809), by which said note the said William Morgan, sixty days after the date thereof, promised to pay to the said Anthony Reintzel, or order, five hundred dollars, without offset, value received; and then and there delivered the said note to *the [***274** said Anthony Reintzel; and the said Anthony Reintzel, to whom, or to whose order, the payment of the said sum of money, mentioned in the said note, was to be made, before the payment thereof or any part thereof, and before the time appointed by the said note for the payment thereof, that is to say, on the day and year last aforesaid, at the county aforesaid, in-

dorsed the said note, his own proper hand writing being thereto subscribed; by which said indorsement the said Anthony Reintzel ordered and appointed the contents of the said note to be paid to the president, directors and company of the bank of the United States, and then and there delivered the said note, so indorsed, to the said president, dircctors, and company of the bank of the United States, of which said indorsement, so made on the said note, the said William Morgan, afterwards, to wit, on the day and year aforesaid, had notice; by reason whereof and also by force of the statute in such case made and provided, the said William Morgan became liable for, and chargeable to pay to the said president, directors and company of the bank of the United States, the said sum of money mentioned in the said note, according to the tenor and effect thereof, and in consideration thereof assumed upon himself so to do. And the said Anthony Reintzel avers that the said William Morgan, although afterwards, to wit, on the 8th day of October, in the year eighteen hundred and nine, at the county aforesaid, he, the said William Morgan, was called upon by the said president, dircctors and company of the bank of the United States, and solemnly required to pay the sum of money in the said note mentioned, refused to pay the same; whereupon afterwards, upon the day and year last aforesaid, the said president, directors and company of the bank of the United States, having made no order concerning the payment thereof, protested the said note at the county aforesaid, according to the said usage and custom of merchants upon such non-payment; by reason whereof the said Anthony Reintzel, according to the usage and custom of merchants became liable to pay to the said president, directors and company of the bank of the United States, the contents of the said note, together with the interest and the damage which should accrue from the delay of payment thereof, and being so liable, afterwards, to wit, on the day and year last aforesaid at the county **275*]** *aforesaid" (did) "pay to the said president, directors and company, the contents of the said note and the costs of protest thereon, whereof the said William Morgan afterwards, to wit, on the day and year last aforesaid at the county aforesaid, had notice; by reason of the premises, and by force of the statute and usage and custom of merchants, the said William Morgan became liable to pay to the said Anthony Reintzel the said sum of money in the said note mentioned and the said costs of protest, and being so liable afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, upon himself assumed and to the said Anthony Reintzel then and there faithfully promised to pay the same when he should be thereunto afterwards required; and which said costs of protest and the said sum of money in the said note mentioned amount unto the sum of five hundred and two dollars and twenty-eight cents current money, whereof the said William Morgan afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice."

After a general verdict for the plaintiff in the court below, upon the issue of *non assumpsit* to all the counts, the defendant moved in arrest of judgment, and assigned as a reason therefor, that the last count in the declaration was bad. The court, however, overruled the motion and rendered judgment upon the verdict.

The defendant took out a writ of error; and the cause was now submitted to this court by *F. S. Key* for plaintiff in error, and *Morsell* for defendant, without argument.

March 13th. *All the judges being present,*

MARSHALL, *Ch. J.*, after stating the case, observed that the court could see no error in the judgment.

The payment of the money by the plaintiff, under the circumstances stated in the count, was a sufficient consideration for the *assumpsit.*

The principal objection was that the count ought to have been founded upon the note, so as to oblige the plaintiff to produce it on the trial. But it states that *the note was [***276** paid by the plaintiff; and the court thinks that the note must have been produced upon the trial.

Judgment affirmed.

Aff'g—2 Cranch, C. C. 20.
Cited—16 Pet. 326; 1 McLean, 336.

WISE & LYNN *v.* THE COLUMBIAN TURNPIKE COMPANY.

Present—All the Judges.

Upon a writ of error to the Circuit Court for the District of Columbia, this court has no jurisdiction if the sum awarded be less than 100 dollars, although a greater sum may have been originally claimed.

THE Columbian Turnpike Company obtained a rule upon the plaintiffs in error, Wise & Lynn, to show cause why this writ of error should not be dismissed for want of jurisdiction, the matter in dispute being less than 100 dollars, and the writ of crror being to the Circuit Court for the District of Columbia.

March 14. Upon the return of the rule, it appearing that the sum awarded was only 45 dollars, the court, all the judges being present, decided that they had no jurisdiction, although the sum claimed by Wise & Lynn, before the commissioners of the road, was more than 100 dollars.

Writ of error dismissed.

Cited—3 Pet. 35; 15 How. 208; 4 Wall. 164; 16 Wall. 344.

CALDWELL *v.* JACKSON.

Present—All the Judges.

Each party is liable to the clerk of this court for the fees due to him from each party respectively.

A copy of the record is not a part of the taxable costs of suit to be recovered by one party against the other; but the party who requests the copy, must pay the clerk for it.

CALDWELL, the clerk of this court, obtained a rule against Jackson, to show cause why an attachment should not issue for non-pay-

277*] ment of his fees in the suit *of Winchester against Jackson, which had been dismissed on the motion of Jacksou, with costs, at a former term.

Milnor now showed cause, and contended, that Jackson was not liable to the clerk for his fees, inasmuch as Jacksou was the defendant in error, and the writ of error had been dismissed with costs. The clerk must look to the plaintiff in error for all the costs. The bill, which had been rendered, included the expense of a copy of the record, which is not regularly taxable as costs, and therefore the non-payment of that charge can be no ground for an attachment.

DUVALL, *J.* In Maryland, each party pays to the clerk his own fees; that is, the fees for those services which the clerk has performed for him; and the successful party recovers them from his antagonist. If either party requires copy of the record he must pay for it, as for auy other service performed; but it is uot a part of the costs which are to be taxed against the other party, as costs of suit.

March 13th. *All the judges being present,*

MARSHALL, *Ch. J.*, stated the opinion of the court to be, that each party was liable to the clerk for his fees for services performed for such party; and it is immaterial to the clerk which party recovers judgment.

Rule absolute.

Cited—17 N. B. Reg. 368; 1 Curt. 98, 204, 205; 2 Gall. 101.

BLACKWELL *v.* PATTEN AND OTHERS.

A writ of error issued in September may bear *teste* of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the *teste* and return of the writ.

JONES, for the defendants in error, moved this court to dismiss the writ of error, because it bore *teste* of February term, 1810, was issued in September, 1810, and was returnable to February term, 1811, whereas it ought to have been *tested* of August term, 1810. The plaintiff in error, aware of this objection, has sued out another writ of error, which stands on a subsequent part of the docket.

**Campbell,* on the same side. August [*278 term is as much a term for *teste* and return of writs as February term. Suppose the writ bore *teste* ten years ago: it might as well be made returnable to February term, 1811, as this writ which bore *teste* of February term, 1810. If *tested* of February term, 1810, it ought to have been returnable to August term, 1810, and not to February term, 1811.

The appearance of the defendants in error only cures the want of a citation, not a fault in the writ of error itself.

March 14th. *All the judges being present,*

The court refused to quash or dismiss the writ of error on account of the irregularity of its *teste.*

Cited—3 Wood. & M. 224.

WALLEN *v.* WILLIAMS.

Present—All the Judges.

This court will not quash an execution issued by the court below to enforce its decree pending the writ of error, if the writ of error be not a *supersedeas* to the decree.

ERROR to the Circuit Court of the District of Tennessee, to reverse a decree in chancery. The court below had issued a writ of *habere facias possessionem* to enforce its decree. The writ of error was too late to be a *supersedeas* to the decree.

Jones, for the plaintiff in error, now moved to quash the writ of *habere facias* as irregular, and contended that the court below, sitting as a court of chancery, under the laws of Tennessee, could only enforce by execution decrees for the payment of money, and cited Tennessee Laws, Ed. 1807 (p. 158, § 2.)

P. B. Key, contra. This court has no jurisdictiou to quash an execution issued from the court below, and executed. But if this court had the power to do it, it would uot in its discretion quash a process which has merely carried into effect the decree of the court below. If the decree be reversed upon the merits, the execution *will be of no avail; but the [*279 court will not anticipate the merits upon such a motion.

MARSHALL, *Ch. J.* The writ of error is to the original decree, which did not award this writ of *habere facias.* It was awarded by a subsequent order of the court, to which no writ of error issued.

TODD, *J.* The attachment to compel a performance of the decree was unavailing; and upon the return of it, the *habere facias* was issued iu conformity with the practice iu that state, as admitted by the counsel on both sides in the court below. It was ordered as a matter of course, and no objection was made. If this motion should prevail, it will make the writ of error operate as a *supersedeas,* contrary to the intention of the act of Congress.

Motion overruled.

Cited—16 How. 148; 18 How. 532; 10 Wall. 292; 12 Wall. 100; 19 Wall. 430.

M'KIM *v.* VOORHIES.

Present—All the Judges.

A state court has no jurisdiction to enjoin a judgment of the Circuit Court of the U. S.

THIS was a case certified from the Circuit Court for the District of Keutucky, in which the opinions of the judges were opposed.

At the July adjourned term of the court below, iu the year 1808, M'Kim, a citizen of Maryland, recovered a judgment in ejectment against Voorhies, a citizen of Kentucky, for the undivided third part of a water mill, with

its appurtenances, in the county of Franklin, in the state of Kentucky. At the same time Voorhies filed his bill in chancery in the court below against M'Kim, and John Instone, a citizen of Kentucky, and Hayden Edwards, a citizen of South Carolina, claiming an equitable lien on the said third part of the mill, &c., on account of contracts, &c., between Bennett Pemberton (under whom Voorhies held the premises) and Hayden Edwards and John Instone; Pember-
280*] ton having *sold the said third part of the mill, &c., to Edwards, who sold to Instone, who sold and conveyed to M'Kim. Instone was the only defendant served with process from the court below. M'Kim and Instone answered the bill, and brought on a motion to dissolve the injunctiou on the merits, which was overruled by the court below. At the term next preceding November term, 1810, (Edwards not having answered) the court below dismissed the suit as to him; and as to Instone, for want of jurisdiction; after which Voorhies had leave to discontinue as to M'Kim on payment of costs. The suit was accordingly discontinued. Previous to this disposition of the cause, Voorhies filed his bill in chancery against the same parties in the state Circuit Court for the county of Franklin, in the state of Kentucky, in which he set up the same equity as he charged in his bill in the court below. On this bill he, by an order from one of the circuit judges of the state, obtained an injunction, staying all further proceedings on the said judgment in ejectment, until the matters of the said bill were heard in equity. This injunction was dissolved at the July term of the Franklin Circuit Court; shortly after which the said injunction was reinstated by the order of the Honorable Caleb Wallace, one of the judges of the Court of Appeals of the state of Kentucky, issued under the act of the general assembly of that state, passed at their December session in the year 1807.

The injunction issued in the cause by the state court, and the order reinstating that injunction, were duly notified to the clerk of the court below, and official copies of each lodged in his office. On the third day of the session of the court below, at its November term, 1810, M'Kim, by his attorney, applied to the clerk of the court below for a writ of *habere facias possessionem* on the said judgment in ejectment, but the clerk refused to issue the writ in consequence of the injunction and orders aforesaid; whereupon M'Kim, by his counsel, moved the court below to instruct and order their clerk to issue a writ of *habere facias possessionem*, on the judgment of that court, the injunction and orders aforesaid notwithstanding. Upon this motion of the plaintiff, the opinions of the judges were opposed. The case was submitted by *Har-*
281*] *per* for the plaintiff, *without argument. There was no appearance for the defendant.

March 14th. *All the judges being present,*

TODD, *J.*, stated the opinion of the court to be, that the state court had no jurisdiction to enjoin a judgment of the Circuit Court of the United States; and that the court below should be ordered to issue the writ of *habere facias.*

Cited—1 How. 306; 6 Wall. 194, 517; 1 Biss. 12; 3 Biss. 271; 2 Curt. 469; 2 Wood. & M. 469; 3 Wood. & M. 119.

BEATTY *v.* THE STATE OF MARYLAND.

Present—All the Judges.

A final account settled by an administrator with the Orphan's Court, is not conclusive evidence in his favor upon the issue of *devastavit vel non.*

ERROR to the Circuit Court for the District of Columbia, sitting in Washington.

This was an action of debt brought at the instance and for the use of Thomas Corcoran against Thomas Beatty upon the administration bond of Mrs. Doyle, administratrix, with the will annexed, of Alexander Doyle. The defendant was one of her sureties in that bond. The defendant after oyer pleaded a special performance of every item in the condition of the bond. To which the plaintiff replied a judgment *de bonis testatoris* obtained by him, in May, 1799, against the administratrix, *fieri facias* upon that judgment and a return of *nulla bona.* The replication also avers that the administratrix had in her hands, at the time of the judgment, goods of her testator sufficient to satisfy the debt, but that she wasted them. The defendant took issue upon the *devastavit.*

Upon the trial of this issue, the defendant below took a bill of exceptions which stated, that the plaintiff offered in evidence the record of the judgment in May, 1799, against the administratrix for 357 dollars, and the *fieri facias* returned *nulla bona.* And also the inventory which she had exhibited to the Orphan's Court of Montgomery County, in Maryland, in January, 1795, *amounting to 3701*l.* 2*s.* 7*d.*, [***282** Maryland currency, of which 200*l.* is stated in the inventory to be cash. Also an account of the administratrix with the estate of her testator, rendered by her to the Orphan's Court upon oath on the 17th of August, 1799, in which she charges herself with the sum of 1085*l.* in addition to the former inventory, making in the whole 4786*l.*, and claims credit for sums paid to other creditors whose claims were not entitled to preference, amounting to 3566*l.*, leaving a balance still in her hands of 1220*l.*, equal to 3253 dollars, and also a second account rendered by her upon oath to the Orphan's Court in November, 1799, charging herself with a further sum of assets to the amount of 463*l.* 15*s.* 5*d.*, in addition to the former balance, and claiming credit for 1607*l.* 16*s.* 11*d.* paid to sundry creditors not entitled to preference, and still leaving a balance of 76*l.* in her hands to be administered. The defendant then offered in evidence a third account rendered by the administratrix to the Orphan's Court in 1801, in which she charges herself with the former balance of 76*l.* and claims allowance for payments and commissions to the amount of 123*l.*, leaving a balance in her favor of 47*l.* To this account, as well as to the two former, was annexed a certificate from the register of wills, that the administratrix made oath on the Holy Evangels of Almighty God, that the account was just and true as it stood stated, and that she had *bona fide* paid or secured to be paid the several sums for which she claimed an allowance, "which after due examination passed by order of court."

This account was offered as conclusive evidence for the defendant on the issue. But the court instructed the jury that it was not con-

clusive evidence in favor of the defendant upon that issue; and further at the request of the plaintiff's counsel, instructed the jury that the said record of the judgment, the inventory and the two accounts of the administratrix offered in evidence on the part of the plaintiff were conclusive evidence in his favor to prove the *devastavit* on the part of the administratrix, to the amount of the plaintiff's claim; to which instructions of the court the defendant excepted, and the verdict and judgment being against him, he brought his writ of error.

283*] **F. S. Key*, for the plaintiff in error.

The question is whether the final settlement of the administration account is conclusive.

If the court has a power to pass such an account—if it be a court of competent jurisdiction—its sentence is conclusive upon every other court. The sentence of the Ecclesiastical Court is conclusive in England, as to all matters within its jurisdiction. (Peake's Law of Ex., 69, 76, 78; Ambler, 760; 3 T. R., 125.)

The order of the court settling the account is a judicial, not a ministerial act.

Had the Orphan's Court power to settle and adjust the account?

By the act of assembly of Maryland, of February, 1777, (c. 8), which was in force at the time these letters of administration were granted, the orphan's courts had all the jurisdiction and authority which the Commissary-General had before.

By the act of 1715, (c. 39, sect. 2), the Commissary-General was to proceed according to the laws of England, and to hold his court once every two months. By the 3d section, he was to call all executors and administrators to exhibit inventories within three months, and render accounts within twelve months next after administration committed; and to enforce obedience by attachment for contempt. By the 7th and 18th sections, he is to transmit an account of the distribution to the county courts. By the 27th section there was an appeal to the governor from the sentence of the Commissary-General.

By the 34th section, the deputy-commissaries had power to pass, audit and allow all such accounts as should come before them "relating to dead men's estates," not exceeding 50*l.* provided there were no controversy thereon; but if any person claiming any interest in such estates should object to any articles of the account, the deputy-commissary was to send it, with all papers, &c., to the Commissary-Gen-

284*] eral, "before *whom all parties are to appear and defend their interest." By the 40th section, the Prerogative Court (which was the Commissary-General's court) had like authority in enforcing obedience to its process, orders, interlocutory sentences and decrees, as the High Court of Chancery had.

By the act of 1718, (c. 5), the person entitled to the residue of an estate may, after 12 months from the date of the letters of administration, sue "for such residuary part as shall appear to "be due by such accounts as shall then be made "up."

This jurisdiction over accounts appears also in the practice of the Commissary's Court, as stated in the Deputy-Commissary's Guide, (p. 45 to 49), which shows also that the settlement of the account by that court was always holden to be conclusive upon the county courts. In the Appendix (p. 198), is the form of a special commission to pass an account. It appears also that all the vouchers are to be surrendered and filed upon passing the account. This shows that it must be conclusive; for nothing could be more unjust than to oblige a man to be always ready to account and to support his account, after taking from him all his vouchers.

DUVALL, *J.*

The account was only binding upon the representatives of the estate, the distributees; and they might still open it in the general court. But the creditors are no parties to the settlement of the account, and cannot be bound by it.

There can be no doubt that the judgment against the administratrix, the inventory and two first accounts were conclusive evidence of a *devastavit.*

MARSHALL, *Ch. J.* I believe that is the law throughout the United States.

The court is unanimously of opinion that the settlement of the account by the Orphan's Court is not conclusive evidence for the defendant upon the issue joined.

Judgment affirmed.

Cited—2 Cranch, C. C. 583; 5 Cranch, C. C. 477,

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*UNITED STATES *v.* JOHN TYLER.

[*285

Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States contrary to the act of Jan. 9, 1809, the punishment of which offense is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods.

THIS case having been submitted without argument,

LIVINGSTON, *J.*, delivered the opinion of the court as follow:

The defendant was indicted under the act to enforce the embargo laws passed the 9th January, 1809, for loading on carriages, within the District of Vermont, nineteen barrels of pearl ashes, with intent to transport the same without the United States, to wit, into the province of Canada.

On a plea of not guilty, the jury returned the following written verdict, which was recorded:

"The jury find that the said John Tyler is "guilty of the charge alleged against him in "said indictment, and that the said potashes "were worth two hundred and eighty dollars."

The defendant moved in arrest of judgment, because the verdict was not sufficiently certain as to the value of the property charged in the indictment, the same having found the value of potashes, whereas the defendant was indicted for the intention of exporting pearl ashes.

Upon this motion, the judges being opposed in opinion, the same has been certified unto this court for its direction in the premises.

The law which creates this offense provides that the party shall, upon conviction, be adjudged guilty of a high misdemeanor, and fined a sum by the court before which the conviction is had, equal to four times the value of

the property so intended to be exported. The court, then, is of opinion that, under this law, no valuation by the jury was necessary to enable the Circuit Court to impose the proper fine; and, **286***] therefore, *that that part of the verdict which is objected to, is regarded as surplusage, and cannot deprive the United States of the judgment to which they became entitled by the defendant's conviction of the offense laid in the indictment.

It must, accordingly, be certified to the court below, that it proceed to render judgment for the United States, on the verdict aforesaid.

Cited—9 How. 572; 1 Wood. & M. 453.

[END OF FEBRUARY TERM, 1812.]

Supreme Court of the United States.

287*] *February Term, 1813.

THE UNITED STATES.

v.

GORDON, and Others.

Absent—Livingston, *J.* and Todd, *J.*

A writ of error does not lie to carry to the Supreme Court of the United States a civil cause which has been carried from the District Court to the Circuit Court by writ of error.

Semb.: It is a good defense to an action upon an embargo bond, that it was given for more than double the value of the vessel and cargo, and that the master was constrained to execute it by the refusal of a clearance.

THIS was an action of debt brought in the District Court of the United States for the District of Virginia, upon an embargo bond, dated the 2d of November, 1808, conditioned to re-land the cargo of the Essex, in some port of the United States, the danger of the seas only excepted.

The defendants, among other things, pleaded the following plea, viz.: "And the said defendants for further plea why the United States ought not to have and maintain the said action, say, that the said bond was given and executed for more than double the value of the vessel and cargo, mentioned in the recital and condition of the said bond, to wit, in a sum of eight thousand dollars more than double the said value; and the said last mentioned defendants aver that the obligors were constrained to execute the said bond by the refusal of the collector of the port of Tappahannock to clear and permit the said vessel and her cargo to depart from the port and district of Tappahannock until the same bond was executed as aforesaid, and this they are ready to verify," &c.

To this plea there was a general demurrer, which was overruled by the district judge 288*] (Tyler). The *United States carried the cause up to the Circuit Court by writ of error, where the judgment was affirmed by Marshall, *C. J.*

The United States brought another writ of error to the Supreme Court of the United States, which was dismissed for want of jurisdiction; upon the authority of the case of *United States* v. *Goodwin* at the last term.

S. C. 1 Brock, 190.
Distinguished—11 Blatchf. 5.
Cited—4 Cranch, C. C. 261; 5 Pet 204; 12 Pet. 144; 14 Pet. 621; 1 Bald. 403; 1 Curt. 139.

BARTON *v.* PETIT AND BAYARD.

Absent—Johnson, *J.*, and Todd, *J.*

If the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond" follows, of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given so as to show the connection between the two judgments.

ERROR to the Circuit Court for the District of Virginia, on a judgment rendered on a bond (technically called in Virginia a "forthcoming bond") given to the marshal with condition to have certain goods forthcoming at the day of sale appointed by the marshal; being goods which he had seized under a *fi. fa.* issued upon a former judgment recovered by Petit and Bayard against Barton, which judgment was reversed at the last term of this court.

P. B. Key, for the plaintiff in error, contended; that the record of the former judgment being referred to in the condition of the bond, was to be considered as part of this record; and that the court could judicially take notice that it was the same which was reversed by this court at the last term, the transcript of which record now remains with the clerk of this court. But if the court could not judicially notice that fact, he moved for a *certiorari* to the clerk below to certify the record of the judgment on which the execution issued upon which the bond was given.

E. I. Lee and *I. R. Ingersoll*, contra, contended, that the former record was no part of the present record, and that the court could not judicially know it to be the same, and cited 4 Hen. and Mun. 293; 1 Wash. 94.

*February 11th. Washington, *J.*, [*289 delivered the opinion of the court as follows:

This is a writ of error to a judgment of the Circuit Court of Virginia, rendered upon a bond given by the plaintiffs in error with condition for the delivery, at a certain time and place, of property seized by the marshal to satisfy an execution which had issued from the same court. The condition not having been complied with, this judgment was rendered upon motion and notice thereof duly served upon the obligors in the bond, agreeably to the laws of Virginia.

It is not pretended that there is any intrinsic error in this judgment to warrant its reversal; but it is contended that the reversal of the original judgment, upon which the proceedings in this record took place, requires necessarily the reversal of this judgment. The general doctrine is undeniably so; but the application of it to this case is not admitted. That the judgment in this record is dependent upon some other judgment is apparent from the bond which recites

a prior execution and seizure, by the marshal, of the property mentioned in the condition, for the purpose of satisfying it; but it does not appear judicially to the court that the recited execution issued upon the identical judgment which has been reversed. The only difficulty which the court has felt has been to devise some proper mode in this, as well as in all similar cases which may hereafter arise, to connect with the original reversed judgment that which is asserted to be dependent upon it.

A *certiorari* upon a suggestion of diminution would not answer the purpose, as the proceedings in the original suit form no part of those in the subsequent suit; the only foundation of which are, the bond and notice. Neither does it appear regular for this court to receive as evidence of the dependency of the latter upon the former judgment, the certificate of the clerk of the Circuit Court.

The court has thought it best to direct a special writ to be framed applicable to cases of this nature, to be directed to the clerk of the court in which the judgments were rendered, **290***] to certify under the seal of the *court, the execution recited in the bond on which the second judgment was rendered. This difficulty can never occur except in cases where all the proceedings in the original judgment, except the execution, are already before this court. The execution, therefore, though no part of either the original or dependent record, being certified by the proposed writ, will supply the only link necessary to prove the connection between the two judgments.

In this case, the court from the novelty of the practice necessary to be adopted, will not permit the plaintiff in error to suffer in consequence of his not having applied sooner for a writ of *certiorari*, but will now direct the same to issue. In future the party must take the consequences of his neglect, if he should fail to have the execution certified in time.

March 16th. WASHINGTON, *J.* The court has examined the execution which has been sent up by *certiorari*, and is satisfied that the judgment on which it issued is that which was reversed at the last term. The judgment, therefore, on the forthcoming bond must be reversed also.

Judgment reversed.

Cited—1 Brock. 263.

MIMA QUEEN AND CHILD, PETITIONERS FOR FREEDOM, *v.* HEPBURN.

Present—All the Judges except TODD, *J.*

Hearsay evidence is incompetent to establish any specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. Claims to freedom in Maryland are not exempt from that general rule.

After a juror is sworn no exception can be taken to him on account of his being an inhabitant of another county. If a juror be challenged for favor, and upon examination before the tryers, he declare that if the evidence should be equal he should give a verdict in favor of that party upon whom the burden of proof lies, the court in the exercise of a sound discretion ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn.

ERROR to the Circuit Court for the District of Columbia, sitting at Washington.

At the trial, several bills of exception were taken.

*1. The first was for the rejection [***291** of part of the deposition of Caleb Clarke, who deposed to a fact respecting the ancestor of the petitioners which he had heard his mother say she had frequently heard from her father.

2. The second was for overruling part of the deposition of Freeders Ryland, which stated what he had heard Mary, the ancestor of the petitioners, say respecting her own place of birth and residence.

3. The third exception stated that after a juror was sworn the petitioners excepted to him because he was not an inhabitant of the county, but the court overruled the exception.

4. The fourth exception stated that a talisman being challenged for favor, and having, upon being questioned, avowed his detestation of slavery to be such that, in a doubtful case, he would find a verdict for the petitioners, and that he had so expressed himself with regard to this very case, and that if the testimony were equal he should certainly find a verdict for these petitioners: the court instructed the tryers that he did not stand indifferent between the parties.

5. The fifth exception was similar to the second.

6. The sixth exception stated that the petitioners, having read the deposition of R. Disney, stating that he had heard a report from divers persons respecting the manner of the importation of the ancestor of the petitioners, &c., the court instructed the jury that if they should believe from the evidence, that the existence of the report was not stated by the deponent of his own knowledge, but from what had been communicated to him respecting the existence of such a report many years after her importation, without its appearing by whom or in what manner the same was communicated to him, then the evidence is incompetent to prove either the existence of such report, or the truth of it.

F. S. Key, for the plaintiffs in error.

The principal exception is to the opinion of the court that in tracing a pedigree, the hearsay of hearsay is *not admissible. Ca- [***292** leb Clarke's deposition, as to what he heard his mother say, was admitted, but, as to what he heard his mother say her father said, was rejected. If this opinion be correct it will be impossible to prove any ancient fact.

John Law, contra.

Hearsay is only admissible on the ground of necessity and antiquity. (1 Wash., 123; 2 Wash., 148.) There was no evidence of the death of the person whose declarations were given in evidence. Hearsay of hearsay is analogous to a copy of a copy. The witness ought at least to state from whom he heard the report.

Jones, on the same side.

Every claim to freedom ought to be supported by the same kind of evidence as is necessary to support other claims. There is no rule of

law that exempts it from the general principles of evidence. In the present case the hearsay was not introduced to prove pedigree nor prescription, nor custom; but to prove that a certain ancestor came from England. It was the neglect of the parties that they did not urge their claim while they had legal evidence to support it. (5 T. R. 121, *Outram* v. *Morewood.*) Although a general right may be proved by traditionary evidence, a particular fact can not, except in tracing a pedigree. The admission of hearsay is an exception to the general rule of evidence, and therefore must be confined strictly to the excepted cases, which are prescription, custom and pedigree—cases in which the strength of the claim depends upon its antiquity. He who would use hearsay as evidence must first prove all the facts which would entitle him to use it, and must satisfy the court that better evidence cannot be had. The hearsay must be of such a fact as, if the person were living, could be given in evidence by him. Hearsay evidence of a general reputation of a fact is not admissible. The witness himself must know the fact of general reputation.

There are two objections to Disney's deposition: 1. That he does not state who informed him, so that it may be known whether that **293***] person be living or not so *as himself to be a witness; and, 2. That a general reputation of a fact is not evidence.

Morsell, in reply.

The general rule of evidence is, that if the evidence offered be the best which the nature of the case admits, and leaves no presumption that there is better behind, it is admissible.

Such evidence as this is always admitted in the courts of Maryland, under whose laws this case was tried, and its use had been sanctioned by the authority of the highest court of that state. The case cited by the opposite counsel shows that it is admitted not only in cases of prescription, custom and pedigree, but in all cases of the like nature. So it has been received in settlement cases, in all cases of paupers, and in questions of ancient boundaries in ejectment. The evidence taken upon commissions to mark and bound lands, under the statute of Maryland, generally consists of testimony of this kind. (1 Harris and M'Henry's Reports, 84, 85.) After a lapse of 100 years better evidence than this cannot be expected. The general reputation of the fact that the ancestor was free is sufficient to rebut the presumption arising from color, and throws the burden of proof on the other side.

As to the admission of hearsay, he cited Peake's ev. 10 to 13, Id. Appendix, p. 18.

February 13th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This was a suit instituted by the plaintiffs in the Circuit Court of the United States for the County of Washington, in which they claim freedom. On the trial of the issue certain depositions were offered by the plaintiffs, which were rejected by the court and exceptions were taken. The verdict and judgment being rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error, and the case depends on the correctness of the several opinions given by the Circuit Court.

*The first opinion of the court to [**294** which exception was taken was for the rejection of part of the deposition of Caleb Clarke, who deposed to a fact which he had heard his mother say she had frequently heard from her father.

The second exception is to the opinion overruling part of the deposition of Freeders Ryland, which stated what he had heard Mary, the ancestor of the plaintiffs, say respecting her own place of birth and residence.

The fifth exception is substantially the same with the second. The question is somewhat varied in form, and the testimony given by the defendant to which no exception was taken is recited, and the hearsay evidence is then offered as historical; but the court perceives no difference in law between the second and fifth exceptions.

The sixth exception is taken to an instruction given by the court to the jury on the motion of the counsel for the defendants. The plaintiffs had read the deposition of Richard Disney, who deposed that he had heard a great deal of talk about Mary Queen, the ancestor of the plaintiffs, and has heard divers persons say that Captain Larkin brought her into this country, and that she had a great many fine clothes, and that old William Chapman took her on shore once, and that nobody would buy her for some time, until at last James Carroll bought her.

Whereupon the defendant's counsel moved the court to instruct the jury that if they find the existence of this report and noise was not stated by the witness from his knowledge, but from what had been communicated to him respecting the existence of such a report and noise many years after her importation, without its appearing by whom or in what manner the same was communicated to him, then the evidence is incompetent to prove either the existence of such report and noise or the truth of it; which instruction the court gave.

The plaintiffs also read the deposition of Thomas Warfield, who deposed that John Jiams, an inspector of tobacco, told him that Mary, the ancestor of the plaintiffs, *was [**295** free, and was brought into this country by Captain Larkin, and was sold for seven years. The court instructed the jury that if they should be satisfied upon the evidence that these declarations of John Jiams were not derived from his own knowledge, but were founded on hearsay or report communicated to him many years after the importation and sale of the said Mary, without its appearing by whom or in what manner such communication was made to him; then his said declarations are not competent evidence in this cause. To these instructions the counsel for the plaintiffs excepted.

These several opinions of the court depend on one general principle; the decision of which determines them all. It is this: That hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.

However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the applica-

tion of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which the court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years past.

It was very justly observed by a great judge that "all questions upon the rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded."

One of these rules is, that "hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particu-
296*] lar case, is not the sole ground *of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact.

It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule: the value of which is felt and acknowledged by all.

If the circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.

This subject was very ably discussed in the case of *The King* against *The Inhabitants of Eriswell*, where the question related to the fact that a pauper had gained a residence, a fact which it was contended might be proved by hearsay evidence. In that case the court was divided, but it was afterwards determined that the evidence was inadmissible.

This court is of the same opinion.

The general rule comprehends the case, and the case is not within any exception heretofore
297*] recognized. *This court is not inclined to extend the exceptions further than they have already been carried.

There are other exceptions taken which appear on the record, but were not much relied upon in argument.

The third exception is to the qualification of one of the jurors. He was called as a talisman, and was stated to be an inhabitant of the county of Alexandria—not of Washington. The court decided that he was a proper juryman, and he was sworn. After his being sworn the objection was made by the plaintiff's counsel, and an exception was taken to the opinion of the court.

Whatever might have been the weight of this exception, if taken in time, the court cannot sustain it now. The exception ought to have been made before the juror was sworn.

The fourth exception also applies to an opinion given by the Circuit Court respecting the service of one of the persons summoned as a juror. James Reed, when called, was questioned, and appeared to have formed and expressed no opinion on the particular case; but on being further questioned, he avowed his detestation of slavery to be such that in a doubtful case he would find a verdict for the plaintiffs; and that he had so expressed himself with regard to this very cause. He added that if the testimony were equal he should certainly find a verdict for the plaintiffs. The court then instructed the triers that he did not stand indifferent between the parties. To this instruction an exception was taken.

It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps *have been so strong as to render it [***298** positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way; and therefore the court exercised a sound discretion in not permitting him to be sworn.

There is no error in the proceedings of the Circuit Court, and the judgment is affirmed.

DUVALL, *J.* The principal point in this case is upon the admissibility of hearsay evidence. The court below admitted hearsay evidence to prove the freedom of the ancestor from whom the petitioners claim, but refused to admit hearsay of hearsay. This court has decided that hearsay evidence is not admissible to prove that the ancestor from whom they claim was free. From this opinion I dissent.

In Maryland the law has been for many years settled that on a petition for freedom where the petitioner claims from an ancestor who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the general court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of

Appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct. Hearsay evidence was admitted upon the same principle, upon which it is admitted to prove a custom, pedigree, and the boundaries of land; because from the antiquity of the transactions to which these subjects may have reference, it is impossible to produce living testimony. To exclude hearsay in such cases would leave the party interested without remedy. It was decided also that the issue could not be prejudiced by the neglect or omission of the ancestor. If the ancestor neglected to claim her right, the issue could not be bound by length of time, it being a natural inherent right. It appears to me that the reason for admitting hearsay evidence upon a question of freedom is much stronger than in cases of pedigree or in controversies relative to the **299***] boundaries of land. It will be *universally admitted that the right to freedom is more important than the right of property.

And people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hearsay evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur.

Aff'g—2 Cranch, C. C.
Cited—1 Wheat. 7; 5 Pet. 86; 10 Pet. 437, 438; 8 Wall. 409; 1 Curt. 45, 48; 2 Curt. 209; 2 Brock. 263; 1 Bald. 577; 1 McLean, 209.

THE BANK OF COLUMBIA
v.
PATTERSON'S Adm'r.

Absent—JOHNSON, *J.*, and TODD, *J.*

Upon a special contract executed on the part of the plaintiff. *Indebitatus assumpsit* will lie for the price.

A simple contract is not merged in a sealed instrument, which merely recognizes the debt, and fixes the mode of ascertaining its amount.

Upon general counts, a special agreement executed may be given in evidence.

The recital of a prior, in a later agreement, after it has been executed, does not extinguish the former.

Wherever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies.

ERROR to the Circuit Court for the District of Columbia, in an action of *indebitatus assumpsit*, brought by the defendant in error against the president, directors and company of the Bank of Columbia, in their corporate capacity. There were four counts only in the declaration.

1st. *Indebitatus assumpsit*, for matters properly chargeable in account. 2d. *Indebitatus assumpsit*, for work and labor done. 3d. *Quantum meruit;* and, 4th. *Insimul computassent.*

The defendant pleaded *non-assumpsit*, and a tender.

On the trial below, the defendant took three bills of exceptions.

The first stated, that the plaintiff read in evidence a sealed agreement, dated 10th December, 1807, between Patterson and a duly authorized committee of the directors of the bank, under their private seals. It recites, that a difference of opinion had arisen between *Patterson and the committee for build-[***300** ing the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee in 1804, and thereto annexed; whereupon it was agreed, that all the work done by Patterson should be measured and valued by two persons therein mentioned according to certain rates, called in Georgetown old prices, and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed, that the out-houses, respecting which there had been no specific agreement, should be measured and valued by the same persons in the same manner. The agreement of 1804 referred to in, and annexed to the agreement of 1807, was also offered in evidence by the plaintiff, and states, that Patterson had agreed with the committee to do all the carpenter's work required, agreeably to the plan of the new bank, and states particularly the manner in which it was to be done; and that "in consideration of the work being done" as stated, the committee agreed to pay Patterson 3,625 dollars as full consideration; and that if, when the work should be finished, the committee should be of opinion that that sum was too much, Patterson agreed to have the work measured, at the expense of the bank, by two persons mutually appointed, who should take the old prices as the standard, and in case the bill of measurement did not amount to the sum of 3,625 dollars, Patterson agreed to take the amount of measurement, for full satisfaction. The plaintiff then read in evidence a paper of particulars of the work, certified by the persons named in the agreement of 1807. The defendants offered in evidence the plan of the building, and that it was built principally according to that plan, and the agreement, and that any work other than that stated in the plan and agreement, was to be charged separately as extra work, and that it was so charged by Patterson, before the 10th of December, 1807, the date of the second agreement, who presented the account (so charged) to the defendants, claiming the amount of the same, and claiming also for the work done under the agreement of 1804, the sum of 3,625 dollars, and proved, that while the work was going on, the defendants paid Patterson sundry large sums of money on account thereof.

*The court was thereupon prayed by [***301** the defendants to instruct the jury, that if they believed that the agreement of 1804 was assented to by Patterson and the committee as binding between them, and that the work therein contracted for was done by Patterson, and that the sum of 3,625 dollars therein mentioned was claimed by him on account of the same, then the plaintiff could recover for no such work, but could only recover for the work done, extra of the said agreement; which instruction the court refused to give.

It was contended by the defendants' counsel,

Morsel & Key, that in that refusal the court below erred, because,

1. Although there were alterations in the building, after the agreement of 1804, yet Patterson was bound by that contract, as far as it could be traced, and could only recover for the extra work done under the counts of this declaration, which were all general. (1 Comyn on Contracts, 360; Peake's Cases, 103.)

2. Because the plaintiff was allowed to recover the value of certain work by measure and value, under the general counts, when he had contracted to do the said work for a certain stipulated price. (Esp. N. P., 138.)

The second bill of exceptions states, that the defendants, upon the same evidence, prayed the court to instruct the jury, that the plaintiff was not entitled to recover under any of the counts; which instruction the court refused to give, but declared that the evidence was competent.

In this refusal, it was contended that the court erred, because, the implied promise to pay for the extra work was merged in the agreement of 1807, and there was no count on that, or the other agreement of 1804. (2 T. R., 479; *Foster* v. *Allanson.*)

The third bill of exceptions states, that the defendants prayed the court to instruct the jury, upon the same evidence, that the plaintiff could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount **302***] *thereof to the plaintiff; and that the jury could not from the evidence offered, presume any such promise. This instruction the court also refused.

It was contended that the court erred in this refusal, because there was an express agreement under seal, relative to the work, and there was no count under that agreement.

It was also contended, that a corporation aggregate could not promise otherwise than under its seal, and therefore the law could not imply a promise.

In support of this proposition, the following cases were cited: Bac. Ab. 13. Tit. corporation; 4 Com. Dig. 258, Tit. Franchises; Bro. corporation, pl., 34; 1 Vent., 47; 1 Salk., 191; 1. Bl. Com. pt., 2; 1 Roll. Rep., 82; 3. P. Wms. 419, *Rex* v. *Bigg.*

Jones & *C. Lee,* contra, cited 5 Cranch, 61, *Deveaux* v. *Bk. of U.S.;* Doug., 526; and Kid. on corporations generally.

As to the form af action, viz., *assumpsit* and not covenant, they said the instruments were under the private seals of the committee, not the corporate seal. The declaration need not show whether the *assumpsit* be express or implied. (1 Chitty on pleading, 333, note II.)

Where the contract is executed general *indebitatus assumpsit* lies. (Fitzgibbon, 302; Bul. N. P., 139, *Weaver* v. *Burrows;* 1. Wil. 117. *Alcorn* v. *Westbrook.* Dennison's opinion; 4 Bos. & Pul., 330; 3 Bos. & Pul., 582; 6 East., 564, 569; 1 Sanders, 272, 276, note 2; Cowp. 284, 289; 9 East., 349; 1 T. R., 134; Doug. 24, *Watson* v. *Downes;* 4 Dall., 428.)

STORY, *J.,* delivered the opinion of the court as follows:

Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say that the practice of filing numerous bills of exceptions is very inconvenient; *for all the points of law might [***303** be brought before the court in a single bill, with a simplicity which would relieve the bar and the bench from every unnecessary embarrassment.

As the argument on the first exception has proceeded upon the ground that the agreement of 1804 was completely executed and performed, and the objection relates only to a supposed mistake in the form of the declaration, it will at present be considered in this view. And we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not in such case necessary to declare upon the special agreement. (*Gordon* v. *Martin,* Fitzgibbon, 303; *Musson* v. *Price,* 4 East., 147; *Cook* v. *Munstone,* 4 Bos, & Pul., 351; *Clarke* v. *Gray;* 6 East., 564, 569; 3 Saund. 350, note 2.) In the case before the court, we have no doubt that *indebitatus assumpsit* was a proper form of action to recover, as well for the work done under the contract of 1804 as for the extra work. It may, therefore, safely be admitted (as is contended by the plaintiff in error), that where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall notwithstanding be considered as subsisting so far as it can be traced. (*Pepper* v. *Burland,* Peake's Rep. 103.) The first exception, therefore, wholly fails.

Under the second exception, the plaintiff in error has made various objections.

1. The first is, that though a promise would be implied by law, for the extra work against the corporation, yet that such promise was extinguished, by operation of law, by the provisions of the sealed contract of 1807. It is undoubtedly true that a security under seal extinguishes a simple contract debt, because it is of a higher nature. (Cro. Car., 415; Raym., 449; 2 Jones, 158; 1 Burr, 9; 5 Com. Dig. tit. Pleader, 2. G. 12.) But this effect never has been attributed to a sealed instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation. At most, the sealed agreement of 1807 could not be *construed to extend [***304** beyond this import. In no sense could it be considered as a higher security for the money originally due. This objection, therefore, cannot prevail, even supposing that the agreement were the deed of the corporation.

2. A second objection is, that the special agreements, connected with the certificates of admeasurement, were inadmissible evidence under the general counts, and could be admissible only under counts framed on the special agreements.

To this objection an answer has already, in part, been given. And we would further observe, that if the agreements connected with the admeasurements were the means of ascertaining the value of the work, the evidence was pertinent under every count. (2 Saund. 122, note 2.) And if the certificates of admeasurement were of the nature of an award, they were

clearly admissible under the *insimul computasent* count. (*Keen* v. *Batshore*, 1 Esp. Rep., 194.)

3. Another objection is, that as the agreement of 1807 is sealed, and is connected, by reference with the prior agrcement, they are to bc construed as one sealed instrument, and *assumpsit* will not lie upon an instrument under seal.

The foundation of this objection utterly fails, for the agreement is not under the seal of the corporation, but the seals of the committee; and if it were otherwise, it is too plain for argument, that the origiual agrcement was not extinguished, but referred to, as a subsistiug agreement. It is quite impossible to contend that the mere recital of a prior, in a later agrecmeut, after it has been executed, extinguishes the forner.

Two other objections are made under this exception; but as they are answered in the preceding observations, it is unnecessary to notice them farther.

Under the third exception, the only objections relied on are in principle the same as the objections urged under the former exceptions, and they admit the same answers.

305*] *The case has thus been considered all along, as though the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee in their own names.

In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A qucstion has therefore occurred how far the corporation were capable of contracting, except under their corporatc seal; and if it were eapable, as no special agreement is found in the case, how far the facts proved, show an express or an implied contract on the part of the corporation.

Anciently it seems to have been held that corporations could not do anything without deed. (13 H. 8, 12; 4 H. 7, 6; 7 H. 7, 9.)

Afterwards the rule seems to have been relaxed, and they were, for convcniency's sake, permitted to act in ordinary matters without deed; as to retain a servant, cook, or butler (Plow. 91. b; 3 Saund. 305), and gradually this relaxation widened to embrace other objects. (Bro. Corp., 51; 1. Salk., 192; 3 Id. 103; 3. Lev., 107; Moore, 512.) At length it seems to have been established that though they could uot contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation, *Rex* v. *Bigg*, (3 P. Wms., 419); and courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. (1. Fonb. 305, Phil. ed. notc o.) The sole ground upon which such an agreement can bc enforced, must be the capacity of the corporation to make an unsealed contract.

As it is couceded, in the present case, that the committec were fully authorized to make agreements, there could then bc no doubt that a contract made by them in the name of the corporation, and not in their own names, would *have been binding on the corpora- [***306** tion. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

The technical doctrine, that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would bc without remedy against the corporation. Accordingly it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court, that adjudged cases fully support the position. (*Bank of England* v. *Moffat*, 3 Bro. Ch. Rep., 262; *Rex* v. *Bank of England*, Doug., 524, and note *ibidem*; *Gray* v. *Portland Bank*, 3 Mass. Rcp., 364; *Worcester Turnpike Corporation* v. *Willard*, 5 Mass. Rep., 80; *Gilmore* v. *Pope*, 5 Mass. Rep., 491; *Andover & Medford Turnpike Corporation* v. *Gould*, 6 Mass. Rep., 40.)

In the case before the court, these principles assume a peculiar importance. The act incorporating the Bank of Columbia (act of Maryland, 1793, ch., 30) contains no cxpress provision authorizing the corporation to make contracts. And it follows, that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchasc, receive, enjoy and retain, lands, tcnements, hereditaments, goods, chattels and effects, of what kind, nature, or quality, soever, and the same to scll, grant, demise, alien, or dispose of—and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of *the money or credit of [***307** the bank, in the common course of banking, for the interest and benefit of the proprictors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question how far the bank notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurauce companies also, it would be a difficult question to decidc whether the law would cuable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed the opposite doctrine, if it were yielded to, is so purely technical, that it

could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical nicetics, the court feel no disposition to extend their influence.

Let us now consider what is the evidence in this case, from which the jury might legally infer an express, or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have laid against the committee personally, upon their express contract, yet as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work, respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case, it appears to the court that there was no error in the court below, and that the judgment ought to be affirmed.

Cited—8 Wheat. 358; 9 Wheat. 745, 829; 12 Wheat. 74, 100, 101, 114; 9 Pet. 566; 6 How. 322, 323; 6 Otto, 344; 8 Bank. Reg. 414; 1 Wood. & M. 358; 6 McLean, 451; 2 Cranch, C. C. 56.

308*] *CLARK'S EXECUTORS v. CARRINGTON.

Absent—JOHNSON, *J.*, and TODD, *J.*

In a case of warranty and indemnity, a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible evidence in a suit against him on his contract of indemnity.

A person who upon receiving an assignment of a share of property as security for debt, agrees to comply with the contract of the assignor with a joint owner of the property, is bound to fulfill that contract although it exceed in amount the value of the share of the property transferred to him.

ERROR to the Circuit Court for the District of Rhode Island, in an action of *assumpsit* brought by Carrington against Clark in his lifetime, and prosecuted against his executors, after his decease, to recover from them five-ninths of the amount of a judgment recovered by Smith & Co., of Hamburgh, against Carrington upon a claim against him jointly with Greene & Barker, and J. C. Nightingale, Carrington having paid the whole.

The declaration contained the usual money counts, and several counts upon a special undertaking by Clark to comply with the contract between Greene & Barker and Carrington, which contract was averred to be to pay all debts contracted by Carrington with Smith & Co. on account of the owners of the ship Abigail, in the proportion in which they are interested therein; the owners being Greene & Barker for five-ninths. J. C. Nightingale for two and an half ninths, and Carrington for one and an half ninths; Clark having received from Greene & Barker, who had become insolvent, an assignment of their share in the ship and cargo; and Carrington having paid over to Clark, five-ninths of the proceeds thereof.

A bill of exceptions was taken to the opinion of the court below, and to the admission in evidence of a letter from Clark to Smith & Co. of the 30th of June, 1800, and of a letter from Greene & Barker, to Smith & Co., of the 12th of July, 1800, and of the writ, proceedings and judgment, in the suit of Smith & Co. against Greene & Barker, J. C. Nightingale and Carrington.

The letter of 30th June, 1800, from Clark to Smith & Co. says: "This will be handed to "you by Mr. Edward Carrington, who goes "supercargo of the ship Abigail, of which he "is a part owner in company with Messrs. "Greene & Barker and John C. Nightingale. "*They have concluded to send their [*309 "ship on freight to your city, where, having no "correspondent, I do myself the pleasure of "recommending them to your notice. Mr. "Carrington proposes continuing in the ship, "and it is probable will require your advice "and assistance in the voyage which he intends "carrying into execution. I have ever found "these gentlemen persons of strict integrity, "and I doubt not will punctually fulfill any "engagements they may enter into with you."

The letter of the 12th of July, 1800, from Greene & Barker to Smith & Co., is as follows:

"NEW YORK, 12th July, 1800.

"Messrs. George Smith & Co.:

"Gentlemen—By the recommendation of "our mutual friend, Mr. John Innes Clark, of "Providence, we are induced to make an ac- "quaintance with your house, and we have ac- "cordingly recommended Mr. Edward Carring- "ton, supercargo of the ship Abigail (of which "he, together with Mr. John C. Nightingale "and ourselves are owners), to call on you for "the necessary aid he may require while in "your city. We have opened our plans of "a voyage for the Abigail to your Mr. Adam- "son, which he doubts not you will readily "coincide with, and render Mr. Carrington the "necessary aid he may require. We shall con- "sider ourselves responsible for all contracts "which Mr. Carrington may make in the busi- "ness of this ship, and anticipate the pleasure "of your being well satisfied with his strict "fulfillment of them. We have handed your "Mr. Adamson bills of lading for a parcel of "dye-wood, shipped in the Abigail with an "order to get one thousand pounds sterling in- "sured on her cargo and freight, and shall draw "on you in consequence for seven hundred and "fifty pounds sterling.

"We are, your most obedient servants,

"GREENE & BARKER.

"Please effect the above insurance, if not "already done.

"WM. ADAMSON."

*The record of the proceedings in [*310 the suit of *Smith & Co.* v. *Carrington* and others, was objected to because Clark was not a party to it. But it was proved that Clark had a power of attorney from Carrington, who was in Can-

ton, and conducted the defense of that suit in his behalf.

The evidence principally relied on by the plaintiff in support of his action was a letter from Clark to him of the 16th of March, 1801, written at Providence. That part of the letter which relates to the subject is as follows:

"Mr. Edward Carrington:

"Dear Sir—Since your departure from hence, "our friends, Messrs. Greene & Barker, have "been so unfortunate as to reduce them to the ne- "cessity of compromising with their creditors. "In order to secure me for the indorsements I "have made in their behalf, they have conveyed "to me two-thirds of the ship Abigail, with her "appurtenances, also five-sixths of two-thirds "of the cargo. Situated as this business is, I "have to recommend your making the utmost "dispatch in your sales and proceeding imme- "diately for this place, with such articles as "you shall receive in return for the sales of "your outward cargo, submitting the articles "entirely to your judgment; but I recommend "that you leave no part of the property behind "you, if it can possibly be avoided. With re- "spect to the ship, notwithstanding I have a "bill of sale from Greene & Barker of two- "thirds, I shall view you (if you return here "with her) as the owner of such proportion as "agreed upon between you and them, and I "give you my word that you shall receive from "me every aid and support in settling the busi- "ness to mutual satisfaction, that is in my "power. Mr. John Corlis, who has undertaken "to conduct the business for Mr. John C. "Nightingale, writes you by this opportunity, "and will assure you in his behalf of one-sixth "of one-third from him—that is to say, to make "you an owner in the whole ship Abigail and "appurtenances of one complete sixth, and the "same proportion in the cargo, and Greene & "Barker's contract with you, shall in every **311*]** "respect be fully complied *with, the "same as it would have been done with them, "had they continued owners."

The answer of Carrington to this letter was as follows:

"Havanna, April 22d, 1801.

"John Innes Clark, Esq.:

"Sir—Triplicate your letter of 16th March, was handed me this day, original and duplicate having not appeared. Your letter gives me the first advice of our friends, Messrs. Greene & Barker's, misfortunes by the fire, and am very sorry that they have been obliged to dispose of the Abigail and her cargo under their present situation of a bottomry to Messrs. Geo. Smith & Co. at Hamburg. But I presume and doubt not Messrs. Greene & Barker have acquainted you with the exact situation of them, and have only disposed to you of that part of the ship and cargo that may remain after the bottomry bond is settled and discharged.

"In consequence of the capture and detention of part of the cargo and bad condition of the ship, I have been unable to return direct to Hamburg, and obliged to make up a voyage for Providence, and have advised Messrs. Greene & Barker with particulars and desired them to cause insurance to be made thereon. I shall leave here this day and join the ship and hope to be at sea in a day or two. Should the voyage meet no other further disappointment, I flatter myself that after settling the accounts of the adventure, it will turn to some advantage and leave a considerable balance due Messrs. G. & B., and beg to assure you that everything that is consistent and within my duty in this business I shall give the strictest attention and consult you therein.

I am, with esteem and respect,

Your obedient servant,

EDW. CARRINGTON."

Carrington, while at Hamburg, in order to procure a cargo for the ship, had obtained credit with Smith *& Co. to a large amount [***312** upon the hypothecation of the ship by a bottomry bond, and upon agreeing to return to Hamburg with a cargo; for which purpose he engaged Smith & Co. to procure insurance to be made in a large sum upon his return voyage. The premium on this insurance constituted a considerable part of the debt due to Smith & Co., upon which they recovered judgment against Carrington as before stated. One of the grounds of defense taken by Clark's executors was that Carrington had neglected to give notice to Smith & Co. of the dereliction of the return voyage in due time to save that premium of insurance, and therefore he alone ought to suffer by it. The judge, in the court below, in charging the jury (as the manner is in Rhode Island), said: "Great blame is attempted to be "thrown on Mr. Carrington for not giving "notice to George Smith & Co. that he had "changed his voyage so as to prevent the in- "surance being made from Havanna to Ham- "burg; and the defendants say that for his "neglect in not giving such timely notice, he "ought alone to pay the whole of that premium; "of this you will judge." The judge also said: "I conceive the case to be clear, that as Greene "& Barker were interested five-ninths in the "voyage, they were bound to indemnify Mr. "Carrington in the same proportion for the "damage he should sustain by the contract with "George Smith & Co." And again he says: "If Mr. Clark received from Mr. Carrington "more than five-ninths of the surplus after pay- "ing the company's debts, and Mr. Carrington "has since been obliged to pay those debts, Mr. "Clark is bound to refund his proportion.".

The judge finally concludes his charge in this manner:

"Having gone through the case at great "length and conceiving it on the whole to rest "principally on questions of law, I will give "you my opinion explicitly upon them, so that "if your verdict should be against the defend- "ants, they may have an opportunity to bring "the cause before the Supreme Court.

"I conceive that Mr. Clark's letter bearing "date March 16, 1801, at Providence, and "directed to Mr. Carrington, at Havanna, and "received by him 22d of *April, 1801, [***313** "taken in connection with the other evidence "in the case, ought to be considered as a letter "of guaranty, and binding Mr. Clark to pay "five-ninth parts of the debt due to George "Smith & Co., as ascertained by the judgment "in their favor against Mr. Carrington.

"I am also of opinion that Mr. Clark, having "received of Mr. Carrington a large sum of "money, under and by virtue of the assign- "ment from Greene & Barker of their interest

"in the ship Abigail and cargo, was bound, "under the circumstances of this case, as made "out and established by the evidence, to refund "the same, or so much thereof as would amount "to five-ninth parts of the debt due to George "Smith & Co. What sum Mr. Clark received "is a question of fact proper for you to decide."

The verdict and judgment being against the defendants, they sued out their writ of error.

C. Lee, for plaintiffs in error.

The bill of exceptions is,

1. To the admission of improper evidence; and,

2. To the judge's opinion as to the effect of that evidence.

1. As to the admission of improper evidence. The letter of the 30th of June was irrelevant and could have no effect upon the present case. The letter of 12th of July, 1800, from Greene & Barker to George Smith & Co., was improper evidence in the case, because it was between other parties. Clark had no knowledge of such a letter when he agreed to comply with the contract of Greene & Barker with Carrington. The record of proceedings in the case of *Smith and others* v. *Carrington* was inadmissible because Clark was not party or privy to that cause.

2. As to the opinion of the judge upon the effect of the evidence.

314*] *The letter of 16th of March, 1801, did not bind Clark to pay any money to George Smith & Co. It was intended only to bind only Clark to permit Carrington to have one-sixth of the ship and cargo according to the contract between him and Greene & Barker. The engagement of Clark was also upon a condition precedent, viz., that Carrington should return with the ship to Providence; which condition he never performed. It was very important to Clark to get possession of the ship, and he therefore annexed the condition to his promise that the ship should be brought to his place of residencc. There is no evidence that Clark knew of any other contract between Greene & Barker and Carrington than the agreement that he should have one-sixth of the ship. The judge ought not to have left it to the jury to decide whether the conduct of Carrington, in not bringing the vessel to Providence, was satisfactory to Clark, as a compliance with the condition of his promise; but ought to have told the jury that the condition had not been performed, and therefore Clark was not bound by his promise.

The judge also erred in directing the jury that the letter of the 16th of March ought to be considered as a letter of guarranty, and binding Clark to pay five-ninth parts of the judgment recovered by *Smith & Co.* v. *Carrington*. That judgment may include items for which Greene & Barker were not liable to reimburse Carrington. He erred also in directing the jury that the special counts were supported by the evidence, and that the plaintiff might, upon the money counts, recover less than the proportion of the judgment of Smith & Co.

Carrington had no equitable claim on Clark. Clark was not liable at all unless he was bound by the letter of 16th March. As to the premium of insurance upon the return voyage from Havana to Hamburgh, which constituted a great part of the claim of Smith & Co. against Carrington upon which their judgment was founded, it was an expense which arose solely from the neglect of Carrington to give due notice to Smith & Co. of his relinquishment of the return voyage, and thererefore Carrington could not have recovered any part of it from Greene & Barker; and the judge ought to have instructed the jury accordingly.

*Clark was a creditor of Greene & [***315** Barker, and had as much equity as any other creditor. He took the bill of sale without notice of any prior equity. Clark, by accepting the bill of sale, could not be considered as a partner, nor liable for any transactions prior to his interest in the ship and cargo. If Greene & Barker had never paid for the ship and had become insolvent, Clark could not have been held liable to the vendor. There was no lien on the vessel or cargo. An assignee is not a partner. There is no partnership without an agreement. (1 H. Bl., 37, 48; Watson on Part., 21, 67; 3 Bos. and Pul., 288, *Parker* v. *Parker;* 289, *Chapman* v. *Cross.*)

Stockton, contra.

Upon every principle of law and justice this judgment ought to be affirmed. The suit was by one joint owner to recover of another joint owner a proportion of a joint debt recovered against the plaintiff. The verdict of the jury has settled all the questions of fact. There is no error in the form of the charge given by the judge to the jury.

1. As to the points of law arising in the case. The charge given by the judge to the jury regards two subjects: 1. That the letter of the 16th of March was, in connection with the other evidence, a guaranty for five-ninths of the debt due to Smith & Co.; and, 2. That Clark, having received upon his five-ninths of the ship and cargo more than his proportion, ought to refund.

1. As to the letter of 16th of March. It clearly binds Clark to do, in regard to that ship and cargo, and to the adventure, whatever Greene & Barker would have been bound to perform had they continued owners. There cannot be a doubt that Greene & Barker, as joint owners with Carrington, would have been bound to reimburse to Carrington five-ninths of the debt due to Smith & Co., which Carrington had been compelled to pay. It is clear also that Clark understood his liability as going to that extent. This is to be inferred from his silence as to the letter of the 22d of April, 1801, which Carrington wrote to him in reply to his of the 16th of March; from the sanction which Clark gave to the subsequent voyage to London by his *letter of 15th of May, 1802; from [***316** his having charged himself in account with five-ninths of the outfit for that voyage; from his having joined in another adventure as to part of the cargo left at Guadaloupe; from his letter of the 9th of July, 1801; from his having conducted the defense of the suit of Smith & Co. against Carrington; from his affidavit made to obtain a continuance of that suit; and finally, by agreeing to refer this cause to arbitrators to ascertain the amount for which the judgment should be rendered, thereby admitting a good cause of action against him.

If all the part owners are not named in a suit, and if those who are named do not plead that fact in abatement, and judgment be obtained

against them, they may compel the others to contribute. (Abbot, 71, § 13, first London edition; 2 Bos. and Pul., 268, 270; 1 East., 30.)

But Clark was liable as a joint owner, independent of the express undertaking contained in his letter of the 16th of March. And even if he is to be considered as the mere assignee of Greene & Barker, he must stand in their place and take their interest *cum oncre*. No person claiming under a partner, or joint owner, can claim more than such partner or joint owner could have claimed, if he had not assigned his interest. (Cowper, 449, *Fox* v. *Hanbury*.)

2. The second opinion of the judge was, that if Clark had received the proceeds of five-ninths of the ship and cargo, he was bound to refund five-ninths of the debt which Carrington had paid to Smith & Co., and that Carrington had a right to recover the same in this suit upon the money counts. In this opinion also he was correct.

If a person has received money, which by subsequent events he ought in equity and justice to refund, it is money had and received for the use of the plaintiff. He might also in this case recover on the count for money paid, laid out and expended for the use of the defendant. He paid the whole of the joint debt of which the defendants ought to have paid five-ninths.

The plaintiff was also entitled to recover on the special count. The only question, on the **317***] point of pleading, *is whether the contract in the letter be materially variant from the count. The only variance alleged is in regard to the bringing of the ship to Providence; but the count is as general as the letter. The only question, then, is whether the return of the vessel to Providence was a condition precedent of the contract contained in the letter. The word "here" is satisfied if the vessel came into the United States. This was a question properly submitted to the jury. Could it mean that the plaintiff was bound at his peril and at all events, to bring the vessel into Providence? Shall nothing excuse him? capture? nor tempest? nor the clear interest of the concern?

As a partner, and especially as husband of the ship, he had a discretion to act for the common benefit of all concerned. (Abbot, 58, 59.) The condition was substantially performed. If not, it was dispensed with by Clark. Time and place are not of the essence of the contract. If a horse be sold to be delivered at a certain place on a certain day, and the purchaser, before the day, receive the horse at another place, the contract is fulfilled. Clark made no objection to the delivery of the ship at Norfolk, but agreed to a new voyage from thence to London, and received the proceeds of that voyage without objection. He is bound by his acquiescence.

Then as to the admission of evidence.

1. It is objected that the record of the case of *Smith & Co.* v. *Carrington* ought not to have been admitted in evidence, because it was *res inter alios acta*.

This objection admits of three answers:

1. It does not apply to this case because Clark, although not an ostensible party, was a party in interest. Where the parties are substantially the same, the record is evidence. (Gill., 35, Doug., 517, *Kinnersly* v. *Small;* 4 Dall., 120.)

2. The 2d answer is that this is either a case of indemnity or warranty; and there is a privity between the person indemnified and the person indemnifying. The root of the principle is found in the common law doctrine of warranty. If the party were called to warrant, *the [***318** judgment was conclusive against him; and when the writ of *warrantia charta* yielded to covenant the same principle applied. (4 Reeves, 167.) Where a person indemnified gives notice to the person indemnifying that a suit is brought against him, the judgment is conclusive against the latter in a suit by the former against him for indemnity. (3 T. R., 374, *Duffield* v. *Scott;* 1 Johnson, 517, *Blandsdell* v. *Glasscock*.) So, in an action of covenant on sale of land the plaintiff must show an eviction, which he can only do by the record of the suit against him. (6 Johnson, 158.)

The principle of *res inter alios acta* never applies to a case of indemnity. Clark not only had notice, but actually defended the suit.

3. The 3d answer is that a judgment ascertaining a precise fact, character or privilege, is always evidence, whenever that fact, character or privilege comes in question between other parties. (2 Strange, 1109; 5 Bur., 2601; 1 Bur., 146; 9 Mod., 66.)

It is objected also that the letter from Clark to Smith & Co., of 30th of June, 1800, was irrelevant, and therefore ought not to have been read in evidence. But it clearly refers to the subject matter. It is also said that the letter from Greene & Barker to Smith & Co. was a letter between others, and ought not to have been admitted as evidence against Clark. But it was a letter from those under whom Clark claims, and by whose acts he is bound, so far as those acts relate to the property assigned to him. It was also evidence of the engagements of Greene & Barker, which Clark had undertaken to perform.

But it is said that Carrington ought not to recover, because the loss of the premium upon the insurance was owing to his negligence in not giving earlier notice of the alteration of the voyage. The answer is, that this was a matter left to the jury and properly in issue between the parties. There is no evidence of negligence in the record.

Hunter, on the same side.

The letter of the 16th of March was in itself a guaranty. *And all the acts of [***319** Clark show that such was his understanding of it.

The judgment of *Smith & Co.* v. *Carrington* was admitted only as evidence of the amount recovered. All the cases on this subject are collected in the American edition of Peak's Law of Evidence (p. 45,47.)

As to the count for money had and received. This was money paid by mistake, in supposing that the debt claimed by Smith & Co. could not be recovered. Or it was a case of trust, Clark having received the money upon the understanding that he would pay his proportion of whatever Smith & Co. might recover.

The premium of insurance was paid by Smith & Co. before it was possible that they could have received notice of the change of the voyage.

If Carrington was an agent, his acts have been sanctioned by Clark. If he was guilty of misconduct, Clark has waived it.

The agent is discharged if the principal adopt his acts. (1 N. Y., T. R., 323, *Lyle* v. *Clason;* 1 N. Y., T. R., 526, *Codwise* v. *Hacker;* Johnson's cases in error, 110, *Towle* v. *Stephenson.*)

Jones, in reply.

The real question is whether Clark made himself liable for the debts of his debtors, Greene & Barker. The whole expedition resulted in loss. It is not probable that Clark meant to take all the risks of the voyages which Carrington might have undertaken under his agreement with Greene & Barker. In order to make Clark a partner the evidence must be very clear. But here was no account of stock taken, no ascertainment of debts, &c., all of which precautions would be taken by a prudent man before he engaged in a copartnership. Clark was merely an assignee of the property, and the account rendered shows that he took Greene & Barker's share at a certain price. Clark could not be liable for any losses which happened before the assignment. He was never considered as a partner either by **320***] *himself or by any of the other parties. He was only considered as an assignee for his own security. Carrington gave up the property to Clark without any engagement on his part to pay the debts of the concern, showing thereby his construction of the nature of the assignment to Clark. There is no evidence to support the counts for money had and received, and for money paid, laid out and expended. Nor did the evidence support the special counts. They do not state the condition that the property was to be delivered at Providence, nor do they aver a delivery anywhere.

The record in the case of *Smith & Co.* v. *Carrington,* was admitted in evidence without any preparatory evidence to show its connection with this case. The declaration was general and extensive. The account filed did not show the cause of action.

Community of interest does not authorize the admission of a record in evidence. There must be either privity of estate or of title. Clark did not claim either under Carrington or Smith & Co.

All the cases of warranty cited apply to land or specific property, where the title to the thing was in question. They are exceptions to the general rule. The case in 3 T. R. is a case of indemnity against actions, and came on upon demurrer. But if it had come on before the jury, the plaintiff must have shown that it was a suit for a debt against which he was to be indemnified. (1 Esp. Rep., 162.)

The other cases cited are of public rights—such as common, prescription, custom, &c.

February 13th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This cause comes on now to be heard.

1st. On exceptions to the opinion of the Circuit Court permitting certain exhibits produced by the defendants in error to go to the jury.

2d. On exceptions to the charge delivered by the judge to the jury.

321*] *The first exhibit, to which the plaintiffs in error objected, was a letter written by their testator to George Smith & Co., of Hamburg, which respects the transaction on which the present suit is founded. This letter is said to be irrelevant.

The second is a letter written by Greene & Barker (whose interest the testator of the plaintiffs held as assignee) to George Smith & Co., making themselves responsible for the contract of Carriugton.

This letter is said to be inadmissible, because it is between other parties, and relates to a contract between Carrington and George Smith & Co.

The third is a judgment obtained by George Smith & Co. against Edward Carrington, the defendant in error, on his transactions as a copartner with Greene & Barker, which were guaranteed by them. The objection to this exhibit, also is, that it is the record of proceedings in a suit between other parties.

The court is unanimous and clear in the opinion that neither of these exceptions is sustained.

The letter of John J. Clark to George Smith & Co. is admissible, because it is part of the correspondence relative to the transactions out of which the present suit has grown, and because it affords a strong implicatiou that the writer was acquainted with the obligation of Greene & Barker, whose interest he claims, to comply with the engagements of Carrington, their copartner and supercargo. It cannot, therefore, be deemed irrelevant.

The letter of Greene & Barker to George Smith & Co. is admissible, because it tends to show the obligation of Greene & Barker (whose interest in the Abigail and her cargo is claimed by John Innes Clark) to perform the engagements of Carrington, and is a proper link in that chain of testimony which was adduced to prove that those engagements passed, with the interest of Greene & Barker in the Abigail and her cargo, to John Innes Clarke.

*The judgment obtained by George [**322** Smith & Co. was admissible, because it was founded on the contracts of Carrington with George Smith & Co. for which Greene & Barker were liable. It was a material document to ascertain the amount to which George Smith & Co. were entitled, as against Carrington, and was therefore a part of the testimony which would be required to show for how much Greene & Barker were responsible when they assigned to John Innes Clark. It was certainly admissible, for these purposes, because Greene & Barker were in truth copartners with Carrington, and because, if they were not, it is a case of warranty and indemnity; and in such case, a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity. Whether it was admissible against John Innes Clark, depends on the degree of his liability for the money for which that judgment was rendered. If the obligation to indemnify passed to him with the interest of Greene & Barker, either on his express undertaking contained in his letter of March, 1801, or in consequence of any equitable lien on the vessel and cargo or on the money produced by them, which attached, while the property of Greene & Barker, and was not affected by the assignment, then these proceedings were admissible in a suit against him.

If no such liability existed, then the action could not be sustained, and the judgment would

be reversed on the charge of the judge. This point therefore will be considered in that part of the case.

In his charge, after summing up the testimony offered by both parties, the judge proceeds to say: "I conceive that Mr. Clarke's letter bearing date March 16th, 1801, at Providence, and directed to Mr. Carrington at Havanna, and received by him the 22d of April, 1801, taken in connection with the other evidence in the case, ought to be considered as a letter of guaranty, and binding Mr. Clark to pay 5-9th parts of the debt due to George Smith & Co., as ascertained by the judgment in their favor against Mr. Carrington. I am also of opinion, that Mr. Clark having received of Mr. Carrington a large sum of money under and by virtue of the assignment from Greene **323*]** & Barker, of their interest *in the ship Abigail and cargo, was bound under the circumstances of this case, as made out and established by the evidence, to refund the same, or so much thereof as would amount to 5-9th parts of the debt due to George Smith & Co. What sum Mr. Clarke received, is a question of fact, proper for you to decide."

The declaration in this cause contains five general counts, and three special counts founded on the letter of March 16th, 1801, which the judge considered as a letter of guaranty binding John Innes Clark to pay 5-9th parts of the debt due to George Smith & Co.

The first part of the charge is supposed, by a part of the Court, to apply to the special counts, and to determine the right of the plaintiff below to recover under them; the latter part of the charge, to the general counts, and to determine his right to recover under them.

If the letter of the 16th of March, 1801, bound John Innes Clark to perform the contract of Greene & Barker, then he was liable to the extent of Greene & Barker's liability, and was bound to pay whatever they were bound to pay, although it might exceed the proceeds of the Abigail and cargo.

If that letter did not support the special counts—if with the other circumstances of the case it did not amount to such a contract as was stated in the declaration—then Carrington could only recover on his general counts, and could obtain a judgment for no more than had been received by Clark.

Others of the court are of opinion, that the charge does not import that, in any state of the accounts, Clark was bound to pay more than he had received.

A decision of this point is rendered unnecessary by the opinion of the court on the letter of the 16th of March, 1801.

The important part of that letter is in these words: "With respect to the ship, notwith- "standing I have a bill of sale from Greene & **324*]** "Barker of two-thirds, I *shall view "you (if you return here with her) as the owner "of such proportion as agreed upon between "you and them, and I give you my word that "you shall receive from me any aid and sup- "port in settling the business to mutual satis- "faction that is in my power. Mr. John Cor- "lis, who has undertaken to conduct the busi- "ness for Mr. John C. Nightingale writes you "by this opportunity, and will assure you in "his behalf, of one-sixth of one-third from him; "that is to say, to make you an owner in the "whole ship Abigail, and appurtenances of one "complete sixth, and the same proportion in "the cargo; and Greene & Barker's contract "with you, shall in every respect be fully "complied with, the same as it would have "been done with them, had they continued "owners."

What was Greene & Barker's contract with Carrington?

It is observable that neither in this letter, nor in any other part of the proceedings, is there any evidence that Greene & Barker had made with Carrington more than one contract respecting this voyage.

A part of this contract, as is apparent from the letter of Mr. Clarke, entitled Carrington to one-sixth part of the Abigail and of the cargo to be taken on board at Hamburg. The letter of the 12th of July, 1800, addressed by Greene & Barker to George Smith & Co., states Carrington to be a part owner of the vessel which was sent to Hamburg on freight, wishes them to render Carrington the necessary aid he may require, and adds, "we shall consider ourselves responsible for all contracts Mr. Carrington may make in the business of this ship, and anticipate the pleasure of your being well satisfied with his strict fulfillment of them."

It seems a necessary inference from the condition and object of the parties, that this letter was written in pursuance of, and conformity with, the contract between Greene & Barker and Carrington, and that their responsibility, "for all contracts Mr. Carrington might make in the business of the ship," was as much a part of their engagement with him as the agreement that he should be interested one-sixth in the vessel and cargo.

*This undertaking was known to Mr. [***325** Clark. His letter of the 30th of June, 1800, introducing Carrington to George Smith & Co., recommends Greene & Barker and Nightingale as the persons on whom G. Smith & Co. were to rely for the fulfillment of the engagements made by Carrington. "I have ever found these gentlemen," says he, "persons of strict integrity, and I doubt not will punctually fulfill any engagements they may enter into with you." Clark knew, then, that Greene & Barker had bound themselves to be responsible for the contracts of Carrington with George Smith & Co., and alluded to this residue of their contract with Carrington, when, after saying that he should consider Carrington as the owner of such proportion of the ship as was agreed on between him and them, and that Mr. Corlis, who represented Nightingale, would do the same, he adds "and Greene & Barker's contract with you shall in every respect be complied with."

The subsequent conduct of Clark certainly proves that he never understood himself to be entitled to more, by the assignment of the Abigail and her cargo, than would remain after discharging the contracts entered into by Carrington.

The record abounds with proofs of this position, which have been much pressed at the bar, of which the court will select only one. It is the letter from Carrington to Clark, dated Havanna, April 22d, 1801, in which he acknowledges the receipt of Clark's letter of the 16th of March of the same year. He states the lien

upon the ship and eargo, and adds, "but I presume, and doubt not, Messrs. Greene & Barker have aeqnainted you with the exact situation of them, and have only disposed to yon that part of the ship and cargo that may remain after the bottomry bond is settled and discharged."

At this information Mr. Clark expresses no surprise, nor does he manifest any dissatisfaetion at the conclusion Carrington had drawn respecting the terms on whieh he had sueeeeded to the rights of Greene & Barker. This is considered as further explaining his meaning in using the terms, "and Greene & Barker's contract with yon shall in every respeet be eomplied with."

326*] *Upon these grounds, it is the opinion of the majority of the eourt, that the letter of the 16th of March, 1801, contains a eontraet binding John Innes Clark to perform the whole contraet of Greene & Barker with Carrington, a part of which was to pay five-ninth parts of the debt eontraeted on account of the Abigail and her eargo, with George Smith & Co.; eonsequently the plaintiffs in error were responsible to Carrington as far as Greene & Barker were responsible.

It has been contended for the plaintiffs in error, that a considerable part of the debt to George Smith & Co. (the premium of insurance on a return voyage to Hamburg) was ineurred in consequence of the gross negligenee of Carrington in not eountermanding the order for insuranee as soon as he determined to ehange the voyage. For this sum it is eontended, Greene & Barker could not have been liable to Carrington, and eonsequently it eannot be reeovered from John Innes Clark.

One of the judges is of opinion, that the question of negligenee is, in this ease, a point of law, Carrington having been a eopartner with Greene & Barker, and therefore proper for the deeision of the eourt; others think that the judge has left that question with the jury.

In summing up the evidence, the jndge says, "the defendants say, that for his (Carrington's) neglect in not giving sueh timely notiee (of the change of the voyage), he ought himself to pay the whole of the preminm. Of this you will judge."

This explieit deelaration is eonsidered as not being overruled by the conelnding part of the eharge.

If the faet of negligence was left to the jury, they have decided it in the negative, and the qnestion whether a partner would in sueh a ease be responsible to his eopartners for negligenee in failing to countermand an order for insurance, does not arise in the cause.

On that part of the charge whieh states John Innes Clark to be responsible to Carrington to the amount of the money he had received, there **327***] is no difference of *opinion in the eourt. It is, however, unnecessary to state the reasoning on which this opinion is fonnded, since the eonstruction given to the letter of the 16th of March, 1801, dccides the cause.

It is the opinion of the court, that there is no error, and that the judgment be affirmed.

Cited—2 Otto, 394; Story, 462.

DICKEY
v.
THE BALTIMORE INSURANCE COMPANY.

Present—All the Judges except TODD, *J.*

A policy of insurance on a vessel, "at and from" an island, protects her in sailing from port to port of the island to take in a cargo.

ERROR to the Circuit Court for the District of Maryland, in an aetion on a policy of Insurance upon the ship Fabius, "at and from "New York to Barbadoes, and at and from "thence to Trinidad, and at and from Trini-"dad baek to New York."

The ship proeeeded to Barbadoes, and from thenee to the port of Spain, in the island of Trinidad, being the only port of entry in the island. Having taken in part of her retnrn cargo, she sailed from thenee for Port Hyslop, in the same island, for the residue. In the way she was lost by the dangers of the seas.

On the trial below, the opinion of the eourt was in favor of the defendants, and the plaintiff took his bill of exceptions, and brought the case up by writ of error.

Harper, for the plaintiff in error, stated, that the only question was,

Whether the terms "at and from Trinidad," authorized the ship to sail from one port of the island to another port of the same island, to eomplete her eargo?

*To show that she was so authorized, [***328** he relied on the case of *Bond* v. *Nutt* (Cowp., 601), and *Thellusson* v. *Ferguson* (Doug., 346; Marshall, 255, 257; Boston ed.).

Pinkney, Attorney-General, contra.

The opinion of the court below was founded upon the reason of the thing, and upon the idea that the late English cases were not authority.

The vessel was not within the policy while sailing from port to port in the island. She was lost on the high seas, and was not protected by the policy, unless she was justified by some usage of trade. Bnt no sueh usage was proved. In the case of *Bond & Nutt*, the vessel was a general ship, and the usage of the trade was to take goods for several different ports in the island of Jamaiea. That island has many ports of entry—Trinidad has only one. There is no case in which a vessel has been permitted to depart from a port and return to it again under such a poliey. She was not literally at the island. Analogy is against the doetrine, and so is the reason of the thing.

Harper, in reply.

In the cases cited by Marshall, there is no allusion to the eourse or usage of the tradc. Nor does the eourt lay any stress upon the fact that there were many ports of entry in Jamaiea. Although there was only one port of entry in Trinidad, yet there were other ports at which they might in fact take in a eargo.

Feb. 17th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This action was brought on a policy insuring the Fabius at and from New York to Barbadoes, and at and from thence to the island of Trinidad, and at and from Trinidad back to

New York. The Fabius arrived at the port of Spain, in the island of Trinidad, on the 21st of October, in the year 1806, where she remained until the 5th of December, when she sailed, under a special license from the proper authorities, for Fort Hyslop, another port in the is-
329*] land, for the purpose of *procuring and taking in a part of her return cargo, and with a view of returning to the port of Spain, that being the only port in the island of Trinidad at which vessels, arriving from other places, were permitted to enter, or from which those destined on foreign voyages were permitted to clear. While on her voyage to Fort Hyslop, the Fabius was lost by the danger of the seas; and the question is, whether this loss is within the policy?

Were this a case of the first impression—were it to be decided for the first time on the intention of the parties to be collected solely from the words of the contract—some contrariety of opinion might undoubtedly be looked for, and it is uncertain what might be the opinion of the court.

Strictly speaking, a vessel is not at an island while sailing from one port to another of the same island; yet it is difficult to resist the persuasion that something more is meant by an insurance at and from an island than by an insurance at and from a port. The words, at and from an island, and at and from a port, are not synonymous, and yet in effect the same meaning would often be given to them, if the privilege of sailing from one port to another, for the purpose of completing the cargo, should not be granted by the policy. An insurance to an island may terminate at the first port, and the expression may be adopted from the uncertainty at what port the vessel insured may first arrive; but it seems difficult to put any other construction on an insurance at and from an island, or to assign any other motive for the risk being so described, than that it is a license to use the different ports of the island, for the purpose of obtaining the return cargo. This particular policy furnishes strong reason for this construction. It is difficult to read it without feeling a conviction that the intention of the contract was to insure the whole voyage from and to New York, and to have the liberty of the islands of Barbadoes and Trinidad. There being but one port in the island of Trinidad at which a vessel was permitted to enter or clear, takes away every inducement for inserting in the policy the words at and from the island of Trinidad, rather than the words at and from the port of Spain, in the island of Trinidad, unless those words secure the liberty of going
330*] to other *ports, for the purpose of completing the cargo, and of returning to the port of Spain, to clear out for New York.

But the words of this policy are not now to receive their first construction. In *Camden* v. *Cowley* (mentioned 1 Marshall, 166), a ship was insured from London to Jamaica generally, and by a subsequent policy she was insured at and from Jamaica to London.

The ship having touched and staid for some days at one port of Jamaica, was lost in coasting the island; but before she had delivered all her outward cargo at the other ports of the island.

In an action on the homeward policy, the claim of the insured on the underwriters was resisted, not on the principle that the words at and from did not imply a permission to use all the ports of the island; not on the principle that sailing from one port to another was a deviation; but on the principle that the risk on the outward policy had not terminated, and that consequently the risk on the homeward policy had not commenced when the loss happened.

A verdict was found against the underwriters, and a new trial was refused.

In *Bond* v. *Nutt* the insurance was made on a ship at and from Jamaica to London, warranted to sail before the first of August, 1776. The ship sailed from St. Anns, in Jamaica, on the 26th of July, for Bluefields, also in Jamaica, in order to join a convoy there. She was detained at Bluefields by an embargo, until the 6th of August, when she sailed with the convoy, but being separated from it, was captured. On this policy a verdict was given in favor of the underwriters, under the direction of Lord Mansfield, and a motion for a new trial was resisted on two grounds.

1st. That a departure from St. Anns was not a departure from Jamaica.

2d. That going to Bluefields was a deviation, that being out of the course of the voyage from St. Anns to London.

After great consideration, the court [
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was unanimously of opinion in favor of the motion.

Lord Mansfield, in giving his opinion, said, "as neither party knew from what part of the "island the ship would sail, they used the words "at and from Jamaica, which protected her "in going from port to port, till she sailed." He also said, "had the insurance been at and "from St. Anns," the going round the island "to Bluefields would have been a deviation."

In *Thellusson* v. *Ferguson*, an insurance was made "at and from Guadaloupe to Havre, warranted to sail on or before the 31st December." The vessel took in her cargo at Point Petre in Guadaloupe, and for the purpose of obtaining convoy, sailed on the 24th of October, to Basseterre, where there is no port, but only an open road. She was there detained till the 10th of January, when she sailed with convoy, but was captured on the return voyage.

The plaintiffs obtained a verdict. A motion was made for a new trial, which was refused. Lord Mansfield said, "under an insurance" at and from such a place as Guadaloupe or Jamaica, the word "at" comprises the whole island, and under that word, the ship is protected in going from port to port, round the coast of the island.

The underwriters not being satisfied with this decision, another action was afterwards brought on the same policy against Staples, also an underwriter. But upon that action, the only point insisted on was that the vessel had not sailed by the stipulated day.

It appears, then, to be the settled doctrine of the courts of England, that an insurance "at and from an island," such as those in the West Indies, generally insures the vessel while coasting from port to port of the island, for the purpose of the voyage insured. It is dangerous to change a settled construction on policies of insurance.

It is the opinion of this court, that the Cir-

cuit Court erred in not giving the instruction
332*] prayed for by the *counsel for the plaintiff, and that the judgment be reversed, and the case remanded to that court with directions to give the instructions prayed for by the plaintiffs, as stated in the bill of exceptions filed in the cause.

Cited—20 Wall. 497; 3 Cliff. 325.

THE MARINE INSURANCE COMPANY OF ALEXANDRIA
v.
HODGSON.

Present—All the Judges except TODD, *J.*

Upon an action on a valued policy, if a misrepresentation of the age and tonnage of the vessel, whereby the underwriters were induced to agree to a high valuation, be a defense, it is at law and not in equity.

THIS was an appeal from the decree of the Circuit Court for the District of Columbia, sitting at Alexandria, in a suit in equity, brought by the Marine Insurance Company of Alexandria against Hodgson, to enjoin so much of a judgment at law obtained by the latter against the former as exceeded the value of the brig Hope as found by the jury in a special verdict upon a valued policy.

It was contended in the bill that the age and tonnage of the vessel was misrepresented, and that such misrepresentation induced the complainants to value the ship at 10,000 dollars, when in fact she was worth only 3,300 dollars, as specially found by the jury on the trial at law. She was represented to be about 250 tons burden, when she was only 161 tons, and to be from six to seven years old when she was between nine and ten years old.

The bill also alleged as a ground for relief, the refusal of the court below to receive two pleas offered by the complainants on the trial at law, the rejection of which pleas had been assigned for error in this court when the cause was here last (see *Ante.*, vol. 6, p. 206); but this court thought the rejection of a plea no ground for a writ of error, and therefore gave no opinion as to the propriety of admitting them.

333*] *The first of those pleas stated the above misrepresentation as to the age, tonnage and value of the vessel, and averred it to be material in regard to the risk of the voyage. The other plea stated in general terms that the policy was obtained by fraud with intent to defraud the complainants of the difference between the true and the represented value of the vessel, which difference it averred to be more than 4,000 dollars.

Upon the answer of Hodgson and the other evidence in the cause the court below dissolved the injunction and dismissed the bill.

E. I. Lee, for the appellants, relied principally upon the evidence of the over-valuation, which he said was so excessive as to amount to proof of fraud. But even if it were only a mutual mistake it is sufficient to avoid the policy. (Park., 12, 196, 225; Miller, 39, 43, 97.)

As to the equity of the case, he contended that the pleas rejected by the court of law, and which charge fraud, being made part of this bill, are to be considered as a charge of fraud, which is a ground of equitable jurisdiction. The rejection of the pleas is of itself a ground for a court of equity to relieve, for the complainants have not yet had an opportunity to show the fraud.

A court of equity will relieve against mistakes upon which contracts are founded.

All that the defendant is entitled to upon a policy is indemnity. He ought in equity to recover only the value and interest.

To show that equity will relieve against error at law, he cited 2 Wash., 36, *Ambler* v. *Wyld;* Prec. in ch., 233, *Kent* v. *Bridgman;* 2 Vern., 146, *Graham* v. *Stamper;* Id., *Robertson* v. *Bell;* Finch, 472; 2 Str., 733, *Burrow* v. *Jemino;* 2 P. Wms., 425; 1 Vez., Jr., 417; 2 Vez., 155; 5 Cranch, 110, *Hodgson* v. *Marine Ins. Co.*

Swann and *Jones*, contra.

The bill contains no charge of fraud. Straas and Leeds, who were the persons insured, are not made *parties. The pleas which [***334** are referred to in the bill are not to be considered as containing an allegation of fraud which is to be answered. It is not a bill for the discovery of any fact which the complainants could not have proved at law. The object is to get rid of the over-valuation. It is to try the case over again. The answer shows that there could be no fraud; for the insured lost a cargo, worth 7,000 dollars, which was not insured.

The bill contains no equity. Their remedy was at law. In cases of insurance there is the same remedy at law as in equity.

But there was no misrepresentation. It was only the opinion of Maxwell, that the vessel was about six or seven years old, and about 250 tons burden. A representation must be the positive affirmation of some material fact. There was no representation as to value—Hodgson only proposed that the vessel should be valued at 10,000 dollars; he never affirmed that she was of that value.

On the question of jurisdiction, and to show that the alleged defense, if it were a defense at all, was a defense at law, they cited 2 Marshall, 679. The court did right in rejecting the pleas because they were complex, and offered after the law had been decided against the complainants. (2 Burr, 717.)

A valued policy is conclusive unless it be a cover to a gaming contract, or be made with a view to a fraudulent loss. (2 Vern., 119, *Woodward* v. *Guile;* 3 Bl. Com., 435; 1 Marsh, 123, 287; 4 Burr, 2228, *Low* v. *Peers;* Finch, 119, *E. I. Comp.* v. *Blake;* Prec. in ch., 102; 6 Br. Parl. ca., 417, 470; 1 Fonb., 167.) Misrepresentation as to the age and tonnage was not material to the risk; it was guarded against by the implied warranty of sea-worthiness. No previous representation as to sea-worthiness is necessary. (1 Marsh., 475.)

C. Lee, in reply.

The real value of the vessel is conclusively fixed by the verdict of the jury. But if it were not, there is evidence *enough to show [***335** that she was not worth one-half the sum insured. The value thus fixed has shown the amount which will be an indemnity to the defendant.

By the refusal of the court to receive the

pleas, the complainants were precluded from a just defense. This court has decided the refusal to be no ground for a writ of error at law. But we contend it is a ground for relief in equity. It is also a sufficient ground of relief that the rule of indemnity has been violated.

The valuation in the policy is only *prima facie* evidence, and throws the burden of proof on the underwriter. It shall be taken to be so fixed as to be an indemnity. An over-valuation is of itself evidence of fraud. If it is intended to be an interest policy, it amounts only to a contract for indemnity. (Cowper, 583, *Kent* v. *Bird*.)

Even if the defendant was mistaken, and both parties were equally ignorant, yet the complainants are not liable for more than an indemnity. (*M'Ferren* v. *Taylor*, 3 Cranch, 270.)

There is no difference in principle between insuring double the value at one office and making double insurance at two offices. The reason against both is the same, viz., that the insured shall have only one indemnity.

The law of liquidated damages does not apply.

The defendant might have had a return of part of the premium upon proving the mistake of the value.

Feb. 18th. *Absent*—DUVALL, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was brought in the Circuit Court, sitting in chancery, for the purpose of obtaining a perpetual injunction to a judgment rendered against the plaintiffs in favor of the defendant, on a policy of insurance effected by him as agent for G. F. Straas and others, of Rich-
336*] mond, *on the brig called the Hope. The allegations of the bill are entirely unsupported by testimony, except those which relate to the value of the vessel insured. The Hope was valued in the policy at $10,000, and $8,000 were insured upon her. She is stated to have been in fact worth less than $4,000.

The underwriters contend that they were in the practice of refusing to insure on any vessel more than four-fifths of her value, and that they were led to make this insurance by a misrepresentation respecting the value of the Hope. They therefore pray to be relieved from so much of the verdict and judgment rendered thereon as exceeds that value.

On the part of the defendants it is contended that the plaintiffs have not made out a case which entitles them to the aid of a court of equity.

Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.

On the other hand it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law.

In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defense which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants, or by any pure and unmixed accident, from making at law.

It will not be said that a court of chancery cannot interpose in any such case. Being capable of imposing *its own terms on the [*337
party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law. Such cases, however, do not frequently occur. The equity of the applicant must be free from doubt. The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself.

The court is of opinion that this is not such a case.

William Hodgson, as agent for the insured, applied for insurance on the brig Hope on a voyage from St. Domingo to her port of discharge in the Chesapeake, and laid before the board the following certificate:

"This may certify, that I was master of the schooner Sophia, of this place, and Alexander Burot, supercargo; that while we were at the city of St. Domingo in July last, Mr. Burot purchased the brig Hope, of Boston, and I was called on with a carpenter to examine her, and found her to be a stout well-built vessel of about 250 tons, in good order, and well found with sails, rigging, &c.; was built in the state of Massachusetts, and is from 6 to 7 years old. I left the city of St. Domingo on the 27th of July, and Mr. Burot expected to sail from there about the 15th or 20th of August up the coast to take in mahogany."

JAMES MAXWELL.

Septr. 24th, 1799."

Upon view of this certificate the vessel was valued at $10,000, and the insurance made at $8,000. On the voyage the vessel was captured.

In fact the Hope was of 160 tons burden, and was from eight to nine years old. There is reason to believe that she was not worth more than $3,000.

It does not appear that the loss was fraudulent or that the cargo was insured.

The plaintiffs contend that this misrepresentation led them to value the vessel much higher, and to insure a *much larger sum [*338
on her than they would have done had a true description been given of her size and age.

To support this allegation they state their practice never to insure on any vessel more than four-fifths of her real value, and their rule, which was known to Hodgson (he being himself one of the directors), to require that every order for insurance should be in writing, and should contain, among other things, "as full a description of the vessel and voyage as can be given."

The answer asserts that when the certificate was laid before the board of directors, Hodgson was asked if he would vouch for its truth,

which he refused to do, whereupon the board agreed to value the vessel at $10,000, and to make the insurance required. He himself believed the certificate to be accurate, and is persuaded that the insured entertained the same opinion. He does not think that the tonnage of the vessel weighed much with the parties. It is not mentioned in the policy.

Straas and Leeds, whose agent Hodgson was, and for whom the insurance was made, are not parties to the bill.

No fraud is proved on them other than what is to be inferred from the error in the certificate given by Maxwell, nor ought their conduct to be decided on, or their interests affected in a suit to which they are not parties, although they might have been made defendants.

The court will not undertake to say what influence this certificate might have had, or ought to have had, at law. But since the plaintiffs were not prevented from using it at law by the act of the defendants or by any positive rule which disabled them from doing so, they have not made out a case of such clear equity—a case in which it would be so obviously against conscience for the defendant to enforce the judgment at law—as to justify the interposition of a court of chancery.

The judgment is to be affirmed with costs.

Cited—8 How. 161; 17 Id. 445; 12 Bank. Reg. 314; 3 Wood. & M. 114; 94 U. S.; 4 Otto, 658; 5 Id. 159.

339*] *LOCKE *v.* THE UNITED STATES.

Absent—TODD, *J.*

In a count in a libel upon the 50th sec. of the collection law of March 2d, 1799, for unlading goods without a permit, it is not necessary to state the time and place of importation, nor the vessel in which it was made, but it is sufficient to allege that they were unknown to the attorney.

"Probable cause" means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion.

ERROR to the sentence of the Circuit Court for the District of Maryland, which condemned the cargo of the schooner Wendell, belonging to Locke, the claimant, as forfeited to the United States.

The libel contained 11 counts.

The 1st count charged that the goods between the 1st of June, 1808, and the day of filing the libel, at Boston, with intent to transport them to Baltimore, without a permit from the collector and naval officer of the port of Boston, were clandestinely laden on board the schooner Wendell, a vessel enrolled and licensed according to statute, whose employment was not then confined to the navigation of bays, sounds, rivers and lakes within the jurisdiction of the United States, nor exempted from the obligation of giving bond according to the provisions of the statute (the embargo law).

The 2d count charged that the goods being of foreign growth and manufacture and subject to the payment of duties, between the 1st of May, 1808, and the day of filing the libel were unladed without the authority of the proper officers of the customs, from on board some vessel to the attorney unknown, after she had arrived within four leagues of the coast of the United States, the said vessel being then bound from some foreign port or place (to the attorney unknown) to the United States.

The 3d count charged that the goods, being of foreign growth and manufacture and subject to duties, were, without any unavoidable accident, necessity or distress of weather, unladen without the authority of the proper officers of the customs.

The 4th count charged that the goods being of foreign growth and manufacture, and subject to the payment of duties imposed by the laws of the United States, *between [*340 the 1st of May, 1804, and the day of filing the libel, were imported from some foreign port or place to the attorney unknown, into some port of the United States to the said attorney unknown, in a certain vessel to the said attorney unknown, and were afterwards and before filing the libel unladed at the said last-mentioned port from the said vessel without a permit from the proper officers of the customs of the last-mentioned port.

The 5th count charged that the goods were imported into Boston and were falsely, and by a false name and denomination, entered at the custom-house of the port of Boston.

The 6th count charged that they were imported into a port of the United States, to the attorney unknown, and were falsely, and by a false name and denomination, entered at the custom-house of such port.

The 7th count stated that the goods were of the manufacture of Great Britain, and were imported into New York, between the first of March, 1808, and the day of filing the libel, from some foreign port or place to the attorney unknown.

The 8th count stated that they were so imported into Boston.

The 9th count stated them to have been so imported into Philadelphia.

The 10th count averred them to have been so imported into Baltimore.

The 11th count stated them to have been so imported into some port of the United States, to the attorney unknown.

The 1st count was under the embargo law.

The 2d, 3d, 4th, 5th and 6th counts were under the collection law.

The other counts were under the non-importation acts *of 18th April, 1806, (vol. 8, [*341 p. 80), and 19th Dec., 1806, (vol. 8, p. 219).

Harper, for the appellant.

The 1st count, under the embargo act, is understood to be abandoned.

The 7th, 8th, 9th, 10th and 11th counts are under the non-importation acts of 18th April, and 19th December, 1806. There is no evidence of the importation of the goods since the 2d Monday in December, 1807, the time when those laws began to operate.

The 2d, 3d, 4th, 5th and 6th counts are under the general collection law of 2d March, 1799, (vol. 4, p. 325, &c.) The 5th and 6th, however, charge acts not forbidden by the law, so that the charges are reduced to those contained in the 2d, 3d and 4th counts.

The 2d and 3d counts are under the 27th sec. of the collection law (vol. 4, p. 324). These counts are defective in not averring that the unlading was before the vessel had "come to

the proper place for the discharge of her cargo," which is an essential ingredient in the offense described in that section. And all the counts are defective in not stating where, how, when, and from what ship the goods were unladen. These defects are as fatal in a libel as in an indictment or declaration. There is no authority for making a distinction. But if some latitude be allowed in a libel, yet it ought to be certain to a common intent in these respects.

If the libel be sufficient, yet it is not supported by proof. There is no evidence of the time when the goods were landed so as to show it to be contrary to law.

But it was said in the court below that the *onus probandi* was on the claimant by the express provision of the statute (Laws United States, vol. 4, p. 391, sec. 71), the words of which are: "If the property be claimed by any "person, in every such case the *onus probandi* "shall be upon such claimant; but the *onus* "*probandi* shall lie on the claimant only where **342***] "probable cause is shown *for such "prosecution." Probable cause is *prima facie* evidence, and whenever that is shown, the *onus probandi* falls, of course, upon the other party. A contrary construction would be against the common principles of law. What you charge, you must prove. Innocence is always to be presumed until there be at least *prima facie* evidence of guilt. This construction is fortified by the 43d section of the collection law, (vol. 4, p. 350), which provides that if distilled spirits, wines and teas be found unaccompanied by a certificate of importation, it shall be presumptive evidence that the same are liable to forfeiture. This presumptive evidence can be no other than probable cause of seizure; and probable cause must mean presumptive evidence. In the present case there is no such probable cause. The circumstances which are supposed to excite suspicion are, 1. That there was a variance in the manifest. 2. That the names of the shippers and consignees were fictitious. 3. That there was no proof of their entry into Boston; and, 4th. That the original marks had been effaced upon many of the packages.

It is not stated where this manifest was found. The variance is very trifling. There could have been no fraud upon the United States intended by using fictitious names, because the goods were as liable to seizure as if they had been shipped in the name of the claimant. It was done to screen the goods from his creditors, he being in embarrassed circumstances at that time, as appears from the deposition of W. French. The want of a certificate of entry is only evidence that they might have been improperly imported, not that they were. The erasure of the original marks could not screen the goods from seizure; part of the original marks remained. None of these circumstances constitutes that *prima facie* evidence which throws the budren of proof upon the claimant. But this provision respecting the *onus probandi* applies only to the importer himself, and as to him it is not unreasonable; he knows where to look for the evidence of their correct importation. But it is unreasonable to apply the rule to a purchaser. It would in many cases be impossible for him to obtain the necessary evidence. There is no evidence that the claimant was the importer of these goods.

Pinkney, contra. [***343**

There is some ground to say that these goods ought to be condemned under the non-importation act of 1806. It is clearly proved that they are of British manufacture; they must therefore have been imported, and some of the articles appeared to be of a very recent fabric. These circumstances, connected with the total want of proof on the part of the claimant, create very strong suspicions, if they do not amount to positive proof.

But under the collection law, especially upon the 4th count, which is founded on the 50th section of that act, the case is quite clear.

It is not necessary in a libel for unlading contrary to law to state from what vessel, nor at what time, nor in what place, the goods were unladen. It would generally be impossible to prove the circumstances; and if averred, they must be proved. Suppose that the claimant had confessed that the goods were smuggled, but had not said in what vessel, nor when, nor where, the evidence of his confession would have been sufficient to condemn the goods although he had omitted to state these immaterial circumstances. It is sufficient to aver that they were landed from some vessel, and at some place within the United States unknown to the prosecutor, and within the time when the law was in force. The claimant has sufficient notice that the United States mean to rely on the general ground of suspicion, and on the shifting the *onus probandi*, and must come prepared to remove the suspicion. Of what use is the provision respecting the *onus probandi*, if the law was so before? It is perfectly nugatory if probable cause means *prima facie* evidence. It must mean something less than evidence; it means reasonable grounds of suspicion.

Another objection as to form is, that the libel does not aver negatively that the vessel had not arrived at her port of delivery. It is not necessary to show this even by intendment; but it does necessarily appear from the facts stated in the count. It is sufficient to set forth the great leading facts of the case, and to aver them to be done contrary to the statute. By referring to the statute he is informed as to the particulars alleged against him.

*The variance in the manifest is im- [***344**
material; but the use of fictitious names for shippers and consignees is a circumstance of strong suspicion. It was probably done to blind the eyes of the custom-house officers, by dividing the ownership into 13 or 14 parts.

Harper, in reply.

If the United States are permitted to state the time and place so vaguely, yet they ought to state all the circumstances which constitute the offense. It must be stated that the fact was committed within some district of the U. S. The offense is unlading before she came to her port of delivery. Whatever is necessary to be averred, must be positively averred; it cannot be made out by inference or intendment. It is not sufficient to state that it was done contrary to the statute. It must be shown how it was done, that the court may judge whether the act was unlawful or not.

Feb. 19th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is a writ of error to a judgment of the

Circuit Court for the District of Maryland, affirming a judgment of the District Court, which condemned the cargo of the Wendell, as being forfeited to the United States.

The first point made by the plaintiff in error is that the information filed in the cause is totally insufficient to sustain a judgment of condemnation.

The information consists of several counts, to all of which exceptions are taken. The court, however, is of opinion that the 4th count is good, and this renders it unnecessary to decide on the others.

That count is founded on the 50th section of the collection law, and alleges every fact material to the offense.

It is, however, objected to this count, that the time and place of importation, and the vessel in which it was made, are not alleged in the information, but are stated to be unknown to the attorney.

345* *These circumstances are not essential to the offense, nor can they, from the nature of the case, be presumed to be known to the prosecuting officer.

The offense is charged in such a manner as to come fully within the law, and is alleged to have been committed after the passage of the act, and before the exhibition of the information. This allegation, in such a case, is all that can be required.

The 4th count of the information being sufficient in law, the court will proceed to examine the testimony adduced to support it.

It is proved incontestibly that the goods are of foreign manufacture and consequently have been imported into the United States.

The circumstances on which the suspicion is founded—that they have been landed without a permit—are,

1st. That the whole cargo in fact, belongs to the claimant, and yet was shipped from Boston in the names of thirteen different persons, no one of whom had any interest in it, or was consulted respecting it, and several of whom have no real existence.

2d. That no evidence exists of a legal importation into Boston, the port from which they were shipped, to Baltimore, where they were seized.

3d. That the original marks are removed and others substituted in their place.

The counsel for the claimant has reviewed these circumstances separately, and has contended that no one of them furnishes that solid ground of suspicion which can create a presumption of guilt and put his client on the proof of his innocence. That they are either indifferent in themselves—mere casualties—or are reasonably accounted for.

To the employment of fictitious names as shippers, he says, that if the circumstance be not totally immaterial, it is sufficiently accounted **346***for by the deposition of William *French, who says, "he understood that the claimant in the cause was in embarrassed circumstances some time before the shipment of these goods, and that he has understood and believes from general report that, for the purpose of preventing his property from being attached, he was in the habit of shipping his property in the names of other persons."

The court is of opinion that the circumstance is far from being immaterial. It is certainly unusual for a merchant to cover his transactions with a veil of mystery, and to trade under fictitious names. The manner in which this mysterious conduct is accounted for is not satisfactory. It does not appear that his creditors were in Baltimore, or would be more disposed to attach his property in that place than in Boston, and it does not appear that in Boston the names of others were borrowed to protect his property from his creditors. The fact itself, if true, might be proved by other and better testimony. This habit might have been proved by his clerks.

An attempt is made to account for the circumstance that the goods were not regularly entered at the custom-house in Boston, by the testimony of the same William French, who deposes that goods to a large amount are transported by land to Boston, and if intended for domestic consumption, are generally unaccompanied by certificates of having paid the duties. The inference is therefore considered as a fair one, that these goods may have paid the duties at some other port where they were purchased by Mr. Locke, and transported by land to Boston.

The court is not satisfied with this inference. Goods in packages, unaccompanied by certificates of having paid the duties, are always liable to be questioned on that account. Large purchasers, therefore, even where re-exportation is not intended, would choose to be furnished with this protection. It is a precaution which costs nothing, and which a prudent merchant will use. The presumption, therefore, is always against the person who is in possession of goods in the original packages without these documents. This presumption ought to be removed, and may be removed, not by proving *that cases have existed where a pur- [**347 chaser of goods, that have been regularly entered, has omitted to furnish himself with certificates, but that the particular case may reasonably be supposed to be of that description. The actual importation, or the actual purchase of the very goods, or of goods of the same description, may be proved, and ought to be proved by a person who has been so negligent as not to obtain certificates that would exempt them from forfeiture.

The alteration of the original marks has been treated as an immaterial circumstance because no criminal motive can be assigned for it. This alteration, it is said, was not calculated to impress the revenue officers with the opinion that the duties had been paid, and is therefore not to be considered as made with that motive.

Certainly the alteration was not made without a motive. Men do not usually employ so much labor for nothing. If they use mystery without an object, they must expect to excite suspicion.

To do away that suspicion they ought to show an object.

In the present case, it is not improbable, that the motive was to relieve the goods from the suspicion of being imported in violation of the then existing prohibitory laws. One witness, who deposes that the goods were of British manufacture, also deposes that he never saw goods imported from Great Britain with such marks as those which were found on the goods.

of Mr. Locke. In the absence of other motives, the mind unavoidably suggests this.

If these circumstances were even light, taken separately, they derive considerable weight from being united in the same case. If these goods have really paid a duty, it is peculiarly unfortunate that they should have been shipped without certificates of that fact, under fictitious names, from a port where they were not entered, and that the marks of the packages should have been changed. It is peculiarly unfortunate that these circumstances cannot be explained away by showing that the goods have **348***] been entered elsewhere, or even *that the claimant has purchased such goods from any person whatever.

These combined circumstances furnish, in the opinion of the court, just cause to suspect that the goods, wares, and merchandise against which the information in this case was filed, have incurred the penalties of the law.

But the counsel for the claimant contends that this is not enough to justify the court in requiring exculpatory evidence from his client. Guilt he says must be proved before the presumption of innocence can be removed.

The court does not so understand the act of Congress. The words of the 71st section of the collection law, which apply to the case, are these: "And in actions, suits, or informations "to be brought, where any seizure shall be "made pursuant to this act, if the property "be claimed by any person, in every such case "the *onus probandi* shall be upon such claim-"ant." "But the *onus probandi* shall be on "the claimant, only where probable cause is "shown for such prosecution, to be judged of "by the court before whom the prosecution is "had."

It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.

This argument has been very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress.

The court is of opinion that there is no error, and that the judgment be affirmed with costs.

Cited—8 Cranch, 110; 3 Wheat. 330; 4 How. 250; 3 Wall. 162; 16 Wall. 516; 17 Id. 92; 18 Id. 546; 2 Blatchf. 121; 1 Brown, 7; 1 Mason, 27; 1 Sprague, 297; 2 Id. 214; Blatchf. & H. 15; 2 Curt. 587; 3 Ware, 79; 7 Otto, 265.

349*] *THE SCHOONER GOOD CATHARINE *v.* THE UNITED STATES.

Absent—LIVINGSTON, *J.* and TODD, *J.*

A vessel of the United States, captured, condemned, sold, purchased by her former master, a citizen of the United States, who obtained a Danish burgher's brief, and who cleared out of a port of the United States as a Dane, is a foreign vessel within the 5th section of the act of 9th Jan., 1808, supplementary to the embargo act, although she was really owned by a citizen of the United State.

THIS was an appeal from the sentence of the Circuit Court for the District of Maryland, which condemned the schooner Good Catharine as a foreign vessel for a violation of the 5th section of the act of January 9th, 1808, supplementary to the embargo act (vol. 9, p. 13), which declares "that if any foreign ship or "vessel shall take on board any specie, or any "goods, wares or merchandise, other than the "provisions and sea-stores necessary for the "voyage, such ship or vessel, and the specie "and cargo on board, shall be wholly for-"feited."

She was originally an American vessel, but had been captured and condemned as prize, and purchased by Hurst, her former master, an American citizen. She took on board goods other than the provisions and sea-stores necessary for the voyage, and cleared out as a Dane.

Martin, for the appellant,

Contended, that notwithstanding these circumstances, the vessel, being really American, could not be condemned under that section of the law; for in criminal cases there can be no estoppel. A man may prove the truth of the case against his own averment.

Pinkney, Attorney-General,

Relied upon the capture, condemnation and sale, and the Danish burgher's brief, which the master had obtained, to show that she was a foreign vessel.

The sentence of the Circuit Court was affirmed.

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*BOND AND ANOTHER *v.* JAY. [*350

Absent—TODD, *J.*

The exception, in the Maryland statute of limitations, in favor of "such accounts as concerns the "trade or merchandise between merchant and mer-"chant, their factors and servants, which are not "residents within this province," applies to dealings between a merchant creditor residing out of Maryland and a debtor residing in Maryland.

And in order to take the case out of the exception, it is not sufficient to aver that the creditor returned to, came, and was within the state of Maryland after the cause of action accrued, and more than 3 years before bringing the suit.

ERROR to the Circuit Court for the District of Maryland, in an action of *assumpsit* brought by Bond & Brooks against Jay, surviving partner of Samuel Jay and Gabriel Christie, trading under the firm of Samuel Jay and Company, upon an account for mercandise sold and delivered. The defendant, Jay, pleaded the statute of limitations of Maryland, 1715, (ch. 23), which limits actions of *assumpsit* to three years after the cause of action shall have accrued.

To this plea the plaintiffs replied "that at "the time when the several sums of money in "the declaration mentioned grew due, viz., on "the 20th of March, 1799, and long before, to "wit, on the 27th of November, 1797, and from "then until the said 20th of March, and from "the said last-mentioned day until the suing "forth the original writ in this suit, the plaint-"iffs were merchants, carrying on trade and

"merchandise under the name and firm of "Bond & Brooks, and residing and carrying "on trade without the limits of the district "aforesaid, and of the state of Maryland, viz., "at Philadelphia, in the state of Pennsylvania; "and that at the several times aforesaid the "said Jay and Christie were merchants, trad- "ing under the firm of Samuel Jay & Com- "pany, and residing and carrying on trade at "and within the district aforesaid, and that on "the said several days, and on sundry days "from the first of those days to the second of "those days the plaintiffs were engaged in mu- "tual trade and merchandise with the said Jay "and Christie, by reason of which trade, and "of and concerning the same, the said several "sums of money in the declaration mentioned "grew due to the plaintiffs, and this they are "ready to verify; wherefore," &c.

To this replication the defendant rejoined, that the plaintiffs ought not to have and maintain their said action by reason of anything alleged in their replication aforesaid; because, protesting, that the said several sums of money in the declaration aforesaid mentioned, do not **351***] *concern the trade and merchandise between merchant and merchant; and also protesting that the plaintiffs had not continued to reside without the state of Maryland and district aforesaid since the contracting and growing due of the said several sums of money, and until the suing out the original writ in this cause; yet, for answer to the said replication, the said Samuel Jay says that true it is that at the time of the contracting and growing due of the said several sums of money, he, the said Samuel and the said Christie, were merchants and residents within the state and district of Maryland aforesaid, and continued to reside therein until the decease of the said Christie, and the said Samuel has continued to reside therein ever since; and that the several sums of money in the declaration mentioned had become due and were payable on the 20th of March, 1799, to wit, at the district aforesaid; and that afterwards, to wit, on the 20th of May, 1799, the plaintiffs returned to, came, and were within the state aforesaid, to wit, at the district aforesaid; and that afterwards, to wit, on the 18th day of October, 1799, the said Joshua B. Bond came to, and was within the said state, viz., at the district aforesaid; and that the original writ in this cause was sued forth on the 19th day of May, 1809, and not before; and so the said Samuel Jay saith that three years and more had elapsed and expired, after the return of the plaintiffs and of the said Joshua B. Bond to, and after their being within the said state and district, and after the contracting and growing due of the said several sums of money, and before the suing out of the said original writ in this cause, viz., at the district aforesaid; and this the said Samuel is ready to verify; wherefore," &c.

To this rejoinder there was a general demurrer and joinder. The court below overruled the demurrer, and adjudged the rejoinder to be good; whereupon judgment was rendered for the defendant, and the plaintiffs sued out their writ of error.

The act of assembly of Maryland, 1715, (ch. 23), enacts, "that all actions of trespass *quare* "*clausum fregit*, all actions of trespass, detinue, "surtrover, or replevin for taking away goods "or chattels, all actions of account, contract, "debt, book, or upon the case, other than such "*accounts as concerns the trade or [**352** "merchandise between merchant and merchant, "their factors and servants, which are not resi- "dents within this province, all actions of debt "for lending," &c., &c., "shall be commenced or "sued within the time and limitation hereafter "expressed, and not after," &c.

The third section contains a clause saving to persons within the age of 21 years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, the right of suing within the respective times limited after the removal of their several disabilities.

The cause was argued by *Harper*, for the plaintiffs in error, and *Pinkney*, Attorney-General, for the defendant in error.

February 22d. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was brought by the plaintiff, a merchant of Pennsylvania, against the defendant, a merchant of Maryland, upon an account which grew out of their trade with each other as merchants. The defendant pleaded the statute of limitations, to which the plaintiff replied that the plaintiff, who resided in the state of Pennsylvania, and the defendant were employed in mutual trade and merchandise, of and concerning which the said several sums of money in the said declaration mentioned grew due. The defendant rejoins that the plaintiff came within the state of Maryland in 1797, and that the original writ in this cause issued on the 5th of July, 1808, and not before. The plaintiff demurred, and upon argument the demurrer was overruled and the bar adjudged to be good.

A writ of error has been sued out to the judgment of the Circuit Court, and the questions in the cause are,

1. Is the replication good in itself?

2. Does the rejoinder avoid the replication and sustain the plea?

These questions depend on the act of limitations passed in 1715 by the legislature of Maryland. The * material part of that act [***353** is in these words: "Be it enacted, That all ac- "tions, &c., other than such accounts as con- "cerns the trade of merchandise between mer- "chant and merchant, their factors and ser- "vants which are not residents within this "province," &c., "shall be commenced or sued "within three years ensuing the cause of such "action, and not after."

By the plaintiffs it is contended, that if either party reside without the province the case is within the exception; by the defendant, that to bring the case within the exception both parties must reside without the province.

It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that courts can never be justified in putting such a construction on their words, if they admit of any other interpretation which is rational and not too much strained.

This, it is thought, may be done in the case now to be decided. The words "which are not residents" refer, it is said, to both parties, plaintiff and defendant. They comprehend all

the persons previously enumerated. Let this be conceded.

Then read the exception as if the word "both" or "all" were inserted. It will stand thus: "Other than such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants which are not both or all residents within this province." The plain meaning of the sentence so read would be that accounts between merchant and merchant, either of whom resided out of the province would come within the exception. It is admitted that without the word "both" or "all," the more obvious meaning of the sentence is that for which the defendant contends. Yet it will bear the same construction without, as with either of those words, and the subject-matter of the law so clearly requires this interpretation that the court thinks it may be made.

The rejoinder is founded on the third section
354*] of the *act, which contains the usual exceptions in favor of infants, &c., and allows three years after the removal of the impediment to bring their suit.

It is contended that since the act of limitations runs against a person beyond sea from the time of his coming into the country, so from analogy it ought to run against a non-resident merchant from the time of his coming, though for a mere temporary purpose, within the country.

The court cannot assent to the correctness of this reasoning. To render it applicable, the rejoinder ought to have averred that the plaintiff had become a resident of the state of Maryland more than three years before the institution of the suit. Not having done so, the words of the exception have never ceased to be applicable to the plaintiff; and, consequently, the statute has never commenced to run.

It is the opinion of this court that the Circuit Court erred in overruling the demurrer of the plaintiff to the rejoinder of the defendant in this cause, and that the judgment be reversed and annulled, and the cause remanded with instructions to render judgment on the said demurrer in favor of the plaintiff, and that further proceedings may be had therein according to law.

Judgment reversed.

PRESTON *v.* TREMBLE.

Absent—TODD, *J.*

If an equitable title be merged in a grant, the party has no relief in equity, although the grant be void, as being contrary to law.

ERROR to the Circuit Court for the District of East Tennessee, who had dismissed the plaintiff's bill in chancery, upon demurrer, for want of equity.

The bill stated that Preston, the complainant, had title to a tract of land in the state of Tennessee, but the defendant, Tremble, fraudulently and deceitfully entered into it, and holds him out.

355*] *In setting forth the title it is stated that the land formerly lay within the state of North Carolina, during which time one Ephraim Dunlop made an entry for the land in regular form, paid the purchase money to the state, and performed every other requisite to complete the contract; but before a patent was obtained, the legislature of North Carolina passed a law defining the limits of the Indian boundary, declaring all entries and surveys already made within those limits to be null and void, and directing the entry-takers to refund all moneys received therefor. That Dunlop never received back the purchase money, nor consented to annul the contract. That the law of North Carolina rescinding the contract was void. That Dunlop afterwards obtained a warrant to survey the land and obtained a patent therefor from the state of North Carolina, and afterwards conveyed the lands to John Rhea, who conveyed to Preston, the plaintiff.

P. B. Key, for plaintiff in error, contended,

1. That the land was within the territorial limits of North Carolina, who had a right to grant it.

2. That the entry and payment of the purchase money vested in Dunlop an equitable estate in fee in the land.

3. That the act of May, 1778, was void and inoperative, so far as it attempted to rescind the contract and destroy the equitable estate of Dunlop.

4. That although the patent which was issued in 1793, in contravention of the law of May, 1778, was declared void and inoperative to convey the legal title, yet the equitable estate existed and remained in Dunlop.

5. That no legal title to the land having passed to Dunlop, the plaintiff could not maintain an ejectment.

6. That when no adequate relief exists at law, a court of equity will interpose its authority, to protect an equitable estate, and by analogy, will give such full relief as a court of law would, had the title been legal.

*7. That the demurrer ought to be [***356** overruled.

MARSHALL, *Ch. J.*

If your title is good at law, you have no case in equity. If you have any title it is at law. If you have no title at law, you can have none in equity. The equitable estate is merged in the grant.

This is an attempt to substitute a bill in equity for an action of trespass.

Decree affirmed.

BRIG PENOBSCOT
v.
THE UNITED STATES.

Absent—TODD, *J.*

Under the non-intercourse law, a vessel, in March, 1811, had no right to come into the waters of the United States to inquire whether she might land her cargo.

THIS was an appeal from the sentence of the Circuit Court of the District of Georgia, which affirmed that of the District Court, condemning the brig Penobscot and her cargo of salt, for a violation of the acts of Congress

interdicting commercial intercourse with Great Britain and her dependencies, (viz., the acts of March 1st, 1809, vol. 9, p. 243; May 1st, 1810, vol. 10, p. 186; the President's proclamation of Nov. 2d, 1810, and the act of 2d March, 1811, p. 346). By the 4th section of the act of March 1st, 1809, it was not lawful to import into the United States, or the territories thereof, any goods, wares or merchandise whatever, from any port or place situated in Great Britain, or Ireland, or in any of the colonies or dependencies of Great Britain; nor from any port or place in the actual possession of Great Britain; nor to import into the United States, &c., from any foreign port or place whatever, any goods, wares, or merchandise of the growth, produce, or manufacture of Great Britain, or Ireland, &c.

By the 5th section, such goods so imported, (or put on board any vessel, &c., with intent of **357***] importing, &c.,) as *well as all other articles on board, belonging to the same owner, are liable to forfeiture. And by the 6th section, the vessel is subject to forfeiture, if the goods are laden on board with the knowledge of the owner or master of the vessel.

The act of May 1st, 1810, and the President's proclamation of Nov. 2d, 1810, announcing that France had so revoked the edicts of Berlin and Milan, as that they ceased to violate the neutral commerce of the United States; and the act of March 2d, 1811, are only referred to as reviving and enforcing against Great Britain the provisions of the act of March 1st, 1809.

The claim of the owners of the vessel and cargo stated, that the vessel sailed from Antigua on the 12th of February, 1811, and being crank and not sea-worthy, put into Turk's Island, for ballast, where she took in a load of salt, being informed, by an American vessel, that there was no law to prohibit it. That she sailed from Turk's Island for the port of Savannah, intending to stand off and on, to get information to know whether she might be permitted to come in or not. That on her approach to the harbor, a gale of wind prevented boats coming to her, and forced her, for the safety of the lives of the crew and the vessel, to make a harbor at Cockspur Island. That before she got a harbor, she was boarded by a revenue cutter, who took possession of her, and forcibly carried her into port. That the salt was not taken in with intent to violate the laws of the United States, but with the express intention and determination, if they found the importation into the United States to be unlawful, to bear away to some foreign port. She sailed from Castine, in the province of Maine, for Antigua, in December, 1810, and arrived off Savannah on the 15th of March, 1811.

There was evidence that the vessel might have called at Amelia Island, in the course of her voyage, where she might have got information of the non-intercourse law being in force. That she spoke a vessel of the United States just before she came in, but made no inquiry as to the law. That the agent of the owners wrote several letters to be delivered to the captain at sea, informing him of the law and warning him to go to some foreign port, but they were not de-**358***] livered. The evidence respecting *the necessity of coming in, by reason of stress of weather, did not seem to be sufficiently proved.

The cause was argued by *P. B. Key* for the appellants, and *I. R. Ingersoll* for the United States.[1]

It was contended by *Key* for the appellants,

1. That the cargo was not taken on board with intention of importing the same into the United States.

2. That the vessel was forced into Cockspur Harbor by stress of weather, to save the vessel and the lives of the crew: and while so making the harbor, she was boarded by a revenue cutter, and seized, and forced into the port of Savannah.

3. That she had a right to come into the waters of the United States to make inquiry whether she could be permitted to enter, and before a reasonable time had expired, she was forcibly seized and carried in.

4. That coming into the waters of the United States under either of the above circumstances, does not constitute an importation, without other and further voluntary acts on the part of the vessel.

February 23. MARSHALL, *Ch. J.*, stated the opinion of the court to be, that the vessel came at her peril; that she was bound to get information; but was negligent in not calling at Amelia Island, and in not inquiring of the vessel which she spoke off the port of Savannah.

Sentence affirmed.

CAZE AND RICHAUD
v.
THE BALTIMORE INSURANCE COMPANY.

Absent.—TODD, *J.*

The underwriters upon a cargo are not liable for freight *pro rata itineris*, to the owner of the vessel, who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss and by them accepted, the loss paid, the cargo condemned, restored upon appeal, and the proceeds of the cargo paid over to the underwriters. Freight *pro rata itineris* is not due unless the owner of the cargo voluntarily agrees to receive it at a place short of its ultimate destination.

ERROR to the Circuit Court for the District of Maryland in an action of *indebitatus assumpsit* for freight *of goods by the [***359** ship Hamilton from Bordeaux to Halifax.

In the court below a case was agreed by the parties, which was in substance as follows.

On the 28th of July, 1805, Mr. John Ducorneau, of Bordeaux, the agent of the plaintiffs, shipped for them, there, on their account, on board the ship Hamilton, of which they were owners, a cargo of the value of $22,986 on a voyage from Bordeaux to New York, where the plaintiffs resided. On the voyage she was captured by a British vessel of war and carried into Halifax, where the ship and cargo were condemned. Within due time after the plaintiffs heard of the capture, they abandoned as for a total loss to the defendants, who accepted the abandonment and paid the amount insured.

1.—The reporter was absent.

From the sentence of condemnation in the Vice Admiralty Court as to the vessel and cargo, but not as to freight, there was an appeal upon which the sentence was reversed and the proceeds of the vessel and cargo were restored. The proceeds of the cargo were paid over to the underwriters; but the sum they received was less than the sum they had paid upon the policy.

The question, upon this case, was, whether the plaintiffs, who were owners of both vessel and cargo, were entitled to recover from the underwriters upon the cargo, freight from Bordeaux to Halifax.

Harper, for plaintiffs in error, contended that they were so entitled.

The underwriters who became the owners of the cargo at Halifax, were benefited by the transportation from Bordeaux. The cargo was liable for its freight. The underwriters received the whole proceeds. So much thereof as amounted to the value of the freight was received by them to the use of the plaintiffs as owners of the ship.

Pinkney, Attorney-General, contra.

This action certainly cannot be maintained upon an insurer's liability for freight under a [*360 policy on cargo. *The case of *Baillie and Modigliani*, 2 Marsh., 728, is decisive to that effect; and even if an insurer were liable for freight under the policy, he must be sued upon that, and could not be made to answer for it in this form of action.

But it is said that this claim does not rest on the policy; but founded upon the idea, that as the underwriters became proprietors (by the abandonment and acceptance) of the cargo, or rather of the proceeds of the cargo, at Halifax, they succeeded to the burden as well as to the benefit, and must consequently pay freight *pro rata itineris* to the plaintiffs as owners of the ship.

To this it may be answered, that if any freight was due, it was due from the plaintiffs themselves, because it was earned while they were the owners of the goods, and because the abandonment could not throw upon the underwriters a responsibility for freight for which the assured were already liable. There could be no privity of contract between the insurers and the ship-owners with reference to such freight; and the ship-owners could have no lien on the proceeds arising from the sales under the condemnation.

But no freight was due. The goods belonged to the owners of the ship, and of course the bill of lading did not call for freight. On the contrary it declared that no freight was to be paid, "the cargo being owner's property." To imply a contract between the owners of the cargo and themselves to pay freight to themselves, and that, too, against the bill of lading, would be absurd. It follows that at the time of the abandonment the plaintiffs had no right, either complete or inchoate, to freight upon the goods insured. If it were even admitted, then, to the utmost extent contended for, that the insurers, accepting the abandonment, took the cargo *cum onere*, they could not be charged with freight in this case, since the thing insured was, when they succeeded to it, free from such a charge. If they became liable for freight they did not take simply *cum onere*; for the *onus* relied upon by the plaintiff's counsel did not exist when the subject-matter came to them by abandonment. The abandonment and acceptance must have created, not passed it. If, indeed, the ship had afterwards performed any service to the underwriters with [*361 respect to these goods, an *assumpsit* might be implied *pro tanto* against them; but this demand is for freight supposed to have been earned while the goods belonged to the plaintiffs, and were expressly, as well as from the nature of the transaction, exempt from freight.

The doctrine of lien which has been spoken of by the plaintiffs' counsel cannot serve his cause, for the plaintiffs could have no lien for freight which was not due; even if there could be a subsisting lien upon these proceeds, for freight which was due.

But freight was not due, for other reasons. It may be conceded that freight is in some cases due *pro rata itineris*, where the voyage being intercepted, the owner of the cargo consents to receive it at a place short of its destination. But he must be a volunteer. A forced receipt, as on this occasion, has never been adjudged to give a title to *pro rata* freight. Besides, this cargo was lost; and even if the proceeds had covered the value, it may well be questioned, notwithstanding the *dictum* in Baillie and Modigliani, whether by taking the proceeds, the owner gives a right to *pro rata* freight.

But however that may be, it can scarcely be maintained that a forced acceptance (by the owner or by an insurer to whom an abandonment has been made) of proceeds far short of the value (as was the fact here) will give such a right.

Harper, in reply.

The case in Marshall wants the essential ingredient of ownership in the person making the abandonment. It was, too, a case of partial loss. The defendants in the present case are sued, not as underwriters, but as owners of goods liable for freight. The benefit they receive from the transportation of the goods is a good foundation for an implied promise. The decision in Burrow's reports, of consent to receive the cargo liable *pro rata itineris*, has never been questioned.

February 24th. STORY, *J.*, delivered the opinion of the court as follows:

*The present action is brought to re- [*362 cover freight *pro rata itineris*, under the following circumstances:

The plaintiffs were the owners of the ship Hamilton and cargo, and effected insurance of her cargo on a voyage from Bordeaux to New York. The sum of $11,000 was underwritten by the defendants—the sum of $10,000 at Philadelphia, and the residue of the value of the cargo ($1,986) was left uninsured. During the voyage the ship and cargo were captured, carried into Halifax, and there condemned. The plaintiffs abandoned to the underwriters and received payment for a total loss. An appeal from the sentence of condemnation was interposed and the sentence finally reversed, and the proceeds of the cargo, which had been previously sold by order of court, were paid over to the underwriters in proportion to the sums underwritten by them respectively.

We are all of opinion that the plaintiffs are not entitled to recover in the present action.

In the first place the court are satisfied that, as between the insured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo against which he does not undertake to indemnify the owner; and if authority be necessary to support the position, it is fully borne out by the doctrine of Lord Mansfield in *Baillie* v. *Modigliani*, (Marshall, 1728.)

In the next place we are all of opinion that no freight whatsoever was, under the circumstances of this case, due. Freight, in general, is not due unless the voyage be performed. Here the ship and cargo never arrived at their port of destination, and of course the whole freight could not be due. Was a *pro rata* freight due? We think not. The whole class of cases resting on the authority of *Luke* v. *Lyde* (2 Burr., 882), proceed on the ground that there is a voluntary acceptance of the goods themselves at an intermediate port; and not, as in the present case, a compulsive receipt from the hands of the admiralty after capture and condemnation, and ultimate restoration upon the appeal. There is, in our judgment, no equity to support such a claim; and although it **363***] *receive countenance from some remarks incidentally thrown out in *Baillie* v. *Modigliani*, the current of more recent authority, as well as of principle, clearly points the other way.

It may be further added that as between the insured and the underwriter the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo after an abandonment.

The judgment of the Circuit Court is affirmed with costs.

Criticised—12 Wheat. 403, 406.
Cited—8 Cranch. 50; 12 Wheat. 396, 406; Abb. Adm. 504; 1 Mason, 44; 3 Sum. 550, 551, 554; 3 Wood. & M. 442, 444.

THE SCHOONER JANE
v.
THE UNITED STATES.

Present—All the Judges except TODD, *J.*

In a prosecution against a vessel for violation of a law of the United States it is not necessary to adduce positive testimony of the identity of the vessel.

THIS was an appeal from the sentence of the Circuit Court for the District of Maryland, reversing that of the District Court, which condemned the schooner Jane for violation of the non-intercourse act.

Nicholson, for appellant,

Contended that there ought to have been positive proof of the identity of the vessel.

Pinkney, Attorney-General.

If these cases are to be likened to criminal prosecutions, and if the same strictness be required, it will be impossible to execute the laws. No proof was offered on the part of the claimant. But there is sufficient proof of identity—she is the same kind of vessel, has the same name, belongs to the same port, has a master of the same name, had the same cargo, and the time of her sailing from Port au Prince corresponded with the time of her arrival at Baltimore, allowing the usual time for performing the voyage.

Harper*, in reply. [*364**

The United States are bound to make out full proof. If the fact be so, much better proof might have been had on the part of the United States.

February 24th. WASHINGTON, *J.*, delivered the opinion of the court as follows:

This was an information filed in the District Court of the United States, for the District of Maryland, against the schooner Jane and her cargo for a breach of the law interdicting the commercial intercourse between the United States and Great Britain and France, and their dependencies. The particular charge alleged in the information is, that this vessel had imported into the port of Baltimore from some place in the island of St. Domingo, a dependence of France, 1920 bags of coffee in violation of the above law. To establish this charge two witnesses were examined on the part of the United States, who concurred in testifying that they were at Port au Prince in the island of St. Domingo, from about the middle of August to the middle of September, in the year 1809, and that they saw lying there a schooner called the Jane, of Baltimore, Vezey, master. That her cargo consisted of flour, which she discharged at that place and took in a quantity of coffee in bags, and that she sailed from Port au Prince about the 10th of September.

One of these witnesses thinks that the name "Jane" was painted on the stern of the vessel, but is not positive as to that fact; nor can either of the witnesses say that the vessel they saw at Port au Prince was the same which was seized by the collector of the port of Baltimore.

The seizure of the vessel and cargo, which are the subject of this controversy, was made between the 1st and 18th of October, 1809.

Upon the above evidence, the District Court dismissed the information and ordered restitution of vessel and cargo. This writ of error is taken to the sentence *pronounced [***365** by the Circuit Court, which, upon an appeal, reversed that of the District Court and condemned both the vessel and cargo. For the claimants it is contended that the evidence in this case is merely presumptive, and is much too light to establish the fact necessary to be made out, that the vessel seized by the collector of Baltimore is the same vessel which was seen by the witnesses at Port au Prince. If the latter part of the objection to the evidence be well founded, it is fatal to the sentence, because, although presumptive evidence is clearly admissible, and may of itself be sufficient to support, in many instances, even a criminal prosecution, yet the circumstances proved ought not only to harmonize with each other, but they ought in themselves to be so strong as fully to satisfy the mind of the fact they are intended to establish.

In this case there is such a coincidence in the circumstances proved in relation to the vessel, the cargo, and the voyage, as to impress the mind with a conviction, almost irresistible, that the schooner Jane seen by the witnesses at Port au Prince, is the identical vessel against

which this prosecution is carried on. That vessel was a schooner, the reputed name of which at Port au Prince was the Jane, of Baltimore, Vezey, master; which took in, at that port, coffee in bags and sailed from thence about the 10th of September. The vessel in question is a schooner, bears the same name, was commanded by a captain Vezey, her cargo coffee in bags, and she arrived at Baltimore between the 1st and 10th of October, about the time when a vessel which had left Port au Prince on the 10th September might reasonably have been expected to arrive. It is barely possible that the facts proved in this case should apply to any other vessel than the one in question; and in the absence of all explanatory evidence, which it was so entirely in the power of the claimants to have produced, is sufficient to deprive him of this slight ground to stand upon.

It is true that the proof of identity might have been strengthened by evidence that this vessel sailed from Baltimore, of the time when she sailed, the port for which she cleared, and the cargo she took out with her. But it does not **366***] appear in this record, nor *does it necessarily follow, that she sailed from Baltimore on her outward voyage, or that it was in the power of the United States to prove any of the above facts. On the other hand, nothing could have been more easy than for the claimants to have proved them, and still further to have proved, if their case would have admitted it, that the evidence on the part of the United States did not apply to this vessel.

The court is of opinion that there is no error in the sentence pronounced by the Circuit Court, and that the same should be affirmed with costs.

LEE *v.* MUNROE AND THORNTON.

Absent—JOHNSON, *J.*, and TODD, *J.*

The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration.

THIS was an appeal from the decree of the Circuit Court for the District of Columbia, in a suit in chancery, brought by Lee against Thomas Munroe, superintendent of the city of Washington, and William Thornton, the survivor of the late board of commissioners for that city. The object of the bill was to obtain a discount of 3,000 dollars upon a judgment, which Munroe, as superintendent, had obtained against Lee upon his bond. The ground upon which this set-off was claimed, was this: Morris and Nicholson were indebted to Lee in that sum by promissory notes, and offered payment in certain city lots, the title whereof was in the commissioners of the city. Morris and Nicholson having paid money in advance to the commissioners, were, as they supposed, entitled to demand from them the conveyance of the lots in question, under existing contracts between the commissioners and themselves. Whereupon Lee applied to the commissioners to know of them whether they would convey the lots to him, upon the order of Morris and Nicholson. This they promised to do, and made an entry of it in their journal. Lee then agreed with Morris and Nicholson to receive the lots in payment, and upon receiving their order to the commissioners to convey them to him, gave up to Morris and Nicholson their notes for 3,000 dollars, which were the *evidence of the debt. [***367** On presenting this order to the commissioners, they refused to convey the lots, unless he would pay them the purchase money due thereon to them from Morris and Nicholson, alleging that the balance was against Morris and Nicholson in their account with the commissioners. Morris and Nicholson shortly afterwards became insolvent.

C. Lee, for the appellant.

This case cannot be distinguished from that of a mortgagee, who, knowing another person is about to lend money upon the mortgaged premises, informs him that his mortgage is satisfied. If it be not, he shall be postponed to the 2d Mortgagee. (2 Vern., 554, *Ibbottson* v. *Rhodes;* 1 P. Wms., 394, *Mocatta* v. *Murgatroyd;* 4 Dall., *Levy* v. *Bank U. S.*)

The commissioners were acting within the scope of their authority. It was their business to keep the accounts with Morris and Nicholson, and to know the balance; it was also their business to convey the lots. It is immaterial what was the real state of accounts at the time. They acted at their peril.

The question is, who shall bear the loss? Not he who was in no fault, but he whose duty it was to know the truth, and who by his negligence has brought this loss upon the plaintiff.

Jones, contra.

This case does not depend upon the principle of first and second mortgagee. The bill does not seek relief personally against the superintendent, or the surviving commissioner, but is intended to charge the public with this loss. The commissioners were public officers; they had no interest in the business. It was a simple mistake of a fact on their part, which cannot bind the United States. It is an attempt to set off unliquidated damages incurred by these public officers against a judgment debt.

Feb. 26th. LIVINGSTON, *J.*, delivered the opinion of the court as follows:

*This is a bill seeking relief against [***368** public officers nominally, but against the United States in fact, for a mistake of the former in a representation made by them to the appellant, by which it is alleged that he has sustained a loss, for the redress of which in damages this suit is brought. It has been contended in this case, that the defendants having, in their public character as commissioners of the city of Washington, misinformed the plaintiff as to the state of the accounts between them and Morris and Nicholson, and thereby induced him to relinquish a demand which he had against the latter, he is now entitled to have discounted from a judgment, which they have obtained against him for the use of the United States, a sum equal to the principal and interest of the debt which he lost by the confidence which he placed in them; and this is supposed to be like the case of a party who, being about to lend money on real estate, applies to one who holds a prior mortgage to ascertain whether he has any in-

cumbrance on it. There is no doubt, in such a case, that if the person making the application discloses that he is about lending money on the estate, he will be preferred to the first mortgagee, should the latter deny his having a mortgage, or assert that it is satisfied; and it seems agreeable to the dictates of reason and good conscience, that his claim should be postponed to that of a person whose confidence was inspired by the misrepresentation of one who was acting for himself, and every way competent to inform him of the truth. But in all the cases which have been decided on this principle, the fraud, for such it is supposed to be, has been practiced by a party who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct therefore ought to be conclusive on him, when the rights of third persons come in question. It is, however, not known to the court that the same rule of decision has been extended so as to affect the interests of principals, and particularly of the public, in consequence of similar mistakes made by an agent, nor is it reasonable that such extension should take place, unless it most manifestly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make the declaration or representation which is relied on as the ground of relief. In the present case, the defendants were employed and author-
369*] ized by the public to *sell and make contracts for the sale of certain lands lying within this district. In pursuance of these powers, they had made contracts with Morris and Nicholson, who, having advanced a considerable sum of money, were in the habit of directing the defendants from time to time, to convey certain of the lots which they had contracted for, to the persons named in such orders. The commissioners, supposing that Morris and Nicholson had not yet received titles to land equal in value to the sum which they had advanced, told the plaintiff that if he would obtain an order from them for certain lots they should be conveyed to him. But in a day or two after they discover that Morris and Nicholson had already received deeds for lots to the whole amount of the sum which they had advanced, and give notice of this fact to the plaintiff, offering, however, to convey to him the lots in question, on his paying for them at the rate expressed in their contract with Morris and Nicholson. The court will not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners, or whether he lost his remedy against Morris and Nicholson (of which very serious doubts may well be entertained), but a majority of the judges are of opinion, that the communication made by the commissioners to the plaintiff was altogether gratuitous, and that not being within the sphere of their official duties, the United States cannot be injured by it, and that the defendants could not, without rendering themselves personally liable to the public, have made a title to the plaintiff after a discovery of the mistake which they had made, but on the terms proposed by them; or in other words, that the United States could not, by any declaration of the commissioners proceeding from a mistake, lose the lien which was secured to them by the contract with Morris and Nicholson, for the stipulated price of this property. If the commissioners acted fraudulently, which is not pretended, they may be personally liable in damages to the plaintiff; but if it were a mistake, and such it is represented to be, the court has already said that the interests of the United States cannot, and ought not, to be affected by it. Were it otherwise, an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might by inadvertence, or incautiously giving information to others, destroy the lien of his principles on very *valuable and large tracts of real estate, [***370** and even produce alienations of them without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes than to introduce a rule, against an abuse of which, by improper collusions, it should be very difficult for the public to protect itself.

It is the opinion of this court that the decree of the Circuit Court be affirmed.

Cited—8 How. 157; 3 Otto, 257: 6 Otto, 692; 2 Paine, 71.

HERBERT AND OTHERS
v.
WREN AND WIFE AND OTHERS.

Present—All the Judges except TODD, *J.*

Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery, or account is prayed, and in cases of sale where the parties are willing that a sum in gross should be given in lieu of dower.

If a devise of land in Virginia to the widow appear from circumstances to be intended in lieu of dower, she must make her election, and cannot take both.

If a wife join her husband in a lease for years she is still entitled to dower in the rent.

A court of chancery cannot allow a part of the purchase money in lieu of dower, when the estate is sold, unless by consent of all parties interested.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria, in a suit in chancery brought by Richard Wren, and Susanna, his wife, who was the widow of Lewis Hipkins, deceased, and John and Westley Adams, her trustees, against W. Herbert, T. Swann, R. B. Lee, and W. B. Page, (trustees of Philip R. Fendall, deceased,) and E. I. Lee, Jos. Deane and F. Green.

The case was stated by MARSHALL, *Ch. J.*, (in delivering the opinion of the court), as follows:

This suit was brought by Richard Wren, and Susanna, his wife, formerly the wife of Lewis Hipkins, praying that dower may be assigned her in a tract of land of which her former husband died seized, and which has since been sold and conveyed to the defendant, Joseph Deane, or that a just equivalent in money may be decreed her in lieu thereof.

The material circumstances of the case are these:

Lewis Hipkins, being seized as tenant in common with Philip Richard Fendall on one-third of a tract of land lying in the county of Fairfax by his deed executed *by himself and [***371** wife, leased the same to Philip Richard Fendall for the term of thirteen years, to commence on

the first of September, in the year 1794, at the annual rent of 140*l.*

In the year 1794 Lewis Hipkins departed this life, having first made his last will and testament in writing, in which he devised both real and personal estate to his wife: the real estate for her life, with remainder to his three daughters.

To his two sons he devised the premises in question, and added that if, during the minority of his sons, Philip R. Fendall should erect thereon another water-mill or water-mills, his desire was that his sons or the survivor of them should, at the expiration of the lease for years made to the said Philip pay one-third part of the value of such mill or mills, and in default of payment that P. R. Fendall should be permitted to hold the same at the present rent until the value should be received.

He directed his two tracts of land in London to be sold for the payment of his debts, and appropriated the annual rent accruing on the lands leased to P. R. Fendall to the education and maintenance of his children.

The testator then adds the following clause: "If it should so happen that the remaining part of my estate, not herein bequeathed, should prove insufficient to pay all just demands against my estate, then my will and desire is that my executors shall sell as much of my real and personal estate as may be necessary to make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be in proportion to the property bequeathed to them and each of them."

On the 13th day of December, in the year 1797, Susanna Hipkins, then the widow of Lewis Hipkins, conveyed her dower in the premises in question and also in the land devised to her for life by her deceased husband to the plaintiffs, John Adams and Westley Adams, in trust for her use.

372*] *In the year 1803 P. R. Fendall and Walker Muse instituted a suit against the executors and children of Lewis Hipkins, deceased, and in the month of June in that year the cause came on to be heard by consent of parties, when the court decreed that the whole estate of Lewis Hipkins be sold and the money brought into court.

The report of the sale does not appear on the record, but an entry was made that the report was made and confirmed by the court.

Under this decree the premises were sold and conveyed to the defendant, E. I. Lee, who purchased in trust for P. R. Fendall, one of the executors of Lewis Hipkins. On the deed of conveyance is a memorandum stating that the property was sold subject to dower.

Lee conveyed the premises to the other defendants, trustees of P. R. Fendall, for the purposes of a trust deed which had been previously executed, conveying to them the other two-thirds of the same estate on certain trusts in the deed recited.

The trustees sold and conveyed to the defendant, Joseph Deane.

The bill states that the defendant, Joseph Deane, had not paid the purchase money, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof.

Soon after the trust deed from Susanna Hipkins to John and Wesley Adams she intermarried with the plaintiff, Richard Wren.

Philip R. Fendall continued to pay the plaintiff, Susanna, during her widowhood, and the plaintiffs, Richard and Susanna, after their intermarriage, one-third part of the rent accruing on the premises devised to him by Hipkins and wife until the year 1803; since which he has refused or neglected to pay the same.

The defendants, the trustees of Philip Richard Fendall, he having departed this life previous to the institution of this suit, insist,

*1. That the remedy of the plaint- [***373** iffs, if they have any, is at law, and that a court of equity can take no jurisdiction of the cause.

2. That the provision made by the will of Lewis Hipkins for the plaintiff, Susanna, not having been renounced by her, bars her right of dower in his estate.

The defendant, Joseph Deane, has put in no answer, and as against him the bill is taken as confessed.

The Circuit Court determined that the claim of the plaintiff, Susanna, to dower was not barred, and decreed her a sum in gross as an equivalent therefor.

From this decree the trustees of Philip Richard Fendall have appealed. The plaintiffs also object to so much of the decree as refuses them rent on the premises, and have therefore taken out likewise a writ of error.

E. I. Lee, for the plaintiffs in error.

1. If the complainant, Susanna, has any right of dower, her remedy was in a court of law.

In a suit in chancery, if a question of dower arise, and the right of dower be denied, a court of equity will send it to a court of law to be tried.

The courts of the United States are forbidden by law to exercise chancery jurisdiction in a case in which there is a remedy at law. A court of equity takes cognizance of no case of dower which does not involve some peculiar ground of equity—such as discovery, partition, account, &c.

Here was no prayer for discovery, nor partition, and although an account was prayed, yet it was unnecessary. (1 Fonb., 19; 1 Br. C. C., 326; 3 Atk., 130, *Dormer* v. *Fortescue;* 2 Br. C. C., 631; 2 Vez., Jun., 124.)

2. She had no right to dower. Her husband, Hipkins, had devised to her an estate for life, which appears, by the various provisions in his will, to have been intended to be in lieu of dower. The lands out of *which [***374** dower is now claimed, he devised to his sons, and also devised them for payment of his debts. He specifically devised away all his lands.

In the case of *Ambler* v. *Norton* (4 Hen. and Mun., 23), the devise was not expressly in lieu of dower, but the fact was collected from the whole context of the will.

3. But if she had a right of dower, the court had no authority to make a decree for part of the purchase money, without the consent of all parties concerned. (1 Inst., 33.)

R. I. Taylor, contra.

None of the facts upon which the claim of dower is founded is denied by the answer. The denial of the right is founded on particular facts therein stated.

1. As to the jurisdiction. At the present day

courts of law and equity have a concurrent jurisdiction in dower, if the facts are not denied upon which the claim of dower is founded; such as seizure, &c. In general a court of chancery is the proper tribunal. A discovery is almost always sought; partition is frequently required, and an account is generally taken. (Comyns Dig. Tit. Chancery, E. Mitford, 109, 129; 1 Fonb., 22; 6 Bac. Ab., 417; 2 Vez., Jr., 122, 124.) There is no case in Virginia where the jurisdiction has been denied.

In this case a partition was necessary, and that is a special ground of equitable jurisdiction.

But the property had been sold by order of court, expressly subject to dower, and the deed to Deane contained a covenant to indemnify him against the claim of dower. A court of chancery can call all parties before it, and by decreeing a compensation in lieu of land, prevent circuity of action. The widow and the purchaser had consented to such a decree. An account of rents and profits was also necessary. The act of Congress prohibiting the resort to chancery where there is a remedy at law, is only an affirmance of a principle of the common law.

375*] *But it is said that by joining in the lease for 13 years, she barred her dower during the lease. This is not so. Her husband still had a free hold of inheritance in the land, and died seized thereof. And the widow is entitled to dower in all lands of which the husband was seized of the freehold of inheritance during the coverture. (1 Inst., 32; Com. Dig., Tit. Dower, A. 6.)

But the most formidable objection arises upon the devise to her by the will. That devise was not expressly in lieu of dower, nor is there such averment as the state of Virginia requires. There is no averment that she accepted the lands devised in lieu of dower; nor that her husband was seized of such an estate in those lands as would be a bar if she had accepted them.

The decree of the court was for a sale of the whole real estate of her husband. It does not appear that the land devised to her was not sold as well as the rest. If it was she is not barred of her dower. (Co. Lit., 18 [B.], Harg. note; Ridgeway's Rep. tem. Hardwicke, 184, *Dormer* v. *Fortescue;* Fonb., 22; 6 Bac. Ab., 417.)

But there is an error in favor of the plaintiff in error, and if the cause should be sent back it ought to be corrected. There was no allowance made for arrearages of rent.

As to the decree for money in lieu of land. The widow was willing to receive it, and the defendant, Deane, to pay it. If there had not been a decree for money, Deane would have been obliged to pay the whole purchase money to the trustees and then sue them for a breach of covenant, and recover back in damages the value of the dower to be assessed by a jury. By ascertaining that value in the first instance, this circuity of action and loss of time are prevented. Whether the court below ought themselves to have fixed the value of the dower, or left it to be ascertained by a master in chancery, or by a jury, we do not pretend to say. We do not wish the decree to be affirmed. We hope the bill will not be dismissed, but sent back with instructions to allow us the arrearages of rent with the profits thereon, and that an account be taken accordingly.

C. Lee, in reply. [***376**

The essential point of the case is that she is barred of her dower by her acceptance of a jointure under the will. The act of assembly (Rev. Co., 180, § 11) says "that if any estate be conveyed by deed or will, either expressly, or by averment, in lieu of dower," &c., "such conveyance shall bar her dower of the residue," &c. She has accepted her jointure and resides upon it. All the circumstances of the will show the intent to be in lieu of her dower. By averment, means by allegation and proof *dehors* the will. (1 Inst., 36 [b] note; Wooddeson, Tit. Dower; Hargrave Co., Lit., 36 [b] note; 1 Br. C. C., 292, *Pearson* v. *Pearson.*)

The court had no right to decree money in lieu of the land without consent of the creditors.

No arrearages of dower can be recovered for the time preceding the demand.

February 26th. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court as follows:

The material questions in the cause are:

1. Has a court of equity jurisdiction in the case?

2. Is the plaintiff, Susanna, entitled to dower?

3. If these points be in her favor what decree ought the court to make?

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favor of this jurisdiction, one of which is, that partitions are made and accounts are taken in chancery in a manner highly favorable to the great purposes of justice. In this case dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate as well as of assignment of dower in the part of which Lewis Hipkins died seized.

*An additional reason and a conclu- [***377**
sive one in favor of the jurisdiction of a court of equity is this: The lands are in possession of a purchaser who had not yet paid the purchase money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now, if the plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law and compel her to receive her dower in the lands themselves. This is therefore a proper case for application to a court of chancery.

2. It is perfectly clear that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower for several reasons, of which it will be necessary to mention only two.

1. It is not expressed to be made in lieu of dower.

2. It is not averred that she has accepted the provision and still enjoys it.

3. It remains to inquire what decree the court ought to make in the case.

The first question to be discussed is this: Is the plaintiff, Susanna, entitled both to dower and to the provision made for her in the will of her late husband?

The law of Virginia has been construed to

authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary the previously existing common law.

In the English books there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which
378*] *she has been permitted to hold both. The principle upon which these cases go appears to be this:

It is a maxim in a court of equity not to permit the same person to hold under and against a will. If, therefore, it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended to devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of *Arnold* v. *Kempstead and wife*, of *Villarael* and *Lord Galway*, and of *Jones* v. *Collier and others*, reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election.

In the case under consideration neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife compared with the whole estate is not in proof; but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify.

The only fund provided for the maintenance and education of his five children is the rent of £140 per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained.

379*] *The clause, too, directing the residue of his estate to be sold for the payment of debts is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the incumbrance of dower.

Upon this view of the will it is the opinion of the majority of the court that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the court that she has accepted the provision of the will, nor that she still enjoys it. Indeed there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life from its operation, nor is the court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one-third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is therefore apparent that she never intended to abandon her claim to dower.

The next inquiry to be made by the court is, to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower?

It is unnecessary to decide whether, in general, a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case the plaintiff was in the actual enjoyment of dower. She received one-third of the rent accruing from the premises for nine years. She was therefore in full possession of her dower estate; and when afterwards the land was sold under a decree of a *court, P. R. Fendall was [***380**
one of the executors who made the sale, and was himself in effect the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one-third of 140*l.* per annum for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff, Susanna, cannot claim the profits on her dower and hold any portion of the particular estate devised to her, or of the profits on that estate. An account, therefore, must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one-third of the purchase money, might legally be made.

This must be considered as a compromise between the plaintiffs and the defendant, Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist that, instead of a sum in gross, one-third of the purchase money shall be set apart and the interest thereof paid annually to the tenant in dower during her life.

If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still it is uncertain on what principle seven years were taken as the value of the life of the tenant in dower. It is probably a reasonable estimate, but this court does not perceive on what principles it was made, nor does the record furnish the means of judging of its reasonableness.

This court is of opinion that there is error in the decree of the Circuit Court in not requiring **381***] the plaintiff, *Susanna, to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate if she shall elect to take dower. The decree is to be reversed and the cause remanded for further proceedings in conformity with the following decree:

This court is of opinion that the plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins, died seized, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said Lewis. She ought therefore to have made her election either to adhere to her legal rights and renounce those under the will, or to adhere to the will and renounce her legal rights, before a decree could be made in her favor.

This court is further of opinion that the plaintiff, Susanna, having been in possession of her dower by the receipt of rent for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession from the time when he ceased to pay the same, until the sale was made to the defendant, Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon since the same was sold and conveyed to him, to ascertain which an account ought to be directed. And the court is further of opinion that an account ought also to be directed to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will; all which must be deducted from her claim for dower.

The court is further of opinion that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one-third part of the purchase money, given by the said Joseph Deane for the lands in which the plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive during life the interest **382***] accruing thereon, *and shall apply to the Circuit Court to reform its decree in this respect, the same ought to be done.

It is the opinion of this court that there is no error in the decree of the Circuit Court for the county of Alexandria in determining that the plaintiff, Susanna, was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This court doth therefore reverse and annul the said decree; and doth remand the cause to the said Circuit Court with instructions to reform the said decree according to the directions herein contained.

JOHNSON, *J.*, dissented from the opinion of the court, but did not state his reasons.

Cited—1 Bald. 408, 416, 421; 2 Mason, 271; 2 Wood. & M. 32, 221; 4 Wash. 353.

THE CARGO OF THE BRIG AURORA, BURNSIDE, CLAIMANT, *v.* THE UNITED STATES.

Present—All the Judges except TODD, *J.*

The legislature may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation. When an act of Congress is revived by a subsequent act, it is revived precisely in that form, and with that effect, which it had at the moment when it expired.

The non-intercourse act of March 1, 1809, was, by force of the act of May 1, 1810, and the President's proclamation of Nov. 2d, 1810, revived on the 2d of February, 1811.

In a libel, it is not necessary to state any fact which constitutes the defense of the claimant.

THIS was an appeal from the sentence of the District Court for the District of Orleans, condemning the cargo of the brig Aurora, for having been imported from Great Britain, in violation of the 4th and 5th sections of the non-intercourse act of March 1st, 1809, (vol. 9, p. 243), which it was contended were in force against Great Britain, on the 20th of February, 1811, (when this cargo was seized), by virtue of the act of May 1st, 1810. (vol. 10, p. 186), and the President's proclamation of November 2d, 1810.

By the fourth section of the act of March 1st, 1809, it is enacted, "that from and after "the 20th day of May next, it shall not be law- "ful to import into the United States *or [***383** "the territories thereof, any goods, wares or "merchandise whatever, from any port or place "situated in Great Britain or Ireland, or in "any of the colonies or dependencies of Great "Britain, nor from any port or place situated "in France, or in any of her colonies or de- "pendencies, nor from any port or place in the "actual possession of either Great Britain or "France."

By the 5th section of the same act it is enacted, "that whenever any article or articles, the "importation of which is prohibited by this "act, shall, after the 20th of May, be imported "into the United States or the territories there- "of, contrary to the true intent and meaning "of this act," 'all such articles' "shall be for- "feited."

By the 11th section of the same act, it is provided, "that the President of the United States "be, and he hereby is authorized, in case either "France or Great Britain shall so revoke or mod- "ify her edicts, as that they shall cease to vio- "late the neutral commerce of the United "States, to declare the same by proclamation; "after which the trade suspended by this act "and by the act laying an embargo," &c., "may be renewed with the nation so doing."

This act was to continue in force only to the end of the then next session of Congress, but the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th,

17th and 18th sections were, by the act of June 28th, 1809, continued to the end of the next session.

On the 19th of April, 1809, in consequence of the arrangement with Mr. Erskine, the President issued his proclamation declaring that Great Britain had so revoked her edicts, &c., whereby the law ceased to operate against her. But in consequence of the disavowal of Mr. Erskine's arrangement by the British government, that proclamation was afterwards revoked.

The act of 1st of March, 1809, expired with the session of Congress, on the 1st of May, 1810, on which day Congress passed an act (vol. 10, p. 186), the 4th section of which enacted, "that in case either Great Britain or "France shall, before the third day of March **384*** "*next, so revoke or modify her edicts, "as that they shall cease to violate the neutral "commerce of the United States, which fact "the President of the United States shall de- "clare by proclamation, and if the other nation "shall not within three months thereafter so "revoke or modify her edicts in like manner, "then the third, fourth, fifth, sixth, seventh, "eighth, ninth, tenth, and eighteenth sections "of the act, entitled 'An act to interdict the "commercial intercourse between the United "States and Great Britain and France, and "their dependencies, and for other purposes,' "shall, from and after the expiration of three "months from the date of the proclamation "aforesaid be revived, and have full force and "effect, so far as relates to the dominions, col- "onies, and dependencies of the nation thus "refusing or neglecting to revoke or modify "her edicts in manner aforesaid. And the re- "strictions imposed by this act shall, from the "date of such proclamation, cease and be dis- "continued in relation to the nation revoking "or modifying her decrees in manner afore- "said."

On the 2d of November, 1810, the President issued his proclamation, declaring that France had so revoked or modified her edicts, as that they ceased to violate the neutral commerce of the United States.

By the act of March 2d, 1811, (vol. 10, p. 346, sec. 1), it is enacted, "that no vessel owned "wholly by a citizen or citizens of the United "States, which shall have departed from a "British port prior to the 2d day of February, "1811, and no merchandise owned wholly by "a citizen or citizens of the United States, im- "ported in such vessel, shall be liable to seiz- "ure or forfeiture, on account of any infrac- "tion, or presumed infraction of the provisions "of the act to which this is a supplement," (the act of May 1st, 1810.)

The second section provides that in case Great Britain should so revoke or modify her edicts, &c., the President shall declare the same by proclamation.

The 3d section enacts, that until the proclamation aforesaid "shall have been issued, the "several provisions of the 3d, 4th, 5th, 6th, **385*** "7th, 8th, 9th, 10th and *18th sections "of the act, entitled 'An act to interdict,' "&c., (the act of March 1st, 1809,) "shall have "full force, and be immediately carried into "effect against Great Britain, her colonies and "dependencies."

The Aurora cleared out from Liverpool on the 11th of December, 1810, sailed on the 16th, and arrived at New Orleans, between the 2d and the 20th of February, 1811. The President's proclamation of 2d of Nov., 1810, was known in Liverpool on the 13th of December.

Joseph R. Ingersoll, for appellant.

Here was no intent to violate the law. The vessel cleared out before the proclamation was known in Liverpool, and a knowledge of that fact is not brought home to her. But if it had been, it was impossible for her to know whether Great Britain would not, before the 2d of February, revoke her obnoxious orders in council, so that the law would never come into operation, even if the President could, by proclamation, call it into existence. And the law, if it should take effect, was not to go into operation until "the 20th of May next." When was the 20th of May next? If the law was revived by the proclamation, it could not be revived until the 2d of February, 1811. It was to be considered as being re-enacted on that day. The 20th of May next, therefore, meant to the 20th of May, 1811. The words of the act of May 1st, 1810, are, "shall from and after the expira- "tion of three months from the date of the "proclamation aforesaid, be revived, and have "full force and effect." The provision that it should begin to operate on the 20th of May next, was as much a part of the law as any other of its provisions. It was the intention of the legislature that some warning should be given to the citizens of the United States, so that they might by possibility avoid forfeiture under it. But if that provision be not adopted as well as the others, it was impossible to avoid the penalties of the law; for until the 2d of February, it would at all events be lawful to import, and until after that day it would be impossible to know that Great Britain had not revoked her edicts, so that if the law was to take effect on that *day it would be impossible for [*386 the most innocent and most wary to escape punishment.

This could not have been the intention of the legislature. Effect ought, if possible, to be given to the words, after the 20th of May next; and the most matured construction is that the legislature meant the 20th of May next following the day, when the act should become absolute, by the happening of the contingency on which its existence was to depend. A contrary construction would attribute to the legislature the most flagrant injustice—that of punishing a man under a law of which it was impossible he should have had a knowledge.

Who ever heard of a conditional penal law, the condition of which was to be decided by the party, and which it was impossible for him to decide until after the law became absolute? The President was not authorized to decide it. Every man was to ascertain the fact for himself.

But Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law. Congress meant to reserve to themselves the power of ascertaining when the condition should have been performed. This is to be inferred from the act of March 2d, 1811, by which it is enacted, that until

Great Britain shall so revoke her edicts, &c., and until that fact shall be proclaimed by the President, the enumerated sections of the act of March 1st, 1809, interdicting, &c., "shall have full force, and be (*i. e.*, shall be) immediately carried into effect." These expressions strongly imply that those sections of the act were not already in full force, and had not been carried into effect.

But the 1st section of the act of March 2d, 1811, protects from forfeiture all American vessels and goods which sailed from Great Britain before the 2d of February. The information in this case does not deny that the goods are *bona fide* American property; and the answer of Burnside calls the Aurora an American brig—speaks of the return voyage, and states himself to be of New Orleans. The **387***] bill of lading is also on account *and risk of an American citizen. It is therefore to be inferred that the property was American, and therefore not liable to forfeiture.

John Law, contra.

The proclamation was known in Liverpool three days before the Aurora sailed, and must be presumed to have been known by the master.

The 20th of May referred to in the act was the 20th of May, 1809, which had passed when the law of May 1st, 1810, was enacted, and when the act of March 1st, 1809, expired.

The legislature meant to revive the law as it existed on the day of its expiration. The words "after the 20th of May next," were at that time of no effect, and were as inoperative as if they had been expunged from the law.

The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect.

The evidence is not sufficient to show the cargo to be American property.

Feb. 26th. JOHNSON, *J.*, delivered the opinion of the court as follows:

This is an appeal from a decision of the District Court of Orleans, on a libel preferred against the goods in question, under the non-intercourse acts of March 1st, 1809, and May 1st, 1810.

These goods were claimed by Robert Burnside, a citizen of Orleans, as his property, and the material questions in the cause are,

1st. Is the property American, in which case it is exempted from forfeiture, by a subsequent law, viz., of March 2d, 1811.

388*] *2d. Was the act of 1st March, 1809, revived by the President's proclamation at all, and if revived, did it commence its operation on the 2d of February, or on the 20th May following the time of issuing that proclamation?

On the question of fact, the court are of opinion that the evidence is not sufficient to prove the property American. The national character of the property the claimant might easily have established by his correspondence, and the examination of witnesses in Europe. No such evidence is resorted to. The bill of lading alone is resorted to, on which it is said to be shipped on account of a citizen of the United States, and consigned to Burnside, but the name of the owner is not inserted. Here again the defect of evidence may have been supplied by evidence who this citizen was, but no such evidence is adduced.

In the examination of the two clerks of John Rason & Co., of Liverpool, it is simply stated that these goods were shipped by John Richardson, of Liverpool, but on whose account they do not state, nor does it appear that they were examined to that point.

Upon the whole, we are of opinion that the absence of proof which might so easily have been supplied, will authorize a conclusion that the property was not American.

On the second point, we can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation without limitation upon the occurrence of any subsequent combination of events.

On the question when the operation of the 4th section of the act should commence, we are of opinion that by reviving an act, the legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment when it expired; *and that a suspended operation [***389** to the 20th May would be wholly inconsistent with the words made use of in the 4th section of the act of May, 1810, viz., "shall be revived and have full force and operation," and therefore, that its operation commenced on the 2d of February, 1811.

Some objections have been made to the sufficiency of the libel, because it does not negative the fact of American property. But on that subject, we are of opinion, that in no case can it be necessary to state in a libel any fact which constitutes the defense of the claimant, or a ground of exception of the operation of the law on which the libel is founded.

Cited—Post, 571; 1 Brock. 352.

THE SCHOONER HOPPET AND CARGO *v.* THE UNITED STATES.

Absent—LIVINGSTON, *J.*, and TODD, *J.*

Wines, the produce of France, imported into the United States before the non-intercourse act, re-exported to a Danish Island, there sold to a merchant of that place, and thence exported to New Orleans during the operation of that act of Congress, were liable to forfeiture under that law.

An information in the admiralty for a forfeiture must contain a substantial statement of the offense. A general reference to the provisions of the statute is not sufficient. If the information be defective in that respect, the defect is not cured by evidence of the facts omitted to be averred in the information.

The decree must be *secundum allegata*, as well as *secundum probata*.

THIS was an appeal from the sentence of the District Court for the District of Orleans (exercising the jurisdiction of a circuit court of the United States), condemning the schooner Hoppet and her cargo as forfeited to the United States under the act of Congress of March 1, 1809, (vol. 9, p. 243), entitled "An act to inter-

"dict the commercial intercourse between the "United States and Great Britain and France "and their dependencies, and for other pur- "poses."

The 4th section of that act makes it unlawful "to import into the United States or the terri- "tories thereof, from any foreign port or place "whatever, any goods, wares or merchandise "whatever, being of the growth, produce or "manufacture of France or of any of her col- "onies or dependencies," or of any country in the possession of France.

By the 5th section it is enacted, "that when- "ever any article or articles, the importation of "which is prohibited by this act, shall, after

390*] "the 20th of May, be imported *into "the United States or the territories thereof, "contrary to the true intent and meaning of "this act, such articles, as well as all other ar- "ticles on board the same ship or vessel belong- "ing to the owner of such prohibited articles, "shall be forfeited."

And by the 6th section it is enacted, "that if "any article or articles, the importation of "which is prohibited by this act, shall, after "the 20th of May, be put on board of any ship "or vessel,' 'with intention to import the same "into the United States or the territories "thereof, contrary to the true intent and mean- "ing of this act, and with the knowledge of "the owner or master of such ship or vessel,' "such ship or vessel shall be forfeited."

The information against the vessel did not aver that the goods were put on board the ves- sel with intention to import the same into the United States or the territories thereof contrary to the act, with the knowledge of the owner or master of the vessel; nor did the information against the cargo state that such of the goods as were not prohibited belonged to the owner of the prohibited goods; but both informations averred generally that the goods were imported contrary to the 4th, 5th and 6th sections of the act.

It appeared from the evidence and admissions in the case that the wines, which constituted the principal part of the cargo, were the prod- uce of France, and had been shipped from New York to the Danish island of St. Bartholo- mews, where they were purchased by a mer- chant of that place and shipped to New Orleans. It did not appear certainly whether they had been imported into New York since the 20th of May referred to in the act of Congress.

Harper, for the appellants,

Contended that it was probable from all the circumstances that the wines had been imported into the United States before the prohibition, and if so they had become incorporated with the general commerce of the country, and had lost their national character as French prod- uce. He also insisted on the defect in the in- formations, as stated above.

391*] *_Pinkney_, Attorney-General, and *Law*, contra.

The letter of the law is too plain to admit of construction. These wines never could cease to be the produce of France. They were im- ported from a foreign place into a territory of the United States during the prohibition by law. If they had acquired an American charac- ter, it was lost by receiving the drawback. It does not appear that they were imported into New York before the prohibition. If they had been, the proof was so easy that the want of it creates the strongest presumption that the fact was not so.

The intent is only to be known by the act of the owners. They were bound to know the laws of the country to which they were trading. It is sufficient for the United States to prove a knowledge that the goods were put on board for that voyage.

Feb. 27th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is an appeal from a sentence of the Court for the District of Orleans condemning the schooner Hoppet and her cargo, as forfeited to the United States for violating the non-inter- course law.

In the District Court two informations were filed by the attorney for the United States, one claiming the ship as being forfeited, and the other claiming the cargo. Objections have been made to each of these informations which will be separately considered.

The information against the vessel charges in substance, that while the act entitled "An act to interdict commercial intercourse," &c., was in force, certain goods of the growth, produce, or manufacture of France, were imported into the United States, to wit: into the port of New Orleans, in the said vessel, from some foreign port or place, to wit: from St. Bartholomews, contrary to, and in violation of the 4th, 5th and 6th sections of the act. By reason of which, and by virtue of the act of Congress entitled "An act, &c., the said vessel her tackle, ap- parel and furniture have become forfeited to the United States.

*The charge contained in this inform- [*392 ation, and the only charge it contains, is an im- portation into the United States of certain pro- hibited articles while the prohibitory act was in force. How far does this crime affect the vessel?

This question must be answered by the law. The 6th section of the act enacts in substance, that if any article, the importation of which is prohibited, shall be put on board of any ship, &c., with intention to import the same into the United States or the territories thereof, con- trary to the true intent and meaning of this act, and with the knowledge of the owner or mas- ter of such ship, &c., such ship, &c., shall be forfeited.

This is the only section of the act which im- poses a forfeiture on the vessel. It will be per- ceived that the crime consists in the prohibited articles being laden on board a ship with intent to be imported into the United States, and with the knowledge of the owner or master of the vessel. A union of a lading with the intention to import, and with the knowledge of the owner or master, is necessary to constitute the crime. Without these essential ingredients, the par- ticular offense, which alone incurs a forfeiture, cannot be committed.

In the information under consideration neither of these offenses is charged. It is neither al- leged that the prohibited goods were put on board the ship with intention to be imported into the United States, nor with the knowledge of the owner or master.

The information against the cargo charges in substance, that certain prohibited articles and

certain other articles not stated to be prohibited, were brought into the United States, to wit: into the port of New Orleans, while the act entitled "An act to interdict commercial intercourse," &c., was in force, from some foreign port or place, by reason of which, and by virtue of the act, the whole cargo of the Hoppet has become forfeited.

The 5th section of the act, under which this prosecution was sustained, inflicts forfeiture on the prohibited articles imported contrary to law, and also on "all other articles on board the same **393***] ship or vessel, boat, *raft or carriage, belonging to the owner of such prohibited articles."

The innocent articles are liable to forfeiture only where they belong to the owner of the prohibited articles. It is this association, and this alone, which constitutes their crime. Their being in the same vessel exposes them to no forfeiture unless they belong to the same person. In the case under consideration, the information does not allege that the innocent and the prohibited articles did belong to the same person.

The first question made for the consideration of the court is this: Will this information support a sentence of condemnation pronounced against the vessel and the innocent part of the cargo?

That the information states a case by which no forfeiture of the ship or the innocent part of the cargo has been incurred, unless its defectiveness be cured by the allegation that the act was done contrary to and in violation of the provisions of the statute, has been already fully shown.

It is not controverted that in all proceedings in courts of common law, either against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession.

Does this rule apply to informations in a court of admiralty?

394*] *It is not contended that all those technical nicetics which are unimportant in themselves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offenses against municipal law.

It is, upon these and other reasons, the opinion of the court, that the information is not made good by the allegation that the offense was committed against the provisions of certain sections of the act of Congress.

Is it cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture?

The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.

The reasons for this rule are,

1st. That the party accused may know against what charge to direct his defense.

2. That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is therefore a maxim of the civil law that a decree must be *secundum alegata* as well as *secundum probata*. It would *seem to be a [***395** maxim essential to the due administration of justice in all courts.

It is the opinion of the court that this information will not justify a sentence condemning the schooner Hoppet and that part of her cargo which is not alleged to be of the growth, produce, or manufacture of either France or Great Britain, or the dependencies of either of those powers, whatever the fact may be.

There are certain wines imported in this vessel alleged to be of the growth, produce, or manufacture of France. These wines were exported from the United States to St. Bartholomews, where they were purchased by the consignee and shipped to New Orleans. It is contended, that having been imported into the United States previous to the passage of the non-intercourse law, their exportation and reimportation does not subject them to the penalties of that law. But the court is unanimously of opinion that they come completely within the provisions of the act of Congress.

It is the opinion of the court, that there is no error in that part of the sentence of the District Court of Orleans which condemns the wines in the information mentioned as forfeited to the United States, but that there is error in that part of the sentence which condemns the schooner Hoppet and the residue of her cargo.

This court doth therefore adjudge and order that so much of the sentence of the District Court as condemns the schooner Hoppet and the thirty-five hogsheads of molasses, five barrels of molasses, twelve dozen of cocoa-nuts and twelve pounds of starch, part of the cargo of the said schooner, be and the same is hereby reversed and annulled; and the said sentence as to the residue of the cargo, is in all things affirmed.

Cited—9 Wheat. 401; 5 Wall. 68; 16 Wall. 431; 20 Wall. 110; 5 Otto. 586; 1 Brock. 350; 4 Biss. 27; 2 Bond. 273; 1 Cliff. 535; Olcott. 511.

Followed—7 Cranch. 572.

396*] *THE MUTUAL ASSURANCE SOCIETY

v.

KORN AND WISEMILLER.

Absent—WASHINGTON, *J.*

The proprietors of buildings in Alexandria, insured by the society, were bound by the act of assembly of Virginia passed in 1805, and the subsequent regulations of the society, to pay an additional premium upon the increased rate of hazard according to the new regulations of 1805.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

The Mutual Assurance Society against fire, &c., was incorporated by an act of the legislature of Virginia in 1795.

According to the original plan of the institution the houses in the towns and country were blended together in one general mass, and were mutually pledged to each other, to make good the losses which might be respectively sustained by fire.

In January, 1805, the legislature of Virginia, at the request of the society, passed a law changing the original plan of the institution, by separating the town buildings from those in the country, and making the town buildings liable only for town losses, and the country buildings for country losses. This law directed that there should be a revaluation of the buildings which had been previously insured; and authorized the society, as in the first instance, to fix the rates of hazard, and make such by-laws, rules and regulations as they might think proper.

The society was authorized to recover its debts by motion, in a summary manner.

Under the act of 1805 the society made a new tariff of rates of hazard.

The houses of the defendants were revalued under the act. The revaluation was less than the original valuation; but the rate of hazard, or in other words, the premium for the insurance, was increased under the new regulation.

397*] *By the third section of a by-law of the society made in January, 1805, under the authority of their original act of incorporation and of the act of 1805, it is enacted, that if the "revaluation of any building shall prove it to "be of less value than that at which it was in- "sured, there shall be no demand against the "society of restitution of any part of the "premium which may have been paid, and the "proprietor of such building shall pay the ad- "ditional premium (if the materials of which "his building be erected, or its contiguity re- "quire it) which according to the new rates of "hazard ought to be paid."

In July, 1805, the defendants, Korn and Wisemiller, agreeably to a form prescribed by the society, made a declaration, under their hands and seals, as follows: "We do hereby "declare and affirm, that we hold the above "mentioned buildings, with the land on which "they stand, in fee-simple, and that they are "not, nor shall be insured elsewhere, and that "we will abide, observe and adhere to the "constitution, rules and regulations, which "are already established, or may hereafter be "established by a majority of the insured, pres- "ent in person or by representatives, or by the "majority of the property insured, represented "either by the persons themselves, or their "proxy duly authorized, or their deputy, as "established by law, at any general meeting to "be held by the said assurance society; or "which are or hereafter may be established by "the president and directors of the society."

To this declaration were annexed a plat, description and new valuation of the buildings insured.

The buildings had been originally insured by the defendants in the year 1796.

The sum now claimed of the defendants was for the additional premium arising out of the increased rates of hazard according to the new regulations, made in January, 1805.

Swann, for the plaintiffs in error.

This case differs from that of *Atkinson* (ante, vol. 6, p. 202), which was for an additional premium occasioned *by the increased [**398** valuation of the building; this is for the additional premium upon the new rates of hazard.

In the former case between these same parties (ante, vol. 6, p. 192), it was decided by this court that the proprietors of houses in Alexandria, still continued members of the society, notwithstanding their separation from the state of Virginia, and were bound by all the by laws and regulations of the society.

The only remaining question is whether the defendants are liable for the new rates of premium. It was just that the old members and the new should stand on the same ground and pay the same rates of premium where the risk was the same. This point has never been disputed in Virginia.

C. Lee, contra.

The former case has settled the point that the defendants are bound by their original contract in 1796. The legislature had no right to alter or vacate that contract. There was nothing unjust or hard in the case. The additional premium ought to be confined to cases of excess upon revaluation.

Swann, in reply.

The act of Assembly of 1805 was passed at the request of the society, of which the defendants were members, and bound by the acts of the majority.

March 3d. JOHNSON *J.*, delivered the opinion of the court as follows:

In the case decided between Atkinson and these plaintiffs, February term, 1810, the question arose on the construction of the 7th section of the act of 1805, and the additional premium in that case was imposed upon a revaluation without relation to a change in the rates of premium, but resulting from the increased valuation.

In this case the sum demanded arises from the changes made in the rates of premium, arising from a *variation of risk; to equal- [**399** ize which the 8th article of the present rules of the society requires an additional per centage to be paid by the present members of the company, in conformity to what is to be imposed upon subsequent applicants for insurance. And it is contended that the contract being complete between the parties, the insurers cannot add to the consideration to be paid for insurance. In general this doctrine is unquestionably correct, but peculiar circumstances except this from ordinary cases. This subject was considered in the quoted case decided be-

tween these same parties in February, 1810. It is there laid down, and on reflection we are confirmed in the opinion, that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society as far as is consistent with the nature of its institution.

This case is within the 4th section of the 8th article of those by-laws, and therefore the judgment below ought to have been for the plaintiffs.

Judgment reversed.

WEBSTER AND FORD *v.* HOBAN.

Present—All the judges except TODD, *J.*

Upon a sale of land at auction, if the terms be that the purchaser shall within 30 days give his notes with two good indorsers, and if he shall fail to comply within the 30 days, then the land to be resold on account of the first purchaser, the vendor cannot maintain an action against the vendee for a breach of the contract, until a resale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser.

ERROR to the Circuit Court for the District of Columbia, in a special action on the case, by the plaintiffs in error, against the defendant in error, for not paying the purchase money for a house sold by the plaintiffs to the defendant, at public auction.

The premises were publicly advertised, and set up at auction by a licensed auctioneer. On the day of sale, certain written articles, purporting to exhibit the terms, were read aloud by the auctioneer in the presence and hearing of the defendant and others assembled upon that occasion, and the paper was also handed round and read by those present. Of those articles, three only require notice.

400*] *Art. 1st, declares that the highest bidder shall be the purchaser.

Art. 3d, requires that the purchaser should secure the purchase money, with interest included, by his promissory notes, with two approved indorsers, payable in six and twelve months.

Art. 5th, declares that the purchaser shall be allowed "thirty days to comply with the 3d "article, at which time (in case of compli- "ance) he shall receive a good and complete "title to the property. On failing to comply "within the 30 days, the property then to be "resold on account of the first purchaser."

The premises were struck off to the defendant, as the highest bidder, at the price of 4,000 dollars; whereupon the auctioneer, in the presence of the defendant, signed a certificate, at the foot of the articles of sale, declaring him to be the purchaser at that price.

An attorney was employed to draw a deed of bargain and sale, and received instructions for that purpose, both from the plaintiffs and defendant; the draft of the deed, with blanks for the date and the name of the grantee, was presented to the defendant, and left with him for inspection; after examining it, he returned it to the attorney, requesting him to insert his, the defendant's, name in the proper blanks, which he accordingly did. This draught of the deed recited the title of the plaintiffs, and that the defendant, being the highest bidder, had purchased the premises at the sum of 4,000 dollars, which he had secured to be paid to the plaintiff's, according to the terms of sale.

The breach of the agreement alleged in the declaration, was, that the defendant had failed to give his promissory notes within the 30 days, or at any time afterwards.

The court below decided that the plaintiffs could maintain no action upon the contract, without first resorting to a resale and ascertaining the deficit.

Jones, for the plaintiffs in error, contended,

1. That the remedy by a resale was cumulative, *and did not take away the right [***401** of action for a breach of the original contract.

2. That the draught of the deed (as to its collateral effect, as written evidence of the agreement) having been authenticated by an act equivalent to signing, imported a substantative and positive agreement to go on with the contract, and to complete the purchase, and was not subject to be explained or controlled by the original terms.

The authority to contract, he said, might be by parol, although the contract must be in writing. (Roberts on frauds, 112; Sugden on vendors, 56.) Hoban gave the attorney verbal authority to draw the deed, which amounts to an agreement in writing signed.

There was no argument for the defendant in error.

March 3d. LIVINGSTON, *J.*, delivered the opinion of the court as follows:

If there ever existed a valid agreement between these parties in relation to the house in question, on which the court gives no opinion, the terms of it must be sought for in the articles exhibited by the auctioneer, at the time of sale. Of these, two only bear on this case. These were, "that the purchaser should secure the "purchase money with interest by his promis- "sory notes, with two approved indorsers, pay- "able in 6 and 12 months;" and "that the "purchaser should be allowed thirty days to "comply with these terms, at which time, in "case of compliance, he was to receive a good "and complete title to the property, and on "failing to comply within the thirty days, the "property was then to be resold on account of "the first purchaser."

The plaintiffs offered no evidence of any resale, or of any deficiency arising thereon, but contended, that the remedy by a resale was merely cumulative, and did not take away the right of action against the defendant, for his violation of the contract. Such is not the opinion of this court. The vendee, by the terms of sale, had an option of taking the estate after it was bid off to him, and in case of refusal, of having it sold again *on his account. [***402** It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing, or it might have sold for less, and then by paying the difference which would have formed his whole loss, he would have been exposed, as he must be, if this action proceeds, to have damages assessed against him, by some uncertain and arbitrary or unsatisfactory rule, which

might be adopted by a jury. Of these advantages which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him. The court is further of opinion, that nothing whichwas done after the sale at all varied the right of the parties.

The judgment below is affirmed with costs.

THE MARYLAND INSURANCE CO. *v.* WOOD.

The letter of Mr. Merry to the Secretary of State, of the 12th of April, 1804, extended to the Island of Curraçoa, the order of the lords commissioners of the admiralty of the 5th of January, 1804, respecting the blockade of Martinique and Guadaloupe.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant on a policy upon the schooner William and Mary "at and from Baltimore to Laguira, with liber- "ty of one other neighboring port, and at and "from them or either of them back to Balti- "more." "Warranted by the assured to be an "American bottom, proof of which to be re- "quired in the United States only."

The former judgment of the Circuit Court in this case having been reversed (see ante, vol. 6, p. 29), and the cause remanded for a new trial, the verdict and judgment were again in favor of the original plaintiff. The defendants took only one bill of exceptions, which stated the execution of the policy, the sailing of the vessel with proper documents as an American bottom from Baltimore on the 8th of March, 1805, upon the voyage insured; her arrival off Laguira on the 24th of the same month, where she remained three days laying off and on, vainly endeavoring to obtain permission to enter the port, and on the 31st sailed towards the **403***] port of *Amsterdam, in the Island of Curraçoa, by the direct and accustomed route, with a view and intention of ascertaining by inquiry of British ships of war, or other vessels, whether the port of Amsterdam was then in a state of blockade, and to enter it if it should not be blockaded, but if it should be blockaded, not to attempt to enter it, but to proceed to St. Thomas's or Porto Rico. That Amsterdam was a neighboring port to Laguira, being distant about 147 miles. That when she approached Amsterdam, being distant about 30 miles, the master discovered a British vessel at the distance of 21 miles, whereupon he altered the course of the schooner, and stood directly toward the British vessel for the purpose of inquiring whether Amsterdam was still in a state of blockade; that while so standing for the British vessel, which was a frigate then actually supporting the blockade of the port of Amsterdam, the schooner was captured by the frigate and sent into Jamaica, and there condemned for breach of the blockade of the port of Amsterdam, whereby she was wholly lost to the plaintiff. That on the 16th of May, 1805, the plaintiff having received intelligence of the capture, abandoned the vessel in due time to the underwriters, who refused to accept the abandonment.

That on the 27th of October, 1803, the government of the United States made to the British government, through its charge d'affairs in the United States, a representation on the subject of a blockade, then recently notified, of the Islands of Martinique and Guadaloupe; which representation is set forth at large in the bill of exceptions, being a letter from Mr. Madison, then Secretary of State, to Mr. Thornton, the British charge d'affairs, dated the 27th of October, 1803.

That on the 5th of January, 1804, the British government, in consequence of that representation, issued an order to its commanding naval officer in the West Indies and to its courts of vice-admiralty there, relative to the blockade of Martinique and Guadaloupe; which order is as follows:

"Admiralty office, 5th January, 1804.

Sir:—Having communicated to the lords of the admiralty Lord Hawkesbury's letter of the 23d ult., inclosing the *copy of a dispatch, [***404** which his lordship had received from Mr. Thornton, his majesty's charge d'affairs in America, on the subject of the blockade of the Islands of Martinique and Guadaloupe, together with the report of the Advocate-General thereupon, I have their lordships' commands to acquaint you for his lordships' information, that they have sent orders to Commodore Hood not to consider any blockade of those Islands as existing unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall have been previously warned not to enter them; and that they have also sent the necessary directions on the subject to the judges of the vice-admiralty courts in the West Indies and America. I am, &c.,

EVAN NEPEAN.

George Hammond, Esq."

That on the 12th of April, 1804, the British government, by its minister plenipotentiary in the United States, communicated the aforesaid order to the government of the United States, who caused it to be immediately published in the public newspapers.

That on the same 12th of April, 1804, the said British minister plenipotentiary officially made known to the government of the United States, that the siege of the island of Curraçoa had been converted into a blockade, which communication was as follows:

"Mr. Merry to Mr. Madison.

Washington, April 12th, 1804.

Sir:—I have the honor to acquaint you that I have just received a letter from Rear-admiral Sir John Duckworth, commander-in-chief of his majesty's squadron at Jamaica, dated the second of last month, in which he desires me to communicate to the government of the United States, that he has found it expedient for his majesty's service to convert the siege which he lately attempted of Curraçoa into a blockade of that island.

*I cannot doubt, sir, that this blockade [***405** will be conducted conformably to the instructions which (as I have the honor to acquaint you in another letter of this date), have been recently sent on this subject to the Commander-in-Chief of His Majesty's forces, and to the judges of the vice-admiralty courts in the West Indies, should the smallness of the Island of Curraçoa still render necessary any distinction

of the investment being confined to particular ports. I have the honor to be, &c.,

ANT. MERRY."

That Travers, the master of the schooner William and Mary, heard a report at Baltimore, before he sailed, that Amsterdam was in a state of blockade; and that he was informed, before he sailed from Baltimore, by the master of an American vessel, that about four months before the time of giving that information, he arrived with his vessel near the port of Amsterdam, and there met with a squadron of British ships of war then blockading that port, and was warned off by the commander of the squadron, with his register indorsed in the usual manner.

That Travers in the course of his voyage fell in with a strong French squadron in lat. 15, long. 63, which was sailing westward. That the port of Amsterdam is in lat. 11 deg. 55 min., long. 68.

That while laying off Laguira to endeavor to obtain permission to enter the port, or to anchor his vessel, he was informed by a merchant at Laguira, to whom he had been introduced by a letter, and through whom he made application for permission as aforesaid, that the port of Amsterdam was then free from blockade; and was advised by the said merchant to proceed thither with his vessel, that the port of Laguira and all the ports on the Spanish main were then shut against foreigners, whereby he was prevented from going on shore and from making inquiries otherwise than by writing from his vessel to some person on shore.

That the island of Buenos Ayres was then a dependency of Curraçoa, distant from it about **406***] twenty miles east, and *is a small island having no port, except a roadstead about the middle of its length on the east side, where there was a small battery and military post. That the cruising ground of vessels blockading Curraçoa, was between that island and Buenos Ayres, which latter was included in the blockade, as were also all the other ports of the Island of Curraçoa. That Travers did not attempt to enter the port of Amsterdam, nor sail towards it with an intention of entering it if blockaded, but merely for the purpose of ascertaining, by any lawful and proper means in his power, whether it was still in a state of blockade, of entering it if it was not, and of proceeding elsewhere if it was.

That when he sailed from Laguira as aforesaid he had, from the facts and circumstances above mentioned, reasonable ground of belief that the blockade had ceased, and had no means of obtaining any further information on the subject at any neighboring port or place.

Whereupon the plaintiff prayed the court to instruct the jury that if they believed the matters so given in evidence by him, then his right of recovery in this action is not affected by the conduct of Travers in proceeding as aforesaid from Laguira towards Amsterdam for the purposes aforesaid; which instruction the court gave, and also the further direction, that if they should believe that Travers intended, while at Laguira, to violate the blockade of Amsterdam, and attempted it by sailing towards that port, and within the limits of the cruising ground; in such case his conduct was unlawful; and the defendants were thereby discharged from any responsibility upon the policy.

To this instruction the defendants excepted and brought their writ of error.

Martin, for plaintiffs in error.

When this case was here before, it was erroneously supposed that the order of the 5th of January, 1804, applied to the Island of Curraçoa, as well as to those of Guadaloupe and Martinique. It was not until the 12th of April following, that the blockade of Curraçoa was notified to our government by Mr. Merry, who gives *his opinion that the former order [***407** would be extended to this blockade. But it is merely his opinion; he had no authority to bind his government upon that subject; and his opinion could not justify the master of this vessel in going to the blockading squadron for information.

If he acted upon the information of the minister he acted at his peril. (5 Rob., 74, 234; 1 Rob., 144; *The Neptunus*, 2 Rob., 92.) He ought to have called at Buenos Ayres for information. (Park, 408, 9; Marshall, 321.)

LIVINGSTON, *J.*, thought this case could not be distinguished from the one which was here before. It appears to be only an application to this court to reverse its own decision.

STORY, *J.*, thought the letter of Mr. Merry was conclusive upon the subject.

JOHNSON, *J.* It does not appear to be so clear a case as the other.

MARSHALL, *Ch. J.*, had formed no opinion upon this case. It seemed to him to be different from the other.

Harper, for the defendant in error, requested that the opinion of the court might be given in writing.

MARSHALL, *Ch. J.* I understand the opinion of the court to be, that the letter of Mr. Merry puts the case on the same ground as if the blockade had been of Martinique or Guadaloupe.

Harper. That is, that it extended to this case the benefit of the order of the 5th of January, 1804.

MARSHALL, *Ch. J.* I so understand it.

LIVINGSTON, *J.*, afterwards delivered the opinion of the court in writing, as follows:

It is the opinion of the court, that the communication of the British minister to the American government on the 12th of April, 1804, relative to the blockade of Curraçoa, furnished a sufficient excuse for the assured's proceeding *towards that island for the purpose of [***408** inquiring as to its continuance, and that his doing so was no violation of his neutrality.

The court does not mean to be understood as giving any opinion on the effect of such conduct if no such communication had been made.

The judgment of the Circuit Court is affirmed with costs.

FERGUSON *v.* HARWOOD.

Absent—Todd, J.

If a clerk of a court certify at the foot of a paper purporting to be a record, "that the aforegoing is truly taken from the record of proceedings" of his court, and if the judge, chief justice, or presiding magistrate, certify that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is a full copy of all the proceedings in the case, and is admissible in evidence.

But if the writing produced, do not purport to be a record, but a mere transcript of minutes extracted from the docket of the court, it is not admissible in evidence.

A variance is immaterial which does not change the nature of the contract.

If a bond of conveyance (then in suit) be assigned, and the assignor agree to refund to the assignee the value thereof if the property should not be recovered on the bond, it is sufficient for the assignee, in a suit against the assignor upon his promise to refund, to aver that the property was not recovered in the suit which was pending when the agreement was made to refund.

ERROR to the Circuit Court for the District of Columbia, sitting at Washington, in an action of *assumpsit*, brought by Harwood against Ferguson, to recover the value of three hogsheads of tobacco, upon the following agreement (after describing the hogsheads by their numbers, marks and weights), viz.:

"Upper Marlborough, June 16th, 1808.

Received of Walter W. Harwood, as one of the administrators of William Eversfield Berry, deceased, in part of my claim against said estate, the three hogsheads of crop tobacco as above stated, to be allowed p. ct. the highest six months' credit price at this place during that time after the rescinding of the embargo. I have put into the hands of the aforesaid Walter W. Harwood a bond of conveyance given by Elisha Berry to his son, William E. Berry, dated March 14th, 1798, for the purpose of recovering the property therein mentioned now depending in a suit in Prince George's County Court. If the property is not recovered in the aforesaid bond of conveyance, I hereby bind myself, my heirs, executors and administrators to return the above three hogsheads of tobacco, with legal interest, or the value thereof in money, to the aforesaid Walter W. Harwood, or to his heirs or assigns.

(Signed) ENOS D. FERGUSON."

409*] *Upon this agreement the plaintiff declared that whereas the said Walter, as one of the administrators, &c., on———at———delivered to the said Enos, in part of his claim, &c., three hogsheads of crop tobacco (describing them), he, the said Enos to be allowed per cent. therefor the highest six months' credit price, &c. And whereas also the said Enos, at——— on——— put into the hands of the aforesaid Walter, a bond of conveyance, &c., for the purpose of enabling the said Walter to recover, and of recovering the property in the said bond mentioned, a suit for the recovery whereof was then depending in the County Court of Prince George's county, in the state of Maryland, the said Enos then and there, in consideration of the premises and the delivery of the three hogsheads of tobacco as aforesaid, promised and undertook and bound himself, his heirs, executors and administrators, to return the three hogsheads of tobacco aforesaid, with legal interest, or the value thereof in money, to the aforesaid Walter or to his heirs or assigns, if the property in the aforesaid bond of conveyance mentioned was not recovered in the suit then as aforesaid depending for the recovery thereof; and the said Walter avers that the property in the said bond mentioned was not recovered from the said Elisha Berry in the suit so as aforesaid depending for the recovery thereof, but that judgment was given for and in favor of the said Elisha in said suit, whereof, and of all which premises, the said Enos afterwards had notice, whereby he became liable to return the said tobacco with legal interest or to pay the value thereof in current money of the United States, which value the said Walter avers to be 180 dollars, whereof the said Enos had notice, &c.

There was also a count in the declaration for money had and received.

Upon the trial of the general issue the defendant, Ferguson, took three bills of exceptions.

The first bill of exceptions was to the admission in evidence of an exemplification of the record of a suit in Prince George's County Court, which was certified as follows;

"I hereby certify that the aforegoing is truly taken from the record of proceedings of Prince George's *County Court, and in testi- [***410** mony thereof I do hereto subscribe my name and affix the seal of the said County Court, this third day of January, in the year of our Lord one thousand eight hundred and eleven.

JOHN READ MAGRUDER, Jr., Clk."

The seal of the County Court was annexed, with the regular certificate of the chief judge of the court that the attestation of the clerk was in due form of law.

The objection to this exemplification was that it did not appear by the certificate of the clerk to be a full copy of the record of all the proceedings in the case. The practice of the clerk of the Circuit Court for the county of Washington, in the District of Columbia, was to certify that the "foregoing is truly taken and copied from the proceedings," &c.

The second bill of exceptions stated that the plaintiff having read to the jury the evidence mentioned in the first bill of exceptions, and which had been permitted by the court to be read, the defendant offered to read a copy of the docket entries of Prince George's County Court, which the clerk had also certified to be truly taken from the proceedings of that court. To this certificate was annexed the seal of the court and a certificate by the chief judge of the court that the attestation of the clerk was in due form of law.

The third bill of exceptions stated that after the plaintiff had read the agreement to the jury, the defendant objected to its admissibility in evidence upon the first count in the declaration, because it varied from the agreement set forth in that count. But the court was divided in opinion and the agreement was read.

The verdict and judgment were for the plaintiff, whereupon the defendant brought his writ of error.

F. S. Key, for the plaintiff in error, contended,

1. That the record of Prince George's County Court ought not to have been admitted as evidence in this cause, because the clerk of that court had not certified it to be a full record of all the proceedings in the case, *nor [***411** even that it was a copy of anything, but had merely stated that "the foregoing was truly taken from the record of proceedings in that court."

2. That the court ought to have admitted the copy of the docket entries of Prince George's County Court to be read in evidence, because they were certified by the clerk in the same

manner to be "truly taken" from the same proceedings.

3. That the court ought not to have admitted the agreement in evidence to support the first count in the declaration, because it varied from the agreement set forth in that count, in the following particulars: 1. The agreement produced in evidence states that the defendant in error, Harwood, should be allowed the highest credit price, &c., for the tobacco, whereas the agreement set forth in the count is, that the plaintiff in error, Ferguson, should be allowed the highest credit price, &c., for the tobacco: and 2. The agreement produced in evidence states that the plaintiff in error was to return the tobacco if the property should not be recovered "in the aforesaid bond of conveyance." But the count charges that the plaintiff in error, Ferguson, agreed to return the tobacco if the property, in the bond of conveyance mentioned, should not be recovered in the suit then pending for the recovery thereof.

In support of this bill of exceptions he cited the following cases: 1 T. R., 240; 2 Bos. and Pull., 116; 4 T. R., 560; 2 East, 2 and 450.

J. Law, for the defendant in error.

On the first exception, cited 2 Harris's Entries, 221, 227 and 263, to show that the clerk's certificate annexed to the transcript of the record of Prince George's County Court was in due form, according to the practice of the courts in Maryland.

On the second exception, he cited Peak's Law of Evidence, 34, 55 and 66, to show that the docket entries of one court were not evidence in another court.

On the third exception, to show how far it is necessary to set forth the agreement in the **412*]** declaration, he *cited 6 East, 564, *Clarke* v. *Marsden*; 4 T. R., 558, *Frith* v. *Gray*, in the note to *Drewry* v. *Twiss*; 3 Wils., 40, *Richard* v. *Symonds*; Doug., 640, *Bristow* v. *Wright*.

And to show that words of surplusage are to be rejected, he cited 2 H. Bl., 113; 1 T. R., 235, *King* v. *Pippett*; 4 Williams's Dig., 707.

To show that omissions may be supplied, he cited *King* v. *Beach* (Cowp., 229); *King* v. *May* (Doug., 183).

And to show that a variance in an immaterial averment is not fatal, he cited 5 T. R., 496, *Peppin* v. *Solomans;* 4 T. R., 558, *Drewry* v. *Twiss*.

March 5th. STORY, *J.*, delivered the opinion of the court as follows:

Several exceptions have been taken in this cause. The first proceeds on the ground that the record was not authenticated by the clerk in due form of law. The statute of the United States of the 26th of May, 1790, declares that the records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form of law. It is conceded that such a certificate accompanied the record objected to. It is therefore a case within the words of the law, and the court below were precluded from receiving any other evidence to show that the attestation was not in due form of law. The record so authenticated was properly admitted in evidence.

Even if the points had been open, the court are not satisfied that any material variance existed between the attestations of the different clerks.

The court are also of opinion that the second exception cannot be sustained. The writing produced did not purport to be a record, but a mere transcript of minutes extracted from the docket of the court. There is no foundation laid to show its admissibility in the cause.

*The third exception has presented [***413** the chief difficulty which we have felt in deciding the cause. It is addressed to the variances between the declaration and the contract produced in evidence. The inducement of the declaration alleges "that the said Walter, as one of the administrators of William E. Berry, deceased, on, &c., at, &c., delivered unto the said Enos, in part of his claim against the estate of the said William, three hogsheads of crop tobacco, &c., he, the said Enos, to be allowed per cent. therefor the highest six months' credit price at the place aforesaid during that time, after rescinding the embargo." The contract produced in evidence is without the words "he, the said Enos." There is therefore a literal variance, and its effect depends upon the consideration whether it materially changes the contract.

In general, courts of law lean against an extension of the principles applied to cases of variance. Mistakes of this nature are usually mere slips of attorneys, and do not touch the merits of the case. Lord Mansfield has well observed, that it is extremely hard upon the party to be turned round and put to expense from such mistakes of his counsel, and it is hard also upon the profession.

It will be recollected that this does not purport on the face of the declaration to be a description of a written instrument, nor the recital of a deed or record *in hæc verba*. In respect to the latter, trifling variances have been deemed fatal; but as to the former a more liberal rule has been adopted. In setting forth the material parts of a deed or other written instruments, it is not necessary to do it in letters and words. It will be sufficient to state the substance and legal effect. Whatever, however, is alleged should be truly alleged. A contract substantially different in description or effect would not support the averment of the declaration.

In the case at bar, it is very clear that the word "Enos" was by a mere slip inserted instead of "Walter." It is repugnant to the sense and meaning of the contract that the creditor who received the tobacco at a stipulated price in part payment of his debt, should allow to himself that price. From the nature of the transaction the debtor must be entitled to the allowance. *If the same words had been introduced [***414** into the written contract itself, they must have been rejected as nonsensical or repugnant, or have had imposed upon them a sense exactly the same as if the words had been "the said Walter." And a declaration which should altogether have omitted the words, or have given that legal sense, would have well supported an action. Can a different result take place, where the repugnancy is not in the contract, but in the declaration? A majority of the court are clearly of opinion that it cannot. The words

of a contract stated in a declaration, must have the same legal construction as they would have in the contract itself.

The context manifestly, in this case, shows the repugnancy. It is impossible to read the declaration and not to perceive that the price is to be allowed to the debtor, and not to the creditor. Many cases have been cited where the variance has been held fatal, but no one comes up to the present. The case of *Bristow* v. *Wright* (Doug., 665), is the strongest. There the demise was alleged to be at a yearly rent payable quarterly. The demise proved was without any stipulation as to the times of payment. The court held that the demise laid and that proved were not the same. But if the demise had been truly laid, and the declaration had proceeded to allege that the rent was to be paid by the lessor to the lessee, we think that the action might well have been maintained notwithstanding the repugnancy. That in effect would be the same as the present case.

In *King* v. *Pippet* (1 T. R., 235), where the declaration set forth a precept and improperly inserted the word "if," which made it conditional, the court rejected the word, and held the variance immaterial. The court said it was impossible to read the declaration and not to know what it should be. There are other cases to the like effect.

We are therefore satisfied that the variance is immaterial, because it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration.

A second variance is supposed in the allegation that the promise was to return the tobacco **415***] or its value, if *the property in the bond of conveyance mentioned in the declaration was not recovered in the suit then depending for the recovery thereof; whereas the contract produced in evidence contained no limitation to a recovery in that particular suit. We are satisfied however that the plaintiff has declared according to the true intent of the parties as apparent on the contract. It could never have been their intention to postpone the right to a return of the tobacco or its value, beyond the time of a recovery or failure in the suit then depending. Any other construction would have left the rights of the parties in suspense for an indefinite period, wholly inconsistent with the avowed objects of the contract.

On the whole, it is the opinion of the court that the judgment be affirmed with costs.

Cited—3 Cranch C. C. 424; 4 Id. 11; 2 Wood. & M. 4; 3 Id. 60; 2 McLean 73; 15 Blatchf. 426.

BIAYS
v.
THE CHESAPEAKE INSURANCE CO.

Absent—TODD, *J.*

There cannot be a total loss of part of a cargo consisting of memorandum articles of only one species (such as hides). Nor are the underwriters liable for salvage upon such articles, under the clause which authorizes the insured to labor and travel for the preservation of the cargo, unless perhaps in a case where the salvage may have prevented an actual total loss of the cargo.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant upon a policy of insurance on hides, which by the memorandum in the policy are declared to be free from average, unless general. The policy contains the usual stipulation "that in case of "loss or damage, the assured shall labor, &c., "for the preservation of the property, to the "expenses of which the assurers will contribute." The voyage was to Amsterdam. The vessel arrived at a place called "Niew Diep;" where, according to the usage of the trade, the hides were put into several lighters to be sent to Amsterdam. One of these lighters sunk, but some of the hides contained in it were afterwards fished up and saved by the people of the place, for which a salvage of 6,000 dollars was allowed and paid. The rest were totally lost. This action was brought to recover for those totally lost, and for the salvage of those which were saved.

*On a case stated, the judgment of [***416** the court below was for the defendants; on which the plaintiff brought his writ of error.

Harper for plaintiff in error, contended,

1. That where an insurance is made in gross, as in this case, upon a cargo consisting of a number of separate distinct things, there may be a total loss upon some of them, though the rest are saved, and

2d. That as consequently the loss here upon the hides fished up would have been total but for the labor and care of the assured, they are entitled to be reimbursed the expense, by the underwriters, under the stipulation in the policy on that subject: notwithstanding the declaration in the memorandum, exempting hides from particular average.

1. The obvious construction and meaning of the memorandum is, that where the cargo is divisible, there may be a total loss of part. The average loss mentioned is loss by deterioration. If one out of many bales of cloths should be lost, it would be a total loss of that bale. But if one piece in a bale should be damaged and lost, it would be an average loss, especially as to memorandum articles. If a cargo should consist of 500 casks of wine, and 499 of them should be lost, one only being saved, this would be a total loss of the 499 casks.

In the absence of all authority, we must resort to general principles. Such cases must have existed often; but no case is found in the books like the present. The inference is, that it must have been considered as a total loss.

2. The 2d point (as to the salvage), is perhaps a point of more difficulty; but it depends in part upon the first. Where the object of the expense is to prevent a total loss, the underwriters are liable. Here the salvage loss prevents a total loss.

If a literal construction be given to the two stipulations in the policy, one would destroy the other. The *insured are to labor to [***417** prevent a total loss; not for their own benefit, for they are insured, but for the benefit of the underwriters. The loss was of part of a lighter load of hides; some were fished up and saved, and salvage paid. No expense could arise respecting these hides, unless it would come under the name of average loss. The stipulation therefore to labor, &c., would be void as to all these articles. The construction ought to be,

that we will pay all expenses incurred, to prevent a greater than an average loss.

March 6th. LIVINGSTON, *J.*, delivered the opinion of the court as follows:

This is an insurance on hides, "warranted by "the assured free from average, unless general." The declaration is for a total loss by perils of the seas, but it came out in evidence that 3,280 hides (the whole number insured being 14,565), were put on board of a lighter to be transported from the vessel to their place of destination; that the lighter in her passage to the shore was sunk, by which accident 789 of the hides, of the value of 4,000 dollars, were totally lost, and the residue, to the number of 2,491 more, were fished up and saved, at the cost of six thousand dollars, which were paid by the plaintiff. The hides thus saved were delivered to the plaintiff's agent, and sold on his account. The whole sum insured on the cargo of hides by the defendants was twenty-five thousand dollars.

On this state of facts it has been contended, that this insurance, although on perishable commodities, being in gross on a cargo consisting of a distinct number of articles, there may be a total loss as to some of them, although others be saved, and that for the part of the cargo thus totally lost, the underwriters are liable, notwithstanding the agreement respecting what are generally called memorandum articles. In support of this position it is said that the only intention of the parties in coming to this agreement, was to obviate disputes concerning losses arising from the perishable nature of the goods insured; but that as this loss happened in another way, and is total as to the portion of the property in question, it ought not to be considered as excluded by the memorandum.

418*] *Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting the insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambignity may once have existed from the term average being used in different senses, that is as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average. It only remains then to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite eight hundred were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue (which in this case amounts to much the greatest part), arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole. This loss then being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it.

Having disposed of this point, it would seem as if much difficulty could not occur in deciding the other question, which has been made in this cause, and that is: whether the assured is not entitled to recover the *expenses [***419** which he was put to in saving part of the hides which had sunk.

This liability is supposed to result from that clause in the policy which authorizes the assured, "in case of any loss or damage, to sue "labor and travel for, in and about the de-"fense, safeguard and recovery of the goods, "or any part thereof, to the charges whereof "the assurers will contribute according to the "amount of the sum insured." If this clause be construed with reference to what is most evidently its subject matter, that is a loss within the policy, and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the assurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place, which cannot be thrown on them, it would require a much stronger and more explicit stipulation than we find in the policy to render them liable to contribute to such expenses. If a cargo be insured for a long voyage against sea risks only, and a capture intervene the very day after the vessel leaves port, it is very clear that the underwriter is not only not liable for such a loss, but that he derives an advantage from it, as his risk may be terminated thereby, and the whole premium be earned, and yet if the construction now endeavored to be put on this clause should prevail, all the expenses of claiming a property, in which he had no interest, and which if condemned is a matter of indifference to him, and all the costs of pursuing it through an almost endless litigation, would be thrown, whether the pursuit were successful or otherwise, or an insurer who had taken care to restrict his liability to losses by perils of the sea only. The court cannot subscribe to such an interpretation, when a more natural, rational, and obvious one, and that without departing from the letter of the instrument, presents itself, which is, that this clause can never apply but in such cases as would, if they happen, be losses (either partial or total) within the meaning *of [***420**

the policy. We are therefore of opinion, that the underwriters not being answerable for the principal loss in this case, they cannot be so for the subsequent expenses which were incurred in recovering the property.

The judgment of the court below is affirmed with costs.

Cited—1 Wheat. 227; 19 Wall. 643; 3 Mason, 443; 6 Blatchf. 324.

STARK
v.
THE CHESAPEAKE INSURANCE COMPANY.

Absent—WASHINGTON, *J.*, TODD, *J.*, and DUVALL, *J.*

It need not appear by the record of naturalization that all the requisites prescribed by law for the admission of aliens to the rights of citizenship have been complied with.

Semb. that the judgment of the court admitting the alien to become a citizen is conclusive that all the prerequisites have been complied with, or that parol proof may be received in aid of the record.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant upon a policy of assurance, in which the goods insured were warranted to be American property, "proof of which to be required in the "United States only." A loss by capture having taken place, the plaintiff offered an abandonment, which was refused, wherefore he brought this action:

To prove his citizenship and support the warranty, he produced and read at the trial an exemplification duly authenticated, of the record of his naturalization, in the words following, viz.:

"At a Court of Common Pleas held at "York, for the county of York, on the third "Monday of May, in the year of our Lord one "thousand eight hundred and four, before "John Joseph Henry, Esquire, President, and "his associate judges, &c., assigned, &c.

"The petition of John Philip Stark, late of "Wetgenstein Berleburg, in the empire of Germany, was read to the court, setting forth "that your petitioner has resided in the state "of Pennsylvania five years, that he is now "desirous of becoming a citizen of the United "States conformably to the act of Congress in "such case lately provided; your petitioner **421*]** "therefore prays of the *honorable "Court that he may be admitted to citizenship "upon his complying with the requisites of the "act aforesaid, and your petitioner will pray, "&c. JOHN PHILIP STARK.

"Jacob Hostler appearing in court, and being duly sworn, says that the petitioner above "named has resided within the state of Pennsylvania five years and upwards; and during "that time he has behaved as a man of good "moral character, attached to the principles of "the constitution of the United States, and well "disposed to the good order and happiness of "the same. JACOB HOSTLER.

"Sworn and subscribed in open court the "21st of May, 1804.

"CHARLES W. HARTLEY.

"John Philip Stark, the above petitioner, appearing in open court and being duly sworn, "doth declare that he will support the constitution of the United States, and that he doth "absolutely and entirely renounce and abjure "all allegiance and fidelity to every foreign "prince, potentate, state or sovereignty whatever, and particularly to Christein the prince "of Wetgenstein Berleburg, in the empire of "Germany. JOHN PHILIP STARK.

"Sworn and subscribed in open court the "21st of May, 1804.

"CHARLES W. HARTLEY.

"Whereupon the court admitted the said "John Philip Stark to become a citizen of the "said United States, agreeably to the prayer of "his said petition, and ordered all the proceedings aforesaid to be recorded by the clerk of "the said court."

The plaintiff also proved by parol evidence that he being a free white person, did reside within the limits and under the jurisdiction of the United States, to wit: in the state of Pennsylvania, at some time between the 18th day of June, 1798, and the 14th day of April, 1802, *viz., on the 1st day of October, 1798, [***422** and there continued to reside from that time until the 21st of May, 1804.

Whereupon, the court, at the prayer of the defendants, by their counsel, directed the jury that the plaintiff had failed in proving the property insured under the policy to be American property, according to the warranty, and therefore was not entitled to recover.

To which instruction the plaintiff took a bill of exceptions.

The act of Congress of the 14th of April, 1802 (vol. 6, p. 74), "to establish an uniform rule of "naturalization and to repeal the acts heretofore passed on that subject," requires that the applicant should have made a previous declaration before some court of record of his intention to become a citizen, &c., three years before his admission; and that the court admitting such alien shall be satisfied that he has resided in the United States five years at least, and within the state or territory where such court is at the time held, one year at least.

The act of 26th March, 1804 (vol. 7, p. 136), dispenses with the previous declaration of intention, &c., as to such aliens, "being free "white persons, as were residing within the "limits, and under the jurisdiction of the United States, at any time between the 18th day "of June, 1798, and the 14th day of April, "1802, and who have continued to reside within the same."

The objection made by the defendant's counsel to the record of naturalization of the plaintiff was, that it did not appear by the record that the plaintiff had made a previous declaration of his intention to become a citizen, agreeably to the first provision of the act of 14th April, 1802; nor that he was residing within the limits and under the jurisdiction of the United States at any time between the 18th of June, 1798, and the 14th of April, 1802, and continued to reside therein so as to be entitled to the benefit of the act of the 26th of March, 1804.

It was contended also that parol evidence of these facts ought not now to be admitted in aid of the record.

On the part of the plaintiff it was contended: [*423] *1. That the decision of the Court of Common Pleas for the county of York was conclusive. That court had power and authority to admit aliens to the right of citizenship; and having admitted the plaintiff, the grounds of their decision cannot now be inquired into, nor the correctness of their judgment questioned.

2. That if the record of admission be not conclusive, yet it was competent for the plaintiff to prove now by parol evidence the facts which did, at the time he was admitted, entitle him to the benefit of the act of the 26th of March, 1804.

Harper, for the plaintiff in error, and Martin, for the defendant in error,

Submitted the question arising in this case without argument to the court, who, without giving a more particular opinion, pronounced the following judgment:

This cause came on to be heard on the transcript of the record, and was argued by counsel, on consideration whereof this court is of opinion that the Circuit Court erred in directing the jury that the plaintiff had failed in proving the property insured under the policy to be American property. It is therefore considered by the court, that the judgment of the Circuit Court be reversed and annulled, and the cause remanded to that court to be further proceeded in according to law.

Judgment reversed.

Cited—1 Otto, 245; 15 Blatchf. 426.
2 Abb. U. S. 443.

WILLIAM WILLIAMS AND OTHERS, APPELLANTS,

v.

GEORGE ARMROYD AND OTHERS, APPELLEES.

Absent—TODD. *J.*

A sentence of a foreign tribunal condemning neutral property under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights; and which has been so declared by the legislative and executive departments of the government of the United States, changes the property of the thing condemned. A sale by the authority of the captors before sentence of condemnation is affirmed by such sentence, and is good *ab initio*.

A French tribunal at Guadaloupe had jurisdiction of property seized on the high seas for breach of the Milan decree, and carried into the Dutch part of the island of St. Martins, and there sold by order of the Dutch governor of St. Martins, before condemnation, without any authority from the French tribunal at Guadaloupe. The American owner cannot reclaim, in the courts of this country, his property which has been seized and condemned in a French court under the Milan decree.

THIS was an appeal from the sentence of the Circuit Court for the District of Pennsylvania, which dismissed the libel with costs.

*The libel stated, that the schooner [*424 Fortitude, owned by Williams and others, citizens of the United States, having taken in a cargo of molasses at Martinico, sailed on the 20th of August, 1809, for New London. That on the next day she was piratically seized on the high seas by an armed schooner, showing no colors, but asserted to be from Guadaloupe, and carried into St. Martin's, where the captain's papers were taken from him, and the vessel and cargo detained, as it was asserted, to wait the event of a trial. That on the 9th of September the prize-master left St. Martin's for Guadaloupe, with a copy of the schooner's papers, under pretense of causing proceedings to be instituted in the French Court of Admiralty in that island. That on the 23d of September the master of the Fortitude went to St. Bartholomews, and on his return was informed, that during his absence the governor had ordered the vessel and cargo to be sold at public sale; which was done and bought for the governor and one of his council, as the libelants believed. That immediately after the sale the governor took possession of the vessel, and on the 2d of October the cargo was landed, and 97 hogsheads of the molasses were shipped on board another vessel to Philadelphia, where they arrived, consigned to Armroyd and others, of whom the libelants demanded it, but they refused to deliver it, or to account for the value of it.

A claim was interposed by George Armroyd & Co. in behalf of Richardson & Carty, and others, which stated, that on the 21st of August, 1809, and long before, war existed between Great Britain and France; that the Fortitude, being an American vessel at peace with the French empire, on her voyage from Martinico, a British colony, where she had been trading with the enemies of the French empire, during the war, in violation of the decrees and regulations of that empire, was seized by a French privateer, and carried to St. Martin's, as lawful prize to the captors, and her papers sent to a French tribunal, having competent jurisdiction, at Guadaloupe, under the sole and exclusive dominion and jurisdiction of the French empire; but the papers were captured on the passage to Guadaloupe. That the vessel and cargo, being so carried into St. Martin's, were there *bona fide* sold by order of the Dutch *governor at the island, to whom [*425 such right belonged, by the laws and constitutions of the said island; and the goods in question, part of the cargo, were *bona fide* purchased by a certain I. L. Lapierre, and by him *bona fide* sold to a certain Abraham Concheyter, from whom they were afterwards *bona fide* purchased by Richards & Carty, for account of themselves and others.

By consent of parties a sentence was passed *pro forma* in the District Court, for the libelants.

In the Circuit Court, upon the appeal, the

NOTE.—CHIEF J. MARSHALL, in the case of The Mary, 9 Cranch, 126, 142, 144, 145, has considered the conclusiveness of a sentence of a court of admiralty, which is said not only to bind the subject matter on which it is pronounced, but to prove conclusively the facts which it asserts. He says in substance: A judgment against one defendant for the want of answer, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party. No reason is perceived why a different rule should prevail in a court of admiralty. "The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject matter is not examinable in them. With respect to itself no reason is perceived for yielding to them a further conclu-

claimants exhibited a further answer, stating, that by a decree of the registry of the commission for prize causes of the island of Guadaloupe, and its dependencies, duly constituted a court of prize by the Emperor of France, on the 12th of October, 1809, the schooner Fortitude, and her cargo, were condemned, by a sentence which is set forth at large in the answer, the substance of which sentence is included in the following extract, viz.:

"It results from the examination and from "the analysis of the papers just mentioned, "that the schooner Fortitude, captured by the "French privateer Le Fripon, is the property "of a citizen of the United States of America; "that she sailed from New London, bound to "Martinico, at which place she sold her cargo, "and took in another of molasses for the said "port of New London, and consequently she "has incurred the penalty pronounced by the "3d article of the Imperial decree, which di- "rects new measures against the maritime "system of England, and was given at the "Royal Palace of Milan, on the 17th of Sep- "tember, 1807, inserted in the bulletin of the "laws, No. 169, which article is as follows:

"Every vessel whatever, and whatever be "her cargo, which shall have cleared from any "English port, colony or country occupied by "English troops, or which shall be bound to "any English port, colony or country occupied "by English troops, shall be good prize, as "having infringed the present decree. Such "vessels shall be captured by our men of war, "and awarded to the captors.

426*] *"And after having heard the opin- "ion of the inspector of marine, we have de- "clared, and do declare, the American schoon- "er Fortitude to have been well and duly "captured by the French privateer Le Fripon, "and to be forfeited to the owners and crew of "the said privateer; consequently the said "schooner Fortitude, together with her cargo, "is awarded to the captors to be sold in the "customary form, if the sale has not already "taken place; and the proceeds shall be dis- "tributed conformably to the ordinance con- "cerning captures," &c.

On the 19th of April, 1811, the Circuit Court reversed the sentence of the District Court, with costs; from which sentence of reversal the libelants appealed to this court.

Lyman Law, for the appellants.

This condemnation was founded upon the Milan decree, which is admitted, on its face, to be in violation of the law of nations. It does not proceed on the ground of its being the property of an enemy, nor contraband of war, nor for violating a blockade. If it appear from the sentence itself, that the condemnation was not upon any ground recognized by the law of nations, nor upon the violation of any municipal right acknowledged by that law, this court will not carry it into effect. France may, by her own municipal laws, regulate her own trade, but she has no right to control ours, beyond her territorial jurisdiction, further than to protect her own belligerent rights, acknowledged by the law of nations. If we violate no such right, and if we do not carry our property within her territorial jurisdiction, she has no right to regulate our trade. Her condemnation, grounded upon regulations which she has no right, according to the law of nations, to make, is void. But even if she had a right to condemn, her condemnation can transfer no title, unless the thing itself be in her possession, at the time of condemnation, so that the possession may pass with the title. Here the property never was within the jurisdiction of the court at Guadaloupe. It had been sold and delivered by the Dutch governor, before the condemnation. It does not appear that he had any authority either from the captors, or from the court, to make the sale. The purchaser cannot *derive from the governor a [***427** better title than the governor had at the time of sale.

I. R. Ingersoll, contra.

It is acknowledged that a tribunal, professing to be a court of admiralty, has condemned the property in question, and that the appellees possess it by virtue of a capture on the high seas. This is *prima facie* evidence of the correctness of the title, and throws the *onus probandi* upon the appellants.

A court of admiralty is a court whose jurisdiction is co-ordinate with that of every other throughout the world. The admiralty law is "of all times and of all nations," and its decrees, so far as they affect the thing itself, and so long as they remain unreversed, can never be questioned. The end being gained, it is an immaterial question, what were the means, as they are sanctified by the end. Whether the proceedings are erroneous, or not, according to our notions of right and wrong; whether they are predicated upon a mistake of the law, or of

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siveness than is allowed to judgments and decrees of courts of common law and equity. They bind the subject matter as between parties and privies.

"The whole world, it is said, are parties to an admiralty cause; and therefore the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principal of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. When these proceedings are against the person, notice is served personally, or by publication; where they are *in rem* notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted in the Court of Admiralty, have no notice of her seizure, and can, on no principle of justice or reason be considered as parties in the cause so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from re-examining it. The judgment of a court of common law, or the decree of a court of equity, would, under such circumstances, be re-examinable in a court of common law, or a court of equity, and no reason is discerned why the sentence of a court of admiralty, under the circumstances, should not be re-examinable in a court of admiralty." The Mary, 9 Cranch, 143, 144, 145, MARSHALL, *Ch. J.* To the same effect in Hollingsworth v. Barbour, 4 Pet., 466, 475.

the fact, or are founded upon regulations consistent with, or repugnant to, the law of nations, are questions wholly immaterial. The sentence has sealed the proceedings, and those questions can never judicially come before this court.

In confirmation of these positions, it might be sufficient to refer to the decisions of this court, where the principles are settled.

In the case of *Rose* v. *Himely* (4 Cr., 292), this court refused to confirm the property of the alleged purchaser, because the court passing sentence had neither the actual nor constructive jurisdiction, nor power, over the subject in controversy. The point upon which it was decided was, that the vessel and cargo were seized out of the territorial jurisdiction claimed by the French government of St. Domingo, for a breach of municipal regulations, and were never carried within that jurisdiction, but were sold by the captor at a foreign port.

Two judges (the Chief Justice and Judge Washington) thought that, in order to give ju- **428***] risdiction, the property *should have been taken as prize of war, and brought *infra præsidia*. Three (Judges Cushing, Chase and Livingston) were of opinion, that it would be conclusive even under a municipal regulation, provided it were carried to the country of the captors. Judge Johnson considered it conclusive at all events. But even in that case, the Chief Justice says, in p. 276, "if the court of "St. Domingo had jurisdiction, the sentence "is conclusive." In the cases of *Hudson and others* v. *Guestier*, and *La Font* v. *Bigelow* (4 Cr., 293), it is decided that, in case of prize of war, a condemnation, while lying in a neutral port, will bind the property; and that the same principle applies to a seizure made within the territory of a state, for a violation of its municipal laws, p. 296. Judges Chase and Livingston dissented, because the vessel was not carried into a French port for trial. Judge Johnson adhered to his former opinion, that it was immaterial whether the capture was made in the exercise of municipal or belligerent rights, or whether within the jurisdictional limits of France, where she is supreme, or upon the high seas, where her authority is concurrent with that of other nations. (P. 298.)

In the case of *Croudson and others* v. *Leonard* (4 Cr., 434), it was decided, that a sentence of condemnation for breach of blockade was conclusive evidence of a violation of the warranty of neutrality in a policy of insurance.

In the case of *Rose & Himely*, above mentioned, the incidental questions were decided in favor of our positions; for here it was prize of war, seized and condemned within the jurisdiction of the court; yet it may be said the issue of that case was adverse. If so, it was expressly overruled in *Hudson & Smith* v. *Guestier* (6 Cr., 281). The court there unanimously decided, that the judge of the French court must have had a right to dispose of every question made in behalf of the owner of the property, whether it related to the jurisdiction of the court, or arose out of the law of nations, or out of the French decrees, or in any other way: and even if the reasons of his judgment should not be satisfactory, it would be no ground for a foreign court to rescind his proceedings, and to refuse to consider his sentence as conclusive on the property; and that, as the title was changed by the condemnation at Guadaloupe, the original *owner had no [***429** right to pursue it in the hands of a vendee.

But this is no new principle of law originating with the present state of the world, which would seem rather to forbid it; since the rapacity of the courts of admiralty on the one side, and their acknowledged subserviency to the governing power on the other, diminish the respect which would otherwise be due to their sentences.

The conclusive effect of a foreign sentence in changing the property seems to have been first judicially decided in the case of *Hughes* v. *Cornelius* (2 Shower, 242; Sir T. Raymond, 473; Skin., 59; Lord Raym., 893, 935; Vern., 21). The authority of this case has never been questioned. The only question has been as to the collateral effect between underwriters and the assured in cases of warranty in a policy of insurance. And even there, whenever the condemnation has been upon the ground of its being the property of an enemy, the sentence has always been holden to be conclusive, without regard to the circumstances by which the court came to that result. The sentence is conclusive as to whatever it purports to decide. (Park, 355, 360, 361–2; Rob., 173, *The Christopher;* 4 Rob., 35, *The Henrick and Maria;* 5 Rob., 255, *The Comet;* 4 Rob., 3, *The Helena;* 3 *Bos. & Pul.*, 505, *Lothian* v. *Henderson*; 7 T. R., 526, *Calvert* v. *Boville*; 7 T. R., 681, *Geyer* v. *Aguilar;* East, 473, *Oddy* v. *Boville;* 3 Bos. & Pul., 201, *Baring* v. *Clagett;* 5 East, 99, *Baring* v. *Royal Exch. Ins. Co.;* 5 East, 155, *Bolton* v. *Gladstone.*) Such also has been the course of decisions in the different American states. (1 Binney, 295, *Calhoun* v. *Penn. Ins. Co.;* 3 Binney, 220, *Cheviot* v. *Faussat;* 2 Johnson's N. Y. cases, 451, *Vanderheuvel* v. *The United Ins. Co.;* S. C., 127.)

Such being the acknowledged effect of a foreign condemnation, the only remedy for the injured party is a resort to the court of the captors for redress. If that government will not afford it, he must apply to his own, which will make it a national concern to be settled either by negotiation or war, if it be deemed a matter of sufficient importance. (Doug., 614, *Le Caux* v. *Eden.*)

The fact that the Milan decree was a violation of the law of nations, and of our neutral rights, can make no difference. For if an unjust condemnation, professing *to be [***430** founded upon a just law, be conclusive, there is no reason why a condemnation, founded upon an unjust law, should not be equally conclusive.

The question is not, whether this court will lend its aid to carry into effect the Milan decree, but whether it will reverse the sentence of a foreign court, and destroy vested rights acquired under such a sentence by a *bona fide* purchaser.

But it is said the purchase was made before the sentence of condemnation was passed, and was therefore void. This, however, can make no difference. The effect of the condemnation is not to vest the property, but to sanctify a title which was vested by the capture; to confirm all intermediate acts, and to give a judicial sanction to that which was already sufficiently firm in point of fact. (1 Wils., 211; 2 Azuni,

262; 12 Mod., 134, *Rex* v. *Broome;* Carth., 398, S. C.) The condemnation does not give property, it only establishes the fact that the captor had a lawful title by the capture. These maritime sales in market overt give an indefeasible title. (4 Johnson, 38, 39, *Grant* v. *M'Lachlan.*) In cases of foreign attachment, if the attached goods are perishable, or from their situation are exposed to peculiar danger, the constant practice is to order a sale, and such sales are valid, although the attaching creditor may fail to support his claim.

It is an established principle, says the Court of Errors (2 Johnson's cases, 458), that any person purchasing will be secure.

Law, in reply, cited the cases of *Geyer* v. *Aguilar; Pollard* v. *Bell; Price* v. *Bell; Bird* v. *Appleton; Mayne* v. *Walter;* (1 Rob. 144), and *Havelock* v. *Rockwood* (8 T. R., 268); to show that there must be a good cause for condemnation by the law of nations. He cited also, 4 Cr., 221; Dong., 574, and 1 Rob., 139. to the same point, and to show the limitation of the general principle of conclusiveness of a foreign sentence. As to the extent of the power of France over neutral commerce, he cited Marten's Law of Nations, 332; and to show that the Berlin and Milan decrees were in violation of our neutral rights, and were so declared by our government, he referred to the President's message to Congress of the 15th of **431***] *December, 1810, and cited 4 Cr., 292, *Rose* v. *Himely;* 3 Rob., 99, 333; 2 Rob., 239.

To show that the court must have jurisdiction, before its decree can be conclusive, he cited 4 Cr., 471; 3 Rob., 96. To support the position that a sale before condemnation is not valid, he cited Marten's 332; 4 Cr., 250; 1 Browne's civil law, 254; 1 Rob., 139.

Dana, on the same side.

This is an appeal by a citizen of the United States to his government for redress for a violation of his neutral rights by a foreign sovereign. This court exercises that branch of the government, which, in some countries of Europe, is exercised by the sovereign himself. The only question is, whether this court has power to declare void a condemnation founded upon a decree which the legislature and the executive of the United States have declared to be a violation of our neutral rights, and contrary to the law of nations. This is a question never before agitated in the courts of the United States.

This vessel has not violated the law of nations, nor the municipal law of any state or nation.

The sovereign power of a nation cannot be exercised on the high seas, unless over its own subjects or pirates, or *jure belli*. It can affect hostile property only. A municipal regulation can not rightfully affect neutral property, beyond the territorial jurisdiction. On the high seas all nations are equal. This property, having never been within the French jurisdiction, can never have offended against French municipal law. The court had no jurisdiction under the municipal law of France in such a case. Suppose, in case of capture and recapture, the first captors proceed to libel and condemn the property in a French court, while it is safe in a port of the United States, having never been within the jurisdiction of France. It can never be pretended that such a condemnation would be valid.

The title and possession must be delivered together at the same time, or the sentence will not be conclusive *in rem*.

*In the cases of *Rose & Himely*, and [***432** *Hudson & Guestier*, the property was sold by an agent of the court; but the Dutch governor of St. Martins had no authority from the tribunal at Guadaloupe. It has been decided in the courts of the United States, that Holland is not a dependency of France. Captors cannot sell or dispose of the property captured, before the capture has been adjudged lawful by a competent court. It is the interest of all nations to enforce this rule. The opposite practice would lead to incalculable evils.

March 8th. MARSHALL, *Chief Justice*, delivered the opinion of the court as follows:

A vessel, with a cargo belonging in part to the appellants, was captured on the high seas, on the 20th of August, 1809, by a French privateer, and carried to St. Martins, where the vessel and cargo were sold by order of the governor, at public auction, and part of the cargo purchased and sent to the appellees in Philadelphia. After the sale the vessel and cargo were condemned by the court of prize, sitting at Guadaloupe, professedly for a violation of the Milan decree in trading to a dependence of England. On the arrival of the goods, they were claimed by the original owner, who filed a libel for them. In the District Court they were adjudged to him. The Circuit Court reversed that sentence, and from the judgment of the Circuit Court there is an appeal to this court.

It appears to be settled in this country, that the sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision in the case of *Hudson & Smith* v. *Guestier*, reported in 6th Cranch, is considered as fully establishing this principle.

It is contended that the sentence, in this case, has not changed the property, because,

*1st. The sale was made under the [***433** direction of the Governor of St. Martins, before the sentence of condemnation was pronounced.

2d. The sentence proves its own illegality, because it purports to be made under a decree which the government of the United States has declared to be subversive of neutral rights and national law.

1st. In support of the first objection it has been urged, that the jurisdiction of the court depends on the possession of the thing; that a sentence is a formal decision, by which a forcible possession is converted into a civil right; and that the possession being gone, there remains nothing on which the sentence can operate.

However just this reasoning may be when applied to a case in which the possession of the captor has been divested by an adversary force, as in the cases of recapture, rescue, or escape, its correctness is not admitted when

applied to this case. The possession is not an adversary possession, but the possession of a person claiming under the captor. The sale was made on the application of the captor, and the possession of the vendee is a continuance of his possession.

The capture is made by and for the government; and the condemnation relates back to the capture, and affirms its legality.

2d. That the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case in a court which cannot revise, correct, or even examine that sentence. If an erroneous judgment binds the property on which it acts, it will not bind that property the less because its error is apparent. Of that error, advantage can be taken only in a court which is capable of correcting it.

It is true that in this case there is the less difficulty in saying that the edict under which this sentence was pronounced, is a direct and flagrant violation of national law, because the declaration has already been made by the legislature of the Union. But what consequences attend this legislative declaration? Unques-
434*] tionably the *legislature which was competent to make it, was also competent to limit its operation, or to give it effect by the employment of such means as its own wisdom should suggest. Had one of these been, that all sentences pronounced under it should be considered as void, and incapable of changing the property they professed to condemn, this court could not have hesitated to recognize the title of the original owner in this case. But the legislature has not chosen to declare sentences of condemnation, pronounced under this unjustifiable decree, absolutely void. It has not interfered with them. They retain therefore the obligation common to all sentences whether erroneous or otherwise, and bind the property which is their object; whatever opinion other co-ordinate tribunals may entertain of their own propriety, or of the laws under which they were rendered.

The sentence is affirmed with costs.

Cited—3 Pet. 206; 13 How. 516; 7 Bank. Reg. 171.

SMITH AND BUCHANAN
v.
THE DELAWARE INSURANCE CO.

Absent—WASHINGTON, *J. and* TODD, *J.*

A verdict "for the defendants subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon are stated on the record.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant on a policy of insurance.

The jury found a verdict "for the defendants, subject to the opinion of the court on the points reserved." And judgment was thereupon rendered "for the defendants accordingly."

The plaintiffs, by their counsel, moved the court below that the points reserved (which the motion states, without stating the facts out of which they arose), and the opinion of the court upon those points, should be entered on the record.

*The court did not act on this motion: [*435 and, of course, the points do not appear, so as to enable this court to take notice of them.

The defendants, it was said, would not agree to any arrangement by which the legal merits of the cause, as they appeared below, might come into discussion here.

Pinkney, Attorney-General, for plaintiffs in error,

Contended that the verdict was imperfect, contradictory and void; and did not warrant the judgment pronounced upon it, nor any other judgment. (23 Vin., 397, pl. 10.) It is neither a general nor a special verdict.

Harper, contra,

Admitted that it was in form an irregular proceeding, but he was instructed to insist on the judgment.

It is a general verdict for the defendants: and by consent of parties it was referred to the court; and if they should be of opinion that the verdict should not stand, they were to award a *venire de novo*. It was the negligence of the plaintiffs in not having the facts, or the points and consent, stated on the record.

It is evident that what was done was by consent. The plaintiffs do not appear to have wished to bring the case here; but were at the time contented to rely on the opinion of the court below.

MARSHALL, *Ch. J.* The case is too plain for argument. The jury did not intend to find a general verdict; but to submit the points of law to the court. If the law had been for the plaintiffs the court could only have awarded a *venire de novo*. The facts ought to have appeared, so that the judgment might have been either reversed or affirmed upon the merits.

Judgment reversed, and a new trial awarded.

S. C. 3 Serg. & R. 74.
Cited—8 Pet. 518; 3 Mason, 20.

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*HOLKER AND OTHERS *v.* PARKER.

Present—All the Judges except TODD, *J.*

An attorney at law, as such, has authority to submit the cause to arbitration.

But an attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client.

THIS was an appeal from the Circuit Court for the District of Massachusetts, in a suit in chancery brought by Holker and others, his assignees, against Parker, to set aside an award made under a rule of court in a suit at law in the same court between Holker and Parker.

The case, as stated by MARSHALL, *Ch. J.*, in delivering the opinion of the court, was as follows:

In the year 1782, John Holker, one of the plaintiffs in this cause, Daniel Parker, the defendant, and William Duer, who is dead, insolvent, formed a trading company under the name and firm of Daniel Parker & Co., of which

Daniel Parker was the acting partner. After receiving large sums of money, and contracting debts to a great amount, Parker absconded from the United States without making any settlement of his accounts. In the month of December, 1785, Holker commenced a suit against Parker in the Court of Common Pleas for the county of Philadelphia, where the said Parker had resided and carried on the business of the copartnership. This suit was commenced by attaching the effects of Parker in the hands of Thomas Fitzsimmons. In June, 1788, a judgment in favor of the said Holker was rendered on the verdict of a jury for the sum of 47,231*l.* 12*s.* 9*d.* Pennsylvania currency, equal to $125,951.03. The property attached amounting to $5,000, was sold and paid to the said Holker towards satisfying this judgment.

Other attachments were laid by Holker on the property of Parker, and proceedings were also instituted against him by other persons, creditors of the company. On the 31st of December, 1788, while these were depending, an indenture of six parts was made and executed between said Parker by Andrew Craigie, his attorney, of the first part, John Holker of the second part, Samuel Rogers of the fourth part, by An-

437* drew *Craigie, his attorney, Royal Flint of the fifth part, and sundry creditors of Daniel Parker & Co. of the sixth part. William Duer was named in the said indenture as of the third part, but never executed the deed.

The object of this deed was to convey to Royal Flint in trust for the creditors of Daniel Parker & Co., and for other purposes therein specified, the partnership effects of Geyer, De la Lande, and Fynye, to which Parker represented himself to be entitled, and which he had previously conveyed to the said Samuel Rogers. By this indenture the said Parker covenanted among other things that he would, within eight months from the date thereof, repair to Philadelphia personally, or by attorney, and then settle all the accounts of the company. It was further agreed that the said Parker and Holker should, within eight months from the date of the first indenture, reciprocally give bonds to each other in the penal sum of 50,000*l.* Pennsylvania currency conditioned for the settlement of their respective accounts within ten months thereafter, and for payment of their several balances to Royal Flint and his successors for the trusts in the said indenture mentioned. The bonds to be assigned to the said Royal Flint or his successors in trust as aforesaid.

In consideration of the premises the said Holker, and also the said parties of the sixth part, severally covenanted with the said Parker that they would immediately "vacate, annul, "discontinue and withdraw all suits, actions "and proceedings whatever, which they or any "or either of them shall or may at any time or "times heretofore have commenced, brought or "prosecuted against the said Daniel Parker or "his estate, goods, chattels or property, in any "court or place whatsoever in Europe or Amer-"ica, and shall and will place him, the said "Daniel Parker, and his property in the same "situation as they were before the commence-"ment of such suits or proceedings." And the said Holker further covenanted not to commence or prosecute any action against him, the said Parker, for any balance that might be due until after eighteen months after the eight months aforesaid should have expired.

The bonds were given, but Parker failed to comply *with the covenant for settling [*438 the accounts of the copartnership transactions.

The effects of Geyer, De la Lande and Fynye, which were assigned to Royal Flint, being insufficient to satisfy previous charges on them, proved totally unproductive.

Debts to a large amount due from Daniel Parker & Co. were recovered from Holker and paid by him.

On the 21st July, 1796, Holker made a power of attorney to James Lloyd, of Boston, for the purpose of recovering from the the said Parker the moneys supposed to be due to him, and at the same time transmitted to the said Lloyd copies of the judgment obtained by him against Parker in June, 1788, and of a judgment obtained against Holker by John Ross for the sum of 12,933*l.* 7*s.* 1*d.* Pennsylvania currency, equal to $34,488.95. This judgment was for a debt due from Daniel Parker & Co., which was rendered subsequent to the indenture of six parts herein before stated, and had been discharged by Holker.

Mr. Lloyd placed these papers in the hands of Mr. Lowell, an attorney at law of Boston, who instituted an action of debt on the judgment obtained by Holker against Parker. This suit was brought by way of attachment. At the June term, 1797, Daniel Parker appeared by his attorney, and filed four several pleas in bar of the action, in all of which the indenture of six parts herein before stated was pleaded as a release of the judgment on which the suit was instituted.

The plaintiff's attorney prayed oyer of the instrument of which the defendant had made a *profert* in his pleas, and, in the October term, 1797, not having replied or demurred to the said pleas, entered into a rule of court, by which the said action and all demands were referred to Nathan Goodale, George Deblois, and Fisher Ames, Esquires, with liberty reserved to Holker of disagreeing to the rule thirty days after he should receive notice of it.

Notice of this rule was received by Holker in August, 1798, but he does not appear to have been informed *that any liberty of dis- [*439 senting from it was reserved to him. It would seem that he submitted to it with some repugnance, and under the idea that it was unavoidable.

On the 8th of September, 1798, Holker made an affidavit, which he transmitted to his attorney, stating many reasons why the referees should not immediately proceed to make up their award in the case, and showing that in the settlement of the complex accounts between Parker and himself, much testimony would be required respecting transactions both in Europe and America, and that so much depended on the entries in the books of the bank at Philadelphia, that the settlement ought to take place there. He declared, however, that he would endeavor to be prepared to appear before the arbitrators in the succeeding months of November or December, or sooner if practicable.

In October, 1798, the rule of reference was made absolute. Mr. Holker had assigned this claim to Mr. Lowell, the father of his attorney at law, the administrator of Mr. Russel, so far

as would be necessary to satisfy a debt due to Russel's estate. On the 6th of November, 1798, Mr. Lloyd wrote a letter to Mr. Holker informing him that his affidavit had been laid before the court, in consequence of which his cause had been continued until the succeeding June term. On the 23d of the same month Mr. Lloyd addressed another letter to Mr. Holker, informing him that the "referees would attend to his business whenever it might be convenient for him to appear before them."

Suits had been instituted against Holker in Philadelphia, in which he had been compelled to give bail in large sums. He then resided in Virginia, and was arrested in Baltimore by his bail in April, 1799, and carried to Philadelphia, where he was enabled to obtain other bail on no other condition than the express stipulation of not proceeding to Boston. On the 18th of May he made an affidavit before the mayor of Philadelphia, stating that he was prevented by this detention from proceeding to Boston in order to attend the referees in person as he proposed to do. That he was about petitioning the Supreme Court of Pennsylvania for a special court, which he had reason to believe he *[**440***] should obtain in the course of the succeeding July or August, but that in the meantime it was utterly out of his power to go to Boston. This affidavit was transmitted to his attorney in Boston. On the 24th of June Mr. Lowell addressed the following letter to Mr. Holker:

"I received your affidavit through my friend "Mr. Lloyd, and with much difficulty obtained "a delay. The referees adjourned to the first "of September next, when the cause will go on "at all events, whether you are here or not. "As to success without your aid it is out of the "question, as we know nothing of the cause, "and as your subsequent covenants with Park-"er will appear to annihilate your claims under "the judgment. Whether you will eventually "succeed in getting a nominal judgment against "Parker if you do attend, you alone can "judge. I am rather inclined to think I could "persuade the adverse counsel to give us a judg-"ment for the whole or part of the property "attached ($7,200). They appear to be heart-"ily sick of defending Parker, as they know "him to be immersed beyond hope of recovery, "and are doubtful whether they will be com-"pensated for their trouble. Whether some "arrangements of this sort would not be ad-"vantageous to you if it can be effected, con-"sidering your doubt of recovery, and the cer-"tainty of Parker's inability to pay what may "be decreed, you best can judge.

"Whatever you do on this point let it be ex-"plicit, as Mr. Lloyd and myself mean to avoid "all responsibility and every hazard of future "blame. I beg you will inform me speedily "what we shall do about your action, as the "referees will meet in sixty days or there-"abouts."

This letter was transmitted to Mr. Holker by Mr. Lloyd, who subjoined thereto the following letter:

"Immediately on the receipt of your favor "covering a memorial to the Circuit Court, I "delivered them both to Mr. Lowell who duly "attended thereto: the result is communicated "in the foregoing letter from that gentleman. "His obtaining the delay is what could not "have been calculated on. The court would "*not have granted it. To avoid ex-[*441 "pense in feeing counsellors it was acceded "to by the other party.

"The period now fixed can no longer be "protracted on any account whatsoever. From "what I can learn of the disposition of the de-"fendants, it is truly depicted to you in Mr. "Lowell's letter: they would, as he observes, "probably confess judgment for the greater "part if not the whole of the property attach-"ed. It must be understood that they would "do this only on the condition that they should "receive a full discharge from you on account "of Daniel Parker. You will please to let me "receive your determination as soon as may be "convenient."

These letters were never answered by Mr. Holker. A petition had been presented by Holker to the Supreme Court of Pennsylvania to have his person liberated on delivering up all his property for the use of his creditors in pursuance of a law of that state. This petition came on to be heard on the 13th of September, 1799, but was continued from time to time until the 14th day of April, 1800; when by the judgment of that court, he was discharged from custody.

The referees made the following report to the Circuit Court during the October term, 1799.

"The subscribers, pursuant to the annexed "rule, met at the office of Nathan Goodale on "the 8th day of June, 1799, after notifying "John Lowell, Jr., Esquire, attorney for the "plaintiff, John Holker, and William Hull, "Esquire, attorney for said Daniel Parker, the "said attornies attending our meeting and "John Lowell, Jr., Esquire, in behalf of said "Holker, having asked a delay or adjournment "until the first day of September then next, "now last past, and on the said first day of "September the referees having again met, and "the said parties appearing by their attornies, "and having been fully heard, the said meet-"ing was again adjourned at the request of the "said Lowell until this day, being the 23d day "of October, 1799, when the said attorneys "having again appeared, and nothing further "being offered in support of their several alle-"gations, we do award that the said John Holk-"er, the plaintiff, *recover against the [*442 "said Daniel Parker the sum of $5,000 in full "satisfaction and discharge of all debts, costs, "judgments, executions, accounts, controver-"sies, claims or demands, subsisting between "them, of what name or nature soever."

The award was read and accepted, and judgment immediately rendered for $5,000 without costs, which sum was received by the attorney of Mr. Holker, and the balance after deducting costs and commissions was paid to the administrator of Russel, to whom Holker was indebted and to whom he had made an assignment of his claims against Parker, so far as it should be necessary to satisfy the said debt.

It appears that the evidences in support of Holker's claims, other than the two judgments which have been mentioned, were never in the hands of his counsel, and were consequently never laid before the referees; that the counsel for Holker never controverted the allegation made on the part of Parker, that the judgment

obtained by Holker in the court for the county of Philadelphia, was released by the indenture of six parts, nor ever insisted that it was to be considered as *prima facie* evidence subject to such objections, or to such discounts as Parker might make. The accounts between the parties do not appear to have been examined, nor the judgment of the arbitrators exercised on any part of the case. The award for $5,000 was made with the consent of Parker's attorney, and without objection on the part of Holker's attorney. That transaction is thus stated by Mr. Lowell: "Some time before the trial, the coun- "sel for Parker did lead this deponent to un- "derstand that as they were desirous of closing "the affair, they should not objeet to our tak- "ing judgment for the amount attached, but "the deponent wholly and absolutely did re- "jeet the said proposal. He, however, stated it "to said Holker and begged his instructions "thereon, but said Holker never replied to said "letter; when the referees met and this depo- "nent found they would proceed to final judg- "ment against his elient for defeet of evidence, "he, this deponent, stated the former offer, but "the adverse counsel refused to agree to it but "said that they had no objection to our taking "judgment if the referees saw fit for $5,000 **443***] "instead of *$7,200 or thereabouts, the "amount attaehed; though they deelared they "had doubts whether on a final liquidation "there would be so mueh due. The referees, "taking their admission against them, awarded "that sum. But it was never agreed by this "deponent that such a sum should be taken "in full of the said Holker's demands. It was "no compromise, nor was there any secret un- "derstanding; but he deemed it his duty to ob- "tain even this sum rather than an award, "which would have been otherwise made, that "the said Parker owed the said Holker "nothing." The attorney for Mr. Parker, whose deposition is also in the reeord, states the transaction thus: "After a considerable exam- "ination of the aecounts by the arbitrators with- "out coming to a decision, Mr. Lowell agreed "that they should award to Mr. Holker $5,000 "in full of all demands, provided I would "agree to give seeurity for the payment of the "money to Mr. Holker or to his attorney, Mr. "Parker being abroad. I agreed to it. We "both agreed to it. It was done. When Mr. "Lowell and myself had agreed, we stated our "agreement to the arbitrators." To another interrogatory the same witness answers: "I did "not reeommend to the arbitrators any award "until the parties had agreed upon a sum; my- "self and Mr. Lowell."

Two of the arbitrators are dead. The deposition of the third has been taken. He says that the award was founded entirely on the admission of Mr. Parker's attorney.

The correspondence of Mr. Holker with his attorneys showed his confident relianee on the judgments placed in their hands as amounting to *prima facie* evidence, and that his claims considerably exceeded those judgments. The evidenee now taken in the eause swells them to a very great amount.

There is evidence that Daniel Parker was at the time much embarrassed in eonsequence of deep speculation in the national debt of France; and that he was eertainly believed by the attorney of Mr. Holker to be insolvent. This was at that time the general impression. It was afterwards known to be erroneous.

*Mr. Holker instituted a suit against [***444** Mr. Parker in Franee, where it was determined that he was barred by the judgment rendered against him in the Circuit Court of the United States on the award.

Holker and his trustees have now brought this suit in the Cireuit Court of the United States sitting in chancery, praying that the award may be set aside in whole or in part, that the accounts between Holker and Parker may be settled, and that Parker may be decreed to pay the sum whieh shall appear to be due. Parker has pleaded the award and judgment thereon in bar of these claims and of any account.

On a hearing, the bill of the plaintiffs was dismissed, and from that decree an appeal was made to this court.

Harper, for the appellants, contended that the award ought to be set aside.

1st. Beeause the rule of reference was entered into without authority.

2d. Beeause if there was authority, the rule and the award exceeded it.

3d. Beeause the award was founded on a mistake in law.

4th. Beeause it was made on an agreement or compromisc made collusively, or inadvertently or by mistake, between the plaintiff's attorney and the agent of the defendant.

5th. Because, if no such agreement or compromise were made, the award was founded on a belief of one, and therefore void for mistake.

1 and 2. The reference was made without authority. The letter of attorney to Lloyd is "generally to do and perform all that may be necessary in the premises." It cautiously avoids giving a power to refer to arbitration. Lowell so understood it, as appears from his answer to the 11th interrogatory. Lowell, as attorney at law, had no such authority. If he had, it could only *extend to submit that action, not [***445** all demands. His authority was limited to the ease in which he was employed, and Lloyd had authority over two causes of action only—the judgment in Pennsylvania recovered by Holker against Parker, and the judgment recovered by Ross against Holker and which he had paid.

3. The award was void because it was founded on a mistake of the law. It is true this mistake does not appear on the face of the award, but that is an objection at law only, and not in a court of equity, whieh may go into collateral circumstances, and may set aside the award if the law be mistaken.

The mistake in law was in supposing that the causes of action ou the judgments of *Holker* v. *Parker*, and *Ross* v. *Holker*, were barred by the indenture of six parts. Ross's judgment was obtained in 1795 and paid in 1796, and the indenture of six parts was made in 1788. Holker's covenant does not extend to judguents—it is only to "vacate, annul, discontinue and "withdraw all suits, aetions and proeeedings," clearly alluding to the attachments whieh Holker and others had then recently instituted against him. This covenant is further explained by the subsequent eovenant not to sue Parker until the expiration of 26 months from that date. The expression "suits, actions and proeeedings" does not inelude judgments. And if

it did, yet the covenant of Parker to appear in Philadelphia within eight months and settle his accounts, was a condition precedent to the covenant on the part of Holker to vacate, and withdraw the proceedings then pending. This covenant is expressed to be "in consideration of the premises," which expression implies a prior performance on the part of Parker. It was *quid pro quo*. A man is not presumed to part with his right until he receive the compensation, unless he expressly stipulates so to do. The pleas do not state a performance on the part of Parker. (1 Lord Raymond, 662, *Thorpe* v. *Thorpe;* 2 Burr., 899, *Collins* v. *Gibbs;* Cro. El., 188; 7 Co. 9, 10, Hob., 106; 1 Esp. N. P., 128.)

4. The award was founded on a compromise entered into between the attorney of Holker and the agent of Parker, either by collusion or **446***] by imposition of the latter *upon the former; and was without any authority from Holker. It was an award in form only, but was in fact a compromise.

General Hull, in his deposition, states it to have been a compromise, and that it was stated as such to the arbitrators. Mr. Deblois, the surviving arbitrator, says the award was made upon the defendant's acknowledgement alone, which implies a compromise. And Mr. Lowell admits there was an understanding that Parker's attorney should acknowledge a balance.

This, then, was a compromise founded on the collusion of the plaintiff's attorney, contrary to his duty to his client, and expressly contrary to his instructions, which were not to agree to arbitration unless Parker would give security to pay the award. Why did he waive this condition? Why not inform Holker of his right to dissent to the arbitration?

Holker repeatedly informed Lowell and Lloyd that the covenant was no bar, because Parker had never settled his accounts agreeably thereto. Yet the attorney yielded to the suggestion of the plea. Again, Holker's letters informed him that the judgment against Parker could not be opened; yet he waived that judgment (although it was at least *prima facie* evidence even if it could be opened), and admitted before the referees that the claims of Holker could not be supported. But if there were no collusion on the part of Lowell, he was imposed upon by Hull. He was made to believe that Parker was wholly insolvent, and might have believed that the amount of the attached effects was so much saved out of the wreck of his estate.

But if there was neither collusion nor imposition, the compromise was made without authority. Neither Lloyd nor Lowell had power to make it. Holker had forbidden a reference, but he knew nothing of a compromise.

And if it were not a compromise, yet the award was made by the arbitrators upon the supposition that there was one; and being founded on a mistake into which they were led by the opposite party, it is void.

447*] *If it is not void for these reasons, yet it is void for misbehavior in the arbitrators in not looking into the case. They had sufficient evidence before them, but confided in the representations of General Hull.

Amory and *P. B. Key*, contra.

In the articles of copartnership it is covenanted that all matters in dispute between the partners shall be left to arbitration; so that Holker could not refuse to agree to the rule of court.

Lowell and Lloyd were to have fifteen per cent. commission upon all moneys collected, and were therefore interested to recover as much as possible. The legal right to the debt was assigned to Russel's administrators with full power to collect it; so that Holker was fully represented.

The plea of the indenture was a good bar to the judgment in Pennsylvania. It was a covenant to open all judgments and go into a settlement of accounts. The parties could not have gone into a settlement of accounts without opening that judgment; for the judgment included all Holker's claims up to a certain time. If it be a covenant to release, it is equivalent to a release. The words of the covenant are, "immediately vacate, annul, discontinue and withdraw, all suits, actions, and proceedings whatever, which they or any or either of them, shall or may, at any time or times heretofore have commenced, brought, or prosecuted against the said Daniel Parker or his estate, goods, &c., in any court or place whatsoever in Europe or America, and shall and will place him, the said Daniel Parker, and his property in the same situation as they were before the commencement of such suits or proceedings." This is not limited to any suits or proceedings then pending, but includes all suits and proceedings which had been at any time before commenced. It included those which had been prosecuted to judgment as well as those then pending.

But a judgment by default in another state is not conclusive. This judgment was by foreign attachment in Pennsylvania. It was a proceeding entirely *ex parte*. It was in itself an imperfect voucher. It was examinable *every- [***448** where—even in Pennsylvania. *Nil debet* was a good plea to an action upon it in that state; and *a fortiori* in another state. (1 Dall., 375, *M'Clenachan* v. *M'Carthy*.)

But the covenant was a good bar to it. The covenants on the part of Parker were not conditions precedent. They could not be so in the nature of things, for the actions, suits and proceedings were to be vacated immediately, and Parker was not to account until eight months afterwards. A covenant not to sue may be pleaded as a release. (2 Bac. Ab., 93; Cro. El., 352.)

A mistake of the law in a doubtful point is no ground to set aside an award. (Kyd on Awards; 2 Eq. ca. ab., 92; 9 Mod., 63; 2 Com. Dig., 146.)

Lloyd's power authorized a reference. It was to compel payment of all demands against every body, by all lawful ways and means. Whatever Holker could do in the premises, Lloyd could do. He was not confined to a jury trial. Having the general power to collect, he was of course to use all reasonable and usual means.

But Lowell, as attorney at law, had power to refer the case to arbitration (Kyd on Awards, 45; 1 Dall., 164); and under the circumstances of the case it was a discreet act. He was led by Holker's letter to suppose that he was to submit the case to arbitration if he could get security. He knew it to be impossible to get

security, and therefore took the other part of his instructions and submitted to arbitration without security. The probability is that Lowell did give him notice of his right to dissent. Holker's letter of September, 1798, shows that he knew that all demands were submitted. Lowell, believing that the judgment was barred by the indenture, and being desirous to support the action and the attachment, thought that he was doing a benefit to Holker by extending the reference to all demands. But Lowell's mistakes of the law, if they be such, or even his mismanagement of the cause, cannot affect Parker. It is a matter entirely between Holker and his attorney.

The reference, then, was a discreet act, and fully authorized. The parties were bound then to produce their claims and their evidence, or **449***] to be forever foreclosed. *Holker knew the time. He asked delay, supported by his affidavit, and obtained it. He knew that his personal attendance was not necessary; he knew that Lowell had not evidence to support the case, yet he neglected to furnish him with evidence, and abandoned his rights, if he had any, and cannot resume them when he pleases.

There was no compromise. Lowell swears expressly there was not. After writing the letter of the 24th of June, 1799, it is not probable that he would have taken such a responsibility upon himself.

The bill does not charge fraud in the referees. If it had, they ought to have been made parties. The object of the bill is to open an account which cannot now be settled with justice.

All the objections now alleged against the award were good in a court of law, and might have been urged upon the return of the award. Where a man has lost his legal remedy by his negligence, he shall not have relief in equity.

March 10th. MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

On the part of the appellants it is contended that an attorney at law has no power, without the consent of his client, to transfer a cause to other judges than those appointed by the laws, and to place it before a tribunal distinct from that before which the party himself has chosen to place it.

In this opinion however the majority of the court does not concur. It is believed to be the practice throughout the Union for suits to be referred by consent of counsel without special authority, and this universal practice must be founded on a general conviction that the power of an attorney at law over the cause of his client extends to such a rule. Were it otherwise, courts could not justify the permission which they always grant, to enter a rule of reference when consented to by counsel on both sides. In **450***] this case, however, the letter *and affidavit of Mr. Holker of the 8th of September, 1798, manifests at least an acquiescence in the rule, which the opposite party had a right to consider as an assent to it.

The same letter and affidavit will meet the still stronger objection which has been made to the reference of matters not involved in the suit actually depending in court. They certainly impair very much the weight and influence of those arguments which have been urged against so much of the award as respects those demands of Holker which were not in suit.

The court, however, does not perceive in the transactions which took place previous to the award itself, any circumstance which could justify a decree to set it aside. The great and real question in the cause is, has the award been made under such circumstances, and is it of such a character, that it ought to bind the parties?

In examining this question it is natural to inquire whether this be in fact an award, in forming which the judgment of the arbitrators has been exercised, or a compromise wearing the dress of an award.

The evidence upon this point is thought very clear. Nothing can be more explicit than the testimony of General Hull, who was the attorney of Mr. Parker. He states an agreement in the most express terms between himself and Mr. Lowell on the sum for which the award should be given; and the arbitrator, whose deposition has been taken, declares that the award was made solely on the acknowledgment of the defendant's counsel.

To the deposition of Mr. Lowell himself great respect is due. He denies a compromise; but on examining his testimony the court is of opinion that his denial goes no further than to the form of an agreement. The facts he states prove one in substance. Believing himself that Holker's judgment against Parker was released, and that the referees would entirely disregard it—he himself not having insisted on it, or questioned the validity of the pleas in bar—he reminded Parker's attorney, in the presence of the referees, of his former offer to give $7,200 in satisfaction of all demands.

*It was impossible to misunderstand [***451** this declaration. It was substantially a proposition to accept an offer which had been formerly rejected. General Hull replied that he would not now give that sum, but would give $5,000. Mr. Lowell did not agree to accept this offer, but he did not reject it. He looked on silently, and saw the referees about to make up an award, not on the testimony of the cause, but on a declaration on the part of the defendant that he would give $5,000, made in answer to one from himself apparently clinging to a former offer to give $7,200. The referees necessarily construed this silence into consent, and Mr. Lowell was not unwilling that they should put this construction on it. He thought it his duty, he says, to secure even this sum for his client rather than have an award that Parker owed him nothing; which would have been equally obligatory.

This then is substantially a compromise, and not an award. It is difficult to examine this cause, and to feel the clear conviction which was felt by Mr. Lowell, that the referees, had the case of Holker been brought as fully before them as it was in the power of his attorney to bring it, and pressed as earnestly on them as its importance deserved, would have awarded that Parker owed him nothing.

Had not the sufficiency of the pleas in bar been impliedly admitted; had the legal operation of the covenant of six parts been seriously contested; it is far from being clear that the referees would have affirmed the sufficiency of these pleas, or have construed the covenant to

be a release of the judgment. There is certainly much reason to doubt whether the covenant of Holker, although it may be an independent covenant, amounts to a release of the judgment he had obtained against Parker. The mind of the referees does not appear to have been exercised on, or called to this question. They do not appear to have had a fair opportunity to form an opinion on it. It does not appear that the indenture itself was inspected by them, and the description given of it in the pleas is inaccurate. The pleas describe the covenant as containing the word "judgment," which it does not contain. The covenant is "to vacate, annul, discontinue and withdraw, all suits, ac-

452*] tions *and proceedings whatever." The pleas introduce the word "judgment" in their description of the covenant; a word which essentially varies its construction. Had the real case been brought before the referees, and their attention been directed to this circumstance, it cannot be assumed as certain that they would have considered the judgment as vacated, or would have refused to receive it as *prima facie* evidence of a claim to its full amount; open to such objections as Parker might make to it.

Had they even been of a different opinion, they could not have believed it certain that Parker, who had escaped from this country, leaving debts to an immense amount which Holker was compelled to pay, against whom, when only part of those debts were paid, Holker had obtained a judgment for $125,951.04 was not the debtor of Holker to a large amount. With this view of the case, had they understood that Holker was intercepted in his attempt to attend them, and detained by legal process, it ought not to have been supposed that they would have refused to suspend their award until the issue of his application to the Supreme Court of Pennsylvania for the liberation of his person should be known.

To this court, then, it appears that this award is not the judgment of the arbitrators in the cause, but a compromise, between the attorneys, taking the form of an award, and a compromise made at a time when the cause was not so desperate as the attorney supposed it to be. It was a sacrifice of great and important interests at a time when that sacrifice does not appear to have been absolutely necessary. Has the attorney a right to make such a compromise?

Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a

453*] compromise could be fairly *made, there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it.

The testimony in this cause accounts for the readiness with which Mr. Lowell acceded to the offer of General Hull. He acted under a mistake, and that mistake is fully disclosed in the record. He believed Parker to be irretrievably ruined. He thought him totally and absolutely insolvent. This impression was communicated to the referees. They too were of opinion that to drudge through the trunks of papers arrayed before them for the purpose of ascertaining how much one insolvent owed another, would be a useless waste of time.

Mr. Lowell was apparently of opinion that nothing beyond the attached effects was worth pursuing. He believed sincerely that an award of $700,000 would not avail his client more than an award for $7,000, and that he should ill perform his duty if he put the attached effects in any hazard in the vain attempt to get a judgment for a larger sum. He could not therefore venture on any measure which might have produced a release of those effects. They were the sole object of his contemplation and pursuit. Those he knew to be substance, every thing further he thought a shadow. This opinion seems to have influenced his whole conduct, and to have determined him to accede to the compromise offered by Parker's attorney.

It has been said that an award rendered under these circumstances ought not to bind Holker unless his own gross negligence may have deprived him of that equity which would otherwise belong to his case.

*Let his conduct be examined. [***454**

He appears to have been strongly impressed with the importance of his personal attendance on the arbitrators. Indeed it could scarcely be otherwise. Although his judgment against Parker might not be viewed as a nullity, it would certainly be opened, and all the items on which it was founded be liable to exception. His personal explanations would certainly be essential. They would also be essential in encountering the credits which might be claimed by Parker. His personal attendance was impossible.

He appears to have indulged the hope that he might be liberated in time, until the period allowed for appearing before the referees had passed away.

It is true that he ought to have transmitted his papers to his attorneys. The evidence now adduced, or a considerable part of it, might then have been obtained. That he was led to believe Parker insolvent, would not be a sufficient excuse for neglecting to do so, unless it could be shown that this impression was made by Parker himself, or by his agents. The evidence to this point does not amount to more than light suspicion.

Yet, when it is recollected that the plaintiff was embarrassed and detained by legal process; that he did not possess a clear and distinct knowledge of the testimony which would be required; that some apology for not making an early exertion to obtain that testimony is to be

found in the hope he indulged of being enabled by the discharge of his person to attend the referees; that the expectation that the judgments in the hands of his counsel would be regarded by the referees, ought not to be considered as entirely unfounded; this court is of opinion that it would be too rigid an application of the rule which exacts, from those against whom iniquitous judgments have been obtained, evidence of having done all that was practicable at law, to deny relief in this case.

With the single exception of his omitting to furnish the evidence on which his judgment against Parker was obtained, and to furnish copies of other judgments rendered against **455***] *him as one of the firm of Daniel Parker & Co., as he did in the case of *Ross* (of the efficacy of all which if furnished nothing decisive can be said), no negligence can be imputed to Holker. He has not rested under the decision against him, until Parker, confiding in his security, may have lost the means of protecting himself from an unjust demand, but has pursued him diligently in the courts of France. Finding this award and the judgment thereon to be an insurmountable bar to the examination of his claim in the courts of France, he has, without loss of time, instituted this suit. Nothing appears in the cause to induce an opinion that the claims of the parties may not now be as fairly and as fully examined as they could have been before the referees in 1799.

Upon a full view of the whole cause, this court is of opinion that the Circuit Court erred in dismissing the bill of the plaintiffs; and that the decree ought to be reversed and annulled, with directions to set aside the award and the judgment rendered in October, 1799, and to direct an account between the plaintiff, Holker, and the defendant.

DECREE.

This cause came on to be heard on the transcript of the record, and was argued by counsel: On consideration whereof this court is of opinion that the award made in October, 1799, in a suit brought by the plaintiff, John Holker, against the defendant, Daniel Parker, in the Circuit Court of the United States for the District of Massachusetts, and referred by a rule of that court to referees therein named, and the judgment of the said court rendered thereon, ought not to bar the claim of the plaintiffs in this cause to an account of all the transactions of the parties, Holker and Parker, with each other as members of the firm of Daniel Parker & Co., and that there is error in the decree of the Circuit Court dismissing the bill of the plaintiffs. This court doth therefore decree and order that the decree of the Circuit Court be reversed and annulled, and that the cause be remanded to the Circuit Court to be further proceeded in according to law.

456*] *After the opinion was delivered, P. B. Key mentioned that in the opinion the court had said that an account ought to be taken, but the decree only directs that the proceedings below should be according to law.

We wish for leave to answer fully before an account be taken, and wish it may be understood that this court does not mean to prevent a further answer.

MARSHALL, *Ch. J.* That is the meaning of the court.

Cited—4 Wash. 511.

BARNITZ'S LESSEE *v.* ROBERT CASEY.

Present—All the Judges.

The statute of descents in Maryland has not declared how an intestate estate shall descend, which was derived to the intestate from his half brother, or from his brother of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend as at common law.

A devise to A in fee, and if he shall die under the age of 21 years, and without issue, then to B in fee, is a good executory devise; and if B die before the contingency happen, it devolves upon his heir, and so from heir to heir until the contingency happen, when it vests absolutely in him only who can then make himself heir to B, the executory devisee. And although A be the heir at law of B, yet the executory devise thus devolving on him is not merged in the precedent estate, but on the death of A devolves to the next heir of B. One tenant in common cannot maintain ejectment against his cotenant, without actual ouster.

ERROR to the Circuit Court for the District of Maryland, in an ejectment brought by the lessee of Barnitz against Casey, to try the title of Barnitz to certain real estate in Baltimore.

The facts of the case were stated by STORY, J., in delivering the opinion of the court, as follows:

On or about the 6th of Feb., 1780, Daniel Barnitz died seized of the premises in the declaration mentioned, having, by his will, devised the same to his wife, Catharine Barnitz, in fee, and leaving issue, by his said wife, an only child and heir, Elizabeth Barnitz, who intermarried with one Charles M'Connell, by whom she had an only child, John M'Connell; after whose birth, and sometime in 1781, Charles M'Connell died. Afterwards, his widow, Elizabeth, intermarried with one John Hammond, by whom she had one child only, John Barnitz Hammond, and died on the 22d of April, 1788. After her death, John Hammond intermarried with Elizabeth Anderson, and died on the 7th of April, 1805, leaving issue by the last marriage, Jane B. Hammond and Henry Hammond, his heirs at law, who are now alive, under whom the defendant in ejectment claims. On the 7th of April, 1794, Catharine Barnitz died seized of the premises, *having [***457** first duly made her last will and testament. By that will she devised to the said John M'Connell, in fee, two certain parcels of land. She then devised another parcel of land, including her mansion-house, to the said John Barnitz Hammond, to the intent and uses following, viz., subject (as to the rents thereof) to certain trusts for the maintenance and education of the said John Barnitz Hammond, and for the payment of certain specific debts of the testatrix, "to the use of John Hammond, the father, for "and during the minority of the said John B. "Hammond, if he shall so long live, provided "the said John Hammond shall maintain, "clothe and educate the said John B. Ham-"mond, out of the rents thereof during his "minority; and from and immediately after "the said John B. Hammond shall arrive to

"the age of 21 years, or the death of the said "John Hammond, his father, which shall first "happen," then to the said John B. Hammond in fee. The testatrix then provides, "and if "it should hereafter happen that the said John "M'Connell should die before he shall arrive "to the age of 21 years, and without issue, "then I give, devise, and bequeath all the "estate of the said John M'Connell, which is "hereby devised to him, to go immediately to "the said John B. Hammond, his heirs and "assigns forever. And if it should hereafter "happen that the said John B. Hammond "should die, before he shall arrive to the age "of 21 years, and without issue, then and in "such case, after the payment of my debts as "above mentioned, I give, bequeath, and de-"vise," &c. (the same land and mansion-house before devised to John B. Hammond) "to the "said John Hammond, his heirs and assigns "forever; and also all the residue of estate "herein before or after devised to the said John "B. Hammond, and not hereby otherwise dis-"posed of, I then, and in such case, give and "devise the same to the said John M'Connell, "to hold to him, his heirs and assigns forever, "from and immediately after the death of the "said John B. Hammond as aforesaid; and in "case of the death of both of my grandsons, "under age and without issue as aforesaid, "then I give, devise, and bequeath all that part "of my estate which I have herein before "given to the said John M'Connell, to Charles "Barnitz, of," &c., "to hold to him, his heirs "and assigns forever."

458*] *The testatrix then provides for the payment of her debts, by a sale, if necessary, of some of her lots of land, on or near Church Hill, in Baltimore, and then proceeds, "And I "give and devise all the rest and residue of "of the said lots on or near Church Hill afore-"said, and all my estate therein (subject never-"theless to the devises aforesaid) to my said "grandsons John M'Connell and John B. "Hammond, their heirs and assigns forever, "to be equally divided between them, share "and share alike, as tenants in common, and "not as joint-tenants." After some inter-mediate bequests, the testatrix devises "all the "rest, residue, and remainder of her estate, "real and personal, to the said John M'Connell "and John B. Hammond, their heirs and as-"signs forever, to be equally divided between "them, share and share alike."

John M'Connell attained his full age of 21 years, married, had issue, and afterwards, on the 7th of April, 1802, died without leaving any surviving issue. And John B. Hammond died on the 12th of February, 1808, under the age of 21 years, and without issue.

The lessors of the plaintiff are the children and heirs at law of Charles Barnitz, who was the only brother of Daniel Barnitz, the testator. And upon the defect of lineal heirs, the said lessors claim as next heirs, in blood, of John M'Connell, on the part of his mother Elizabeth Barnitz, the daughter of Daniel Barnitz. It is admitted that the inheritable blood is extinct on the part of Charles M'Connell, the father of John M'Connell.

At the death of John B. Hammond, the property consisted of four descriptions; which it may be proper to enumerate.

1. The land specifically devised to John M'Connell, with a limitation over to John B. Hammond.

2. The land specifically devised to John B. Hammond, with a limitation over in fee to his father.

3. The moiety of the Church Hill lots, and the residuary estate devised to John M'Connell, in fee.

*4. The moiety of the Church Hill [**459** lots, and the residuary estate devised to John B. Hammond in fee, with a limitation over to John M'Connell.

At the time of the death of Catharine Barnitz (as she survived her daughter), her two grandsons, M'Connell and Hammond, were her heirs at law.

Harper, for plaintiff in error.

1. As to the devise to John M'Connell, with limitation over, in case of his death under age and without issue, to J. B. Hammond. This was a fee-simple in M'Connell, with a conditional limitation, and not an estate tail. (1 Fearne on Contingent Remainders, 9, 10, Dublin ed. 1795, id. 409; Powell on Devises, 261; 7 T. R., 589, *Shears* v. *Jeffrey;* Plowd., 408; 3 Co., 10; Carthew, 175; Dyer, 127.)

Upon J. M'Connell's arrival at full age he had an absolute estate in fee, because the condition never could happen which was to defeat his estate.

As he took by purchase, and not by descent, and as at the time of his death he left neither child, nor brother or sister of the whole blood, the estate descended, according to the statute of descents in Maryland, to his brother of the half blood, John B. Hammond.

J. B. Hammond took it by descent, through his mother, and therefore the estate descended to him "on the part of his mother," within the meaning of the statute.

He certainly took by descent, and not by purchase; and the *commune vinculum*, which connected him with his brother, must be traced through his mother.

The statute was intended to prevent escheats *pro defectu sanguinis*, and to provide for all cases.

The legislature meant to comprehend all cases in three classes.

1. Where the estate had descended to the intestate, on the part of the father.

2. Where it had descended, on the part of the mother; and

*3. Where it had vested in the in- [**460** testate by purchase, and not derived from or through any of his ancestors.

The court will not suppose that the legislature has omitted to provide for the case where the estate has descended from a brother to a brother, but will rather place the present case in the second class.

The legislature did not mean to limit the 2d class to cases where the estate had descended from the mother, because it provides, that if there be no child or descendant of the intestate, the estate shall go to the mother: And it would be absurd to say, that an estate which had descended from the mother, should descend again to the mother. So if the estate had descended from the mother's father directly to the mother's son, it would be an estate which had descended to the son on the part of his mother,

and yet it had not descended either from or through his mother, for the estate had never vested in her. The statute must mean every case where the blood must be traced through the mother; every case where the mother is a link of the chain which connects the intestate with the person from whom the estate descended to him.

This estate, therefore, must be understood, as having descended to J.B. Hammond, on the part of his mother; and therefore, inasmuch as at his death he left neither child nor descendant, nor mother, nor brother or sister of the blood of the mother, nor descendant of such brother or sister, nor grandfather on the part of the mother, nor descendant of such grandfather, nor father of such grandfather, and inasmuch as the lessors of the plaintiff are the descendants of the father of such grandfather, the estate must, by the provisions of the statute, descend to them.

2d. The devise to John M'Connell, in fee, of the moiety of the Church hill lots, and of the general residuum, vested in him a fee-simple estate from the beginning. He took by purchase under the will. It descended to J. B. Hammond by the same rule of descent as in the former case, and by the same construction of the statute has descended from him to the plaintiffs.

3d. The third case under this will, is that of the specific devise to J. B. Hammond, with **461***] limitation over, in *case of his death under age and without issue, to John M'Connell.

J. B. Hammond died under age and without issue, so that the fee devised to him was defeated, and would have vested immediately in John M'Connell, if he had been alive, but he died in the life time of J. B. Hammond. In whom then did it vest? By the rules of the common law, John M'Connell had such an interest in the devise, as was descendible to his heirs. Who were his heirs? Not they who were such at the time of his death, but they who answered the description of his heirs at the time of the death of J. B. Hammond. (2 Fearne, 529; Id., 535; 2, Wilson, 29; *Goodright* v. *Searle.*)

John M'Connell, if he had been alive at the time of the death of J. B. Hammond, would have taken the fee by purchase, and the lessors of the plaintiff were the only persons who could at that time entitle themselves as his heirs, there being no heirs of the paternal line then living.

Martin and *Pinkney*, Attorney-General, contra.

The executory devises were void, because the contingency is the dying "without issue" indefinitely, and not limiting it to the case of dying without leaving issue alive at the time of his death. (1 Fearne, 411; 2 Fearne, 74, 144, 5, 154; 1 Sid., 148, *Cotterson* v. *Right;* 4 Bac. Ab., 251, Gwillim's Ed.; 2 Fearne, 187, 358; 1 P. Wms., 198, *Nichols* v. *Hooper;* 2 Fearne, 245; 2 Fearne, 206, 159, 154, 160; 2 H. Bl., 358.)

The limitations, over being void, each took an absolute fee-simple in the lands devised to him.

Upon the death of John M'Counell, the estate descended, according to the provisions of the statute, to J. B. Hammond, who took, not by way of descent at common law, but by force of the statute. The preamble of the statute shows that the legislature meant to abolish the law of descents altogether.

The expression "on the part of the mother," means, from or through the mother. Now this estate never came to J. B. Hammond from or through his mother. Under *the 3d [***462** branch of the statute, every estate which comes to an intestate, "and not derived from or through either of the ancestors," is supposed to have come by purchase, and is to descend accordingly. This estate was not derived to the intestate, J. B. Hammond, from or through either of his ancestors, and therefore is to descend as if it came to him by purchase. This construction makes the statute provide for all cases, whereas the construction insisted upon by the plaintiffs, leaves the cases where the estate has descended or passed by force of the statute from brother to brother of the whole blood, or from son to father, or from husband to wife, or from wife to husband, wholly unprovided for; for these are not cases of purchase, nor of descent from ancestors.

If, however the case of Hammond be *casus omissus*, then the estate may descend at common law through the line of his father.

One argument of the plaintiff's counsel was built upon the absurdity of supposing that the statute directed an estate to descend to the mother, which had already descended from her. But the statute only directs it to descend to the mother, by way of illustration, so as to lead to the heir.

But if the limitations over were good, then John M'Connell died seized of an hereditament, a descendible interest, which went to his heir. Who was his heir? This same J.B. Hammond, so that either way the absolute estate in fee vested in him as a purchaser, and descended to his heirs. Again, the 3d section of the statute declares, "that no right in the inheritance "shall accrue to or vest in any person, unless "such person is in being, and capable in law "to take as heir at the time of the intestate's "death." Now these plaintiffs were not "capable in law to take as heirs" to John M'Connell "at the time of his death." So that they are prohibited by the statute from taking the benefit of this executory devise, even if they could do so by the common law. Under the statute, J. M'Connell had, at his death, an inheritable interest in the land devised to J. B. Hammond, with limitation over. The statute makes no difference between vested and contingent interests; they all descend alike.

*But there is a fatal objection to the [***463** plaintiff's recovery in this case. The lessors of the plaintiff are tenants in common with the defendants; and one tenant in common cannot maintain ejectment against another, without proof of actual ouster. Such ouster is not proved.

Harper, in reply.

The defendants have confessed lease, entry and ouster, and therefore, an actual ouster need not be proved.

The whole question is as to the meaning of the words "descent on the part of the mother."

There are only two modes of acquiring property, viz., by purchase and by descent; by the act of the party, or by act of law.

Descents are either lineal or collateral. Lineal is from the ancestor in the direct descending line. Collateral, is where you first ascend to the common ancestor and then descend until you find the heir.

The construction of the statute adopted by the defendants, allows only one kind of descent —lineal. The statute uses the word "descent" generally, comprehending both kinds. It says from or through either of his ancestors. "From" applies to lineal descent; "through" to collateral. If the statute includes collateral descents, there is an end of the question. If a man takes an estate by reason of his mother, he takes through his mother. If a man takes as great grandson from I. S., the estate has not passed through the father or grandfather, yet he takes through them. So in tracing a collateral descent, the estate does not go through the intermediate links, yet the heir claims through them.

As to the executory devises. The contingency was not too remote nor indefinite. It must be determined within 21 years. If the contingency had been simply dying without issue, there would be weight in the objection; but it is dying under age, and without issue; so that if he came of age, or had issue, the estate became absolute. Here are not two conditions, but two facts making one condition.

464*] *The plaintiffs do not take as heirs, but as purchasers under the will by the description of their person; if they answer the description of heirs at the time the contingency happens on which the executory devise takes effect, they must take. A possibility is not descendible. They take as purchasers. This is an answer also to the objection raised upon the 3d section of the statute. They do not claim as heirs, and therefore are not within the statute. The statute refers to their natural capacity to take. It alludes to the disability of alienage, attaint, &c., and was intended to exclude posthumous children in cases of collateral descent.

March 11th, 1813. *Present*, MARSHALL, *Ch. J.*, WASHINGTON, DUVALL and STORY, *J. J.*

The court having taken time since last term to advise,

STORY, *J.* (after stating the facts of the case), delivered the opinion of the court as follows:

It is true, that the general rule is, that an heir shall not take by devise, when he may take the same estate in the land by descent. (1 Roll. Abr., 626. *l.* 30; Hob., 30; 1 Salk., 242; 1 Bl. Rep., 22.)

But it is not denied that all the estates which each of the grandsons derived under the will were estates by purchase. Admitting the executory devises over to be good, there could be no doubt as to any part of the estates; for the estates are of a quality different from what the parties would have taken in the course of descent.

It has been argued by the plaintiff's counsel, upon the foregoing facts, that as to the whole estate immediately devised to John M'Connell, the lessors of the plaintiff are entitled to recover, in the events which have happened, as his heirs *ex parte materna;* and that as to the estate devised to him upon the contingency of the death of John B. Hammond under age and without issue, the lessors of the plaintiff are entitled to recover as the heirs at law of John M'Connell, at the time when the contingency happened, although not heirs at the time of his death.

*The decision of these points depends [***465** upon the true construction of the statute of descents of Maryland, and the application thereto of the principles of the common law.

This statute of descents (1786, ch. 45), after reciting that the law of descents which originated with the feudal system and military tenures, is contrary to justice, and ought to be abolished, enacts, "That if any person seized of an estate," &c., "shall die intestate thereof, such lands," &c., "shall descend to the kindred, male and female, of such person, in the following order, to wit: First, to the child or children, and their descendants, if any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the father, then to the father, and if no father living, then to the brothers and sisters of the intestate of the blood of the father, and their descendants equally, and if no brother or sister as aforesaid, or descendant from such brother or sister, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather and their descendants, in equal degree equally, and if no descendant of such grandfather, then to the father of such grandfather, and if none such living, then to the descendants of the father of such grandfather in equal degree, and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree, without end: And if no paternal ancestor, or descendant from such ancestor, then to the mother of the intestate, and if no mother living, to her descendants in equal degree equally, and if no mother living, or descendants from such mother, then to the maternal ancestors and their descendants in the same manner as is above directed as to the paternal ancestors and their descendants. And if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendant as aforesaid, then the estate shall go to the mother, and if no mother living, then to the brothers and sisters of the intestate of the blood of the mother, and their descendants in equal degree equally, and if no such brother or sister, or descendant of such brother or sister, then to the grandfather on the part of the mother, and if no such grandfather living, then to his descendants in equal degree equally, and if no such *descendant of [***466** such grandfather, then to the father of such grandfather, and if none such living, then to his descendants in equal degree, and so on, passing to the next male maternal ancestor, and if none such living, to his descendants in equal degree, and if no such maternal ancestor, or descendant from any maternal ancestor, then to the father of the intestate, and if no father living, to his descendants in equal degree equally, and if no father living, or descendant from the father, then to the paternal ancestors and their descendants, in the same manner as is above directed as to the maternal ancestors."

"And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the

estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants in equal degree equally, and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood and their descendants, in equal degree equally, and if no brother or sister of the whole or half blood, or any descendant from such brother or sister, then to the father, and if no father living, then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather, in equal degree equally, and if no such grandfather, or any descendant from him, then to the grandfather on the part of the mother, and if no such grandfather, then to his descendants in equal degree equally, and so on without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants; and giving preference to the paternal ancestor and his descendants; and if there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be; and if the husband or wife be dead, then to his or her kindred in the like course as if such husband or wife had survived the intestate, and then had died entitled to the estate by purchase; and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives in equal degree equally."

467*] *Three classes of cases are here in terms provided for.

1. "Estates descended to the intestate on the "part of the father."

2. "Estates descended to the intestate on the "part of the mother."

3. "Estates vested in the intestate by pur- "chase and not derived from or through either "of his ancestors."

The case of a *propositus* dying seized of an estate which descended to him from his brother who had taken the same by purchase or by descent not *ex parte paterna* or *materna;* and the case of a *propositus* dying seized of an estate which descended to him from his own child who had taken the same by purchase or by a like descent; are not directly within the language of the statute. For, by the common law, a descent from brother to brother is held to be an immediate descent, and not from or through the parents; and the express provision of the statute of Maryland as to estates of purchase, necessarily involves the same conclusion; and the same may be declared of a descent from a child to a parent under the same statute.

It has been argued that the legislature intended to form a complete scheme of descents; and that the court ought not to construe any case to be a *casus omissus,* if by any reasonable construction the words can be extended to embrace it. Both parties accede to this argument, but they apply it in a very different manner. The plaintiffs contend that the descent from brother to brother was meant to be included in the first and second classes of descents, as the parents were the common link of connection from and through whom the consanguinity was to be sought; that therefore the descent, in such case, is *ex-parte paterna,* or *materna,* as the father or mother happens to be the *commune vinculum.* And the plaintiffs rely on the words "and not derived from or through either of his ancestors," in the clause embracing the third class, as distinctly showing that the legislature deemed every case of descents to be completely within the preceding classes. On the other hand, the defendants contend that whatever might be the legislative supposition, it is impossible to support the position, that a descent from brother to brother, or from child to parent, is a descent *ex-parte paterna* or *materna.* *It is therefore, either a *casus omissus,* or the words "and not derived from or through either of his ancestors" are to be considered not as qualifying and limiting the preceding words, but as either constituting a fourth class of cases, embracing all such as are not included in the three preceding classes; or as explaining estates by purchase to include all cases which are not paternal or maternal descents. [***468**

There are certainly intrinsic difficulties in admitting either of these constructions. If the legislature have proceeded on a mistake, it would be dangerous to declare that a court of law were bound to enlarge the natural import of words in order to supply deficiencies occasioned by that mistake. It would be still more dangerous to admit that because the legislature have expressed an intention to form a scheme of descents, the court were bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed by adopting the construction contended for by either party.

It is not a descent from or through the paternal or maternal line, in the sense of the common law. Nor is it a purchase.

The words "and not derived from or through either of his ancestors" are manifestly used as explanatory of the legal import of purchase. They are the exact words which the common law selects to distinguish the estate of a purchaser from the estate of an heir.

It is obvious that the legislature use the words descent and purchase in their technical and legal sense. They have also expressly provided for the case of a descent from brother to brother, passing by the parents; and from a child to a parent, when there are no brothers or sisters. These descents must therefore be direct and immediate; and the former case is so deemed also at the common law. It is therefore in our judgment perfectly clear, that a descent from brother to brother is not within the statute, and of course is a *casus omissus,* to be regulated by the common law.

To apply this to the present case. By the arrival of John M'Connell at the age of 21 years, all the estates *devised to him [***469** immediately became absolute estates in fee-simple. On his death they passed to his half brother, John B. Hammond; and upon his death they passed to the heirs at law of the latter. The lessors of the plaintiff have therefore made no sufficient title thereto.

Let us now consider the second question: whether the lessors of the plaintiff have any title to the estates which were devised over to John M'Connell upon the contingency of John

B. Hammond's dying under age and without issue.

It has been argued by the defendant's counsel that this executory devise is void because the contingency is too remote.

It is the acknowledged rule, that an executory devise is not too remote if the contingency may happen within a life or lives in being, or 21 years and a few months after.

In the present case the contingency must have happened within 21 years at all events. For if John B. Hammond attained his full age the estate vested absolutely. To have defeated the estate over, it was sufficient either that he attained his full age, or died under age leaving issue. The authorities are conclusive on this point. (1 Wils., 140, 270; 2 Burr, 873; 1 Taunt., 174; 2 Bos. and Pul., 38; 12 East., 288; 2 Str., 1175.) There is no validity therefore in this objection.

In the next place it will be necessary to consider what is the nature of an executory devise as to its transmissibility to heirs, where the devisee dies before the happening of the contingency.

And it seems very clear that at common law, contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happens. (Pollexfen, 54; 1 Rep., 99; Cas. Temp. Talb., 117.) In such case, however, it does not vest absolutely in the first heir so as upon his death to carry it to his heir at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make **470***] himself heir to the first devisee at *the time when the contingency happens, and the executory devise falls into possession.

This rule is adopted in analogy to that rule of descent which requires that a person who claims a fee-simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir of such purchaser at the time when that reversion or remainder falls into possession. (Co. Lit., 11, [b.] 14, [a.] 3 Rep., 42.) Nor does it vary the legal result that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee, for though on the death of the latter the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency and then vests absolutely in the then heir of the executory devisee. The case of *Goodright* v. *Searle* (2 Wils., 29), is decisive on this point, and indeed runs on all fours with the present.

But it is contended that the statute of descents of Maryland has changed the rule of the common law in this respect, and has made the death of the intestate the point of time from which the descent and heirship are in every case to be traced. The third section, which is relied on for this purpose, enacts as follows: "That no right in the inheritance shall accrue "to or vest in any person, other than to child- "ren of the intestate and their descendants, un- "less such person is in being, and capable in "law to take as heir at the time of the intestate's "death; but any child or descendant of the in- "testate, born after the death of the intestate, "shall have the same right of inheritance as if "born before the death of the intestate."

In our judgment, the conclusion drawn from this clause is not correct. The object of the section is to limit the natural capacity to take, as heirs to persons in being at the time of the death of the intestate, where the estate is then capable of vesting in possession; and not to make persons heirs, who, if in being at the time, would not, by the common law, answer the description of absolute heirs, or to give a vested absolute interest, where the common law had given only a possible contingent interest. The legislature had in view cases of *posthu- [***471** mous children, and cases where a descent to an heir had been defeated by the subsequent birth of a nearer heir. The argument of the defendants on this point ought not, therefore, to prevail. No question has been made as to the land specifically devised to John B. Hammond in fee with a limitation over to his father in fee. As that limitation over was a good executory devise, and, in the events which happened, took effect, it is very clear that the lessors of the plaintiff cannot claim title thereto. This is indeed conceded on all sides.

The result of this opinion accordingly is, that the lessors of the plaintiff are entitled, as heirs of John M'Connell at the happening of the contingency, on the death of John B. Hammond, under age and without issue, to one moiety of the Church Hill lands, and the residuary estates as tenants in common with the heirs of John B. Hammond; but they are not entitled to any portion of the lands of which John M'Connell had an absolute vested fee at the time of his decease.

As, however, a tenant in common cannot in general maintain an action of ejectment against his co-tenant, and there are no facts found in this case to prove an actual ouster and to take it out of the general rule, the consequence is that the judgment, in the opinion of a majority of the court, must be affirmed with costs.

Cited—16 How. 283; 2 Curt. 135.

BLACKWELL
v.
PATTON & ERWIN'S LESSEE.

Absent—WASHINGTON, *J. and* TODD, *J.*

By the laws of N. Carolina and Tennessee a deed for land in Tennessee, executed in N. Carolina, by grantors residing there in the year 1794, proved in 1797, by one of the subscribing witnesses before a judge in N. Carolina, and recorded in 1808, in the proper county in Tennessee, is valid, and may be given in evidence in ejectment.

In ejectment the date of the demise in the declaration may be amended during the trial so as to conform to the title.

The first grant from the state of N. Carolina upon an entry, is valid, although issued upon a duplicate warrant, the original being in the hands of the Surveyor-General, although a subsequent grant issue upon the original warrant for other lands.

ERROR to the Circuit Court for the District of Tennessee, in an action of ejectment brought by the lessee of Patton and Erwin, against Blackwell, for 5,000 acres of land, in Bedford county, in the state of Tennessee.

At the trial the defendant took three bills of exceptions.

The first stated, that the plaintiff produced in evidence, at the trial, a deed of bargain and sale from I. G. and Thomas Blount, to whom **472***] it was alleged *the land had been granted by the state of North Carolina, while it was a part of that state. The deed from I. G. and T. Blount, was executed on the 9th of October, 1794, to David Allison. On the 29th of September, 1797, it was proved by one of the subscribing witnesses before John Heywood, a judge of the Supreme Court of law and equity, for the state of North Carolina, and registered in Stoke's county.

On the 9th of December, 1807, the handwriting of the subscribing witnesses, who were dead, and of the grantors, was proved before Samuel Powell, one of the judges of the Supreme Court of law and equity of the state of Tennessee, who ordered it to be registered. At November term, 1808, in the Supreme Court of Tennessee, for Mero district (in which the land lies), the hand writing of the grantors, and of the subscribing witnesses, was again proved, and on the 28th of December, 1808, the deed was recorded in the proper county. On the trial (which was in June term, 1810), the plaintiff offered parol evidence to prove the handwriting of the subscribing witnesses and their death before the month of December, 1807, and also to prove the handwriting of the grantors.

To the admission of this evidence the defendant below objected, but the court overruled the objection, and admitted the deed in evidence.

The 2d bill of exceptions stated that the plaintiff also offered in evidence a deed to his lessors, bearing date after the demise laid in the declaration, to the admission of which deed the defendant objected, but the court admitted it to be read in evidence, saying the date of the demise was immaterial, or the plaintiff might amend his declaration, which he did, before the jury retired from the bar, by altering the date of the demise.

The 3d bill of exceptions stated, that the defendant offered evidence to prove that the original grant or patent from the state of North Carolina to I. G. and Thomas Blount, was issued upon a duplicate warrant, while the original warrant was in the hands of the surveyor general; and that I. G. and Thomas Blount afterwards obtained another grant or patent **473***] from the state *of North Carolina for other lands upon the original warrant. To the admission of this evidence, the plaintiff objected, and the court rejected it.

Martin, for the plaintiff in error.

1. The deed from I. G. and T. Blount to Allison, was not proved and registered according to the laws of North Carolina, or of Tennessee, so as to be valid.

The law of North Carolina (1715, ch. 30, § 5, p. 18) requires every deed to be acknowledged, or proved, in open court, or before the chief justice, and registered within 12 months after its date, in the county where the land lies. This deed bears date the 9th of October, 1794, was never acknowledged nor properly proved, and was not registered till the 28th of December, 1808.

By the law of England, a deed of bargain and sale is inoperative, until enrolled; in the same manner as a deed of feoffment does not operate until livery of seizen. A deed by a joint-tenant—a deed for the reversion and payment of rent to the bargainor are good before enrollment. The bargainee is not seized before enrollment, and if he dies before enrollment, his wife is not entitled to dower, although when enrolled it relates back to its date. (1 Bac. Abr., 473; 2 Bl. Com., 311; 3 Wood's Conveyancer, 32 to 34.)

2. The court ought not to have permitted the deed to the lessors of the plaintiff, dated after the demise, to be given in evidence on that declaration, nor to have suffered the plaintiff to amend his declaration after the jury was sworn. (2 Str., 1086, *Beddington* v. *Parkhurst*; Runnington, 87; Bul. N. P., 105, *Basset* v. *Basset*.)

Courts have gone no further in permitting amendments in ejectment, at the trial, than to enlarge the term which had expired, or to correct grammatical errors. Although the declaration is a fiction in form, yet what is of substance must be truly set forth.

3. The act of North Carolina (1783, ch. 2, p. 322, § 9, 10 and 11) which prohibits the issuing of a grant *upon a duplicate warrant, [***474** was in force when this warrant was issued. It was a fraud upon the state, for only one warrant was paid for, and yet it was made to operate as two.

Campbell, contra.

1st. There were other laws of North Carolina, and of Tennessee, extending from time to time the term for registering deeds, so that any deed, even of 50 years standing, may now be registered.

The probate of the deed, before judge Haywood, on the 29th of September, 1797, brings the deed within the act of Tennessee (1809, Nov. 23, ch. 100, § 4, p. 129), by which it is enacted, "That all deeds, or mesne conveyan-"ces, for land within this state, which shall "have been made and executed out of the lim-"its of this state, and shall have been proven "by one or more of the subscribing witnesses "thereto, or acknowledged by the grantor or "grantors, before any judge of any court in "another state, or before the mayor of any "city or corporation in another state, and shall "have been registered in this state in the coun-"ty where the land or any part thereof lies, "within the time required by law for register-"ing the same, such probate and registration "shall be good and sufficient to entitle the same "to be read in evidence in any court within "this state."

But the probate and the admission to registration is conclusive on this point.

To show that the term for registering deeds had been kept open until the present time, he cited the following laws: Iredell's revisal of the laws of North Carolina, p. 83, 1741, c. 1, § 2, 3; p. 173. 1756, c. 6, § 2, 3; p. 196, 1760, c. 6, § 2; p. 213, 1764; p. 224, 1766; p. 246; 1770; p. 269, 1773; p. 289, 1777; p. 424, 1782; p. 487, 1784; p. 590, 1786; p. 640; 1 Sess. a. a. p. 665, 668. Laws of Tennessee, 1794, c. 22, § 3, id. 1796, 1797, 1801, c. 20, § 1; 1803, c. 57; 1805. c. 16, § 1; 1807, c. 85, § 1, 2; 1809, c. 100, § 4.

2d. MARSHALL, *Ch. J.* Pass over the 2d point.

Campbell.* 3d. This was the first [*475** grant which issued upon this entry. It was good when it issued, and cannot be invalidated by a subsequent grant on the same warrant. Both cannot be void. If either, it must be the last.

March 11th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The writ of error in this case is brought to reverse a judgment obtained by the defendants in error against the plaintiffs in an ejectment brought in the Circuit Court of West Tennessee. At the trial, the plaintiffs in that court offered in evidence in order to make out their title, a deed bearing date the 9th of October, 1794, from J. G. Blount and Thomas Blount, of North Carolina, to David Allison, of Philadelphia, which deed was recorded in the county in which the lands lie on the 28th day of December, 1808. The defendants objected to the admission of this deed, and excepted to the opinion of the court overruling the objection.

The original law requiring the enregistering of deeds, passed in North Carolina (then comprehending what is now the state of Tennessee), in the year 1715. This act requires that the deed shall be acknowledged by the vendor, or proved by one or more evidences upon oath, either before the Chief Justice for the time being, or in the court of the precinct where the land lies, and registered by the public register of the precinct where the land lies within twelve months after the date thereof. It was afterwards enacted, that the deed might be registered by the clerk of the county in which the land lies, and the time for the registration of deeds was prolonged until Tennessee was erected into an independent state, after which the time for enregistering of deeds continued to be prolonged by the legislature of that state.

In the year 1797, the legislature of Tennessee enacted a law, declaring that deeds made without the limits of the state should be admitted to registration on proof that the same was acknowledged by the grantor, or proved by one or more of the subscribing witnesses in open court, in some one of the courts of the United States, and on no other proof whatever, except where the party holding such deed shall have [**476***] the same proved *or acknowledged within the limits of the state of Tennessee, agreeable to the mode heretofore in force and use in that state.

It is contended by the counsel for the defendants in error, that the deed being recorded in the proper county, the judgment of a competent court has been given on the sufficiency of the testimony on which it was registered, and that judgment is not examinable in any other tribunal. But this court is not of that opinion. The proof on which a deed shall be registered is prescribed by law, and it is enacted that the deed shall not be good and available in law, unless it be so proved and recorded. The evidence therefore is spread upon the record, and is always attainable. The order that a deed should be admitted to record is an *exparte* order, and might often be obtained improperly if the order was conclusive. It is believed to be the practice of all courts, where the law directs conveyances to be recorded, and prescribes the testimony on which they shall be recorded in terms similar to those employed in the act of North Carolina, to hold themselves at liberty to examine the proof on which the registration has been made.

This deed in the present case was proved before Judge Haywood, in North Carolina, by one of the subscribing witnesses thereto, on the 29th of September, 1797, and registered in Stoke's County, in North Carolina.

On the 9th day of December, 1807, the handwriting of the subscribing witnesses, who were dead, and of the grantors, was proved before Samuel Powell, one of the judges of the Supreme Court of law and equity, in the state of Tennessee, who thereupon ordered the deed to be registered; and afterwards in November term, 1808, the same proof was received in open court in the county where the lands lie, and was ordered to be registered by that court, which order was executed.

This court is of opinion, that the deed was not sufficiently proved according to the then existing law. The probate before judge Haywood was not sufficient to prove it as a deed made out of the state, because the act of 1797 required that such probate should be made in open *court. The proof made before [**477** Judge Powell, and in open court, is sufficient, because it was not made by a subscribing witness.

On the 23d of November, 1809, the legislature of Tennessee passed an act, declaring that all deeds for land within the state, made out of the state by grantors residing without the state, and "which shall have been proven by one or more of the subscribing witnesses thereto, or acknowledged by the grantor or grantors before any judge of any court in another state, or before the mayor, &c., and shall have been registered in this state in the county where the land, or any part thereof, lies, within the time required by law for registering the same, such probate and registration shall be good and sufficient to entitle the same to be read in evidence in any court within this state."

This act appears to the court to cover the precise case. This was a deed for land lying within the state of Tennessee, made out of the state by grantors residing without the state, which had been proven by one of the subscribing witnesses thereto, before a judge of a court of another state, and had been registered in the county where the land lay, within the time required by law for registering the same.

This act gave complete validity to the registration made in December, 1808, and entitled the deed to be read in evidence. It looked back, in order to affirm and legalize certain registrations made on probates which did not satisfy the laws existing at the time, but which the legislature deemed sufficient for the future.

In tracing his title, the plaintiff in the Circuit Court gave in evidence a deed to himself which bore date posterior in point of time to the demise laid in the declaration of ejectment. The defendant, on this account, objected to the deeds going in evidence to the jury, but the court overruled the objection, and declared the date of the lease to be immaterial, and that it should be overlooked, or the plantiff have leave to amend. The declaration was amended by striking out the date of the lease mentioned in the declaration, and inserting a date posterior to the conveyance made to the plaintiff.

*In an ejectment the lease is entirely [**478** a fiction invented for the purpose of going fairly to trial on the title. Courts have exercised a full discretion in allowing it to be amended. A plaintiff has frequently been allowed to enlarge the term when it has expired before a

final decision of the cause. Between making the term extend to a more distant day, and commence at a later day, the court can perceive no difference in substance. They are modifications of the same power intended to effect the same object; and although not precisely the same in form, the one is not greater in degree than the other. The amendment therefore was properly allowed.

Although this court is of opinion, that the Circuit Court erred in saying that it was unnecessary to prove a title in the lessor of the plaintiff at the date of the demise laid in the declaration, yet it is an error which could not injure the defendants, or in any manner affect the cause. The amendment being allowed, the question whether the deed could have been read in evidence had the amendment not been made becomes wholly immaterial, and this court will not notice it.

For the purpose of showing that the original grant was void, the defendant then offered evidence to prove, that it was founded on a duplicate warrant issued by John Armstrong, entry-taker of western lands for the state of North Carolina, in the year 1793, the original warrant being still in the hands of the Surveyor-General of the middle district within which the original entry was situated; and that the grantees, after the said grant was issued, obtained the original warrant from the Surveyor-General, and procured another grant founded thereon for other lands. To the admission of this testimony, the plaintiff objected and the court sustained the objection. To this opinion also an exception was taken.

By the laws of North Carolina, under which this entry was made, any citizen was permitted to enter with the entry-taker any quantity of land not exceeding 5,000 acres, which it was his duty to describe specifically. After the expiration of three months the entry-taker was to give him a copy of the entry, with a warrant to the surveyor to survey the land. As no **479***] other *land than that described could be surveyed under this entry and warrant, while the land really entered remained vacant, it was entirely unimportant whether the survey was made under the first or a second copy of the entry. If indeed two persons claimed the same land, under different surveys and grants, the elder patentee would of course hold the land at law. But no person other than such subsequent patentee, or one claiming under him, could contest the elder grant. To the state, and to all the world, it was perfectly immaterial when this grant issued, whether it emanated on the first copy of the entry, or on any other copy, as no other use had then been made of the first copy, and this grant was unimpeachable.

In 1784, a power was given to remove entries when they were made on lands previously granted or entered. But certainly this would not extend to the removal of an entry, and the survey of other lands on a copy thereof, which entry had already been executed and carried into grant, either on the first or on any other copy. The face of the grant gave no notice that it had issued on a second copy of the entry, and as the case was not provided for by law, it was not improbable that every copy given by the entry-taker would bear the same appearance. There was nothing which would indicate to a purchaser that some future fraud might possibly be practiced whereby another grant might be obtained, and which might caution him, that a title, good to every appearance, was infected by a circumstance into which the law did not expect him to inquire. Had no subsequent patent issued in this case for other lands, it would not be contended that this patent was either void or voidable, and it is perfectly clear that a patent which was valid when issued, never can be avoided in the hands of a fair purchaser, by a subsequent fraud committed by the original patentee. It is the subsequent patent which injures the state, and which is obtained by fraud. It is the subsequent patent, if either, the validity of which is questionable.

In the year 1795, an act passed directing the books of entry-takers to be delivered to the clerks of the several county courts in which such entry-takers respectively resided: And in 1796 an act passed prescribing the *man- [***480**
ner in which duplicates might be obtained, where the warrants were lost, and others had not been issued, while the books remained with the entry-takers.

It is strongly to be inferred, not only from the language of this act, but from the circumstance that no provision is made for duplicates to be issued by the entry-taker in future cases of lost warrants, that every copy of an entry which was granted by the entry-taker, was considered as an original, and as an equal authority to the surveyor to survey the land entered. The entry being once executed, it was his duty not to execute it again.

This act provides, that where duplicates shall issue from the clerk, by order of the court, the surveyor shall note the fact in his plat, and it shall appear on the face of the grant, that the same is issued on a duplicate, and shall be liable to become null and void, if it shall appear that a grant had been obtained on the original warrant.

This act applies only to grants issued on duplicates obtained in conformity with its provisions, and would seem to respect only the junior patent. It cannot affect the grant in this case, which was issued before its passage. But it affords strong reason for the opinion, that the state of North Carolina did not purpose to impeach its own grants, unless they conveyed notice to the world that they were impeachable, and even then they were voidable, not void. An individual not claiming under the same entry, could not avail himself of their liability to be avoided.

It is the opinion of the court that there is no error, and that the judgment be affirmed.

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*MILLS *v.* DURYEE. [***481**

Absent—TODD, *J.*

Nil debet is not a good plea to an action founded on a judgment of another state.

ERROR to the Circuit Court for the District of Columbia in an action of debt upon a judg-

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NOTE.—This case is founded on the U. S. constitutional provision that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other

ment of the Supreme Court of the state of New York, to which the defendent below pleaded *nil debet*, which plea, upon general demurrer, was adjudged bad.

By the constitution of the United States (art. 4, sect. 1), it is declared, that "full faith and "credit shall be given, in each state, to the "public acts, records and judicial proceedings "of every other state. And the Congress may, "by general laws, prescribe the manner in "which such acts, records and proceedings "shall be proved, and the effect thereof."

The act of May 26th, 1790 (vol. 1, p. 115), after providing the mode by which they shall be authenticated, declares, that "the said rec- "ords and judicial proceedings, authenticated "as aforesaid, shall have such faith and credit "given to them, in every court within the "United States, as they have by law, or usage, "in the courts of the state from whence the "said records are, or shall be, taken."

And by the supplementary act of March 27th, 1804 (vol. 7, p. 153, § 2), it is declared, that the provisions of the original act of 26th May, 1790, shall apply as well to the records and courts of the respective territories of the United States and countries subject to the jurisdiction of the United States as to the records and courts of the several states.

F. S. Key, for plaintiff in error.

The true construction of that part of the constitution and laws of the United States will confine their operation to evidence only, and will not justify such an alteration in the rules of pleading. The "effect" to be given to such copies is their "effect" as evidence, for it **482***] *is not pretended that an execution could issue here upon such a record.

If *nul tiel record* is the proper plea, or could be pleaded in such a case, there are no means of procuring and inspecting the original record (which is essential under such an issue): and the constitution and law, not having provided for this, it must be presumed did not intend it.

The record in this case is not the original—it is certified and authenticated as a copy; and therefore unless entitled to more faith and credit here than in New York, it could not be offered to the court upon the plea of *nul tiel record*, for under that issue this record, even in New York, would not be admitted. The original must be produced and inspected.

But if this record would be entitled to such consideration in another state, by force of the constitution and law, it is not entitled to it in this district, which is not a state. (1 Dall., 261, *Phelps* v. *Holker;* Id., 188, *James* v. *Allen;* 1 N. Y. T. R., 460, *Hitchcock* v. *Aicken;* 1 Mass. T. R., 401, *Bartlett* v. *Knight.*)

Jones, contra.

It is admitted that a record authenticated pursuant to the act of Congress, is to have the effect of evidence only: but it is evidence of the highest nature, viz., record evidence.

In every case of debt or contract the form and effect of the plea are determined by the dignity of that debt or contract; in other words by the dignity of the evidence, whether it be of record, by specialty, or simple contract.

The act of Congress makes the authenticated exemplification of the record equivalent to the original record in its proper state; and communicates to it the same effect as evidence, thereby making it capable of sustaining the same averments in pleading, and of abiding the same tests, as the original record. It therefore cannot be denied or controverted by any plea, such as *nil debet*, which goes to put in issue before the jury the matters averred by the record, and the existence of the record *itself; but [***483** the defendant must either distinctly deny the record, or avoid it by pleading *per fraudem*, satisfaction, &c. (2 Dall., 302, *Armstrong* v. *Carson.*)

In allowing this conclusive effect to the evidence of the authenticated record, it is immaterial that it has not the further effect of enabling the ministerial officers of the law to issue an ex-

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state." Constitution of U. S., Art. 4, Sec. 1, and the act of Congress as to how records of a state may be authenticated, and providing that records, so authenticated, shall have such faith and credit in every court of the U. S. as they have by law in the courts of the state from which they are taken. 1 Stat. at Large, 122; Rev. Stat. U. S., Sec. 906.

There has been a difference of opinion in the construction of the constitutional provision and the statute. The decision in Mills v. Duryee, *supra*, has been reviewed in many cases, and it has been asserted that the jurisdiction of the court may be inquired into either as to the subject matter or person. Aldrich v. Kinney, 4 Conn., 380; Hall v. Williams, 6 Pick., 232; Pennyart v. Foote, 27 Ohio St., 600; Curtiss v. Gibbs, 1 Penning, 399; Benton v. Bargot, 10 Serg. & R., 240; Folger v. Con. Ins. Co., 99 Mass., 467; Hoffman v. Hoffman, 46 N. Y., 30; Bissel v. Briggs, 9 Mass., 462; Denuison v. Hyde, 6 Conn., 508, 518; Christmas v. Russell, 5 Wall., 290; Harris v. Hurdman, 14 How., 334; Seevers v. Clements, 28 Md., 426; U. S. v. Arredondo, 6 Pet., 691; Voorhies v. Bk. of U. S., 10 Pet., 475; Starbuck v. Murray, 5 Wend., 148; Mackey v. Gordon, 34 N. J., 286; Paine v. Moorland, 15 Ohio, 445; Marx v. Fordc, 51 Mo., 69; Rogers v. Coleman, Hardin (Ky.) 413.

In a late case in New York it is held that the jurisdiction of a court of another state in which a judgment has been rendered is always open to inquiry in the courts of New York, and the judgment may also be questioned collaterally for fraud. Hunt v. Hunt, 72 N. Y., 217.

But a judgment rendered by a court having power lawfully conferred to deal with the general subject involved in the action, and having jurisdiction of the parties, although against the facts, or without facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally. Hunt v. Hunt, 72 N. Y., 217; Pringle v. Woolworth, 12 N. Y., Week. Dig., 554. Jurisdiction in such case will be presumed. Pacific Co. v. Wheelock, 80 N. Y., 278.

Nil debet cannot be pleaded to an action of debt on judgment rendered in a court whose records import absolute verity. Wheaton v. Doolittle, 23 Wend., 375; Sackett v. Andross, 15 Hill (N. Y.), 327.

Record of judgment of another state conclusive where it shows personal service of the process. Miller v. Brcabane, 68 N. Y., 83.

A decree of divorce, obtained in another state, against an absent defendant, without service in the mode prescribed by the law of such state, may be impeached in a collateral proceeding, on proof of the omission of such service; such decree is without jurisdiction, or based on fraud. Stanton v. Crosby, 9 Hun., 370; Hoffman v. Hoffman, 46 N. Y., 30.

The case of *Mills v. Duryee, supra*, is explained and limited in D'Arcy v. Ketchum, 11 How., 165, 175, and distinguished in M'Elmoyle v. Cohen, 13 Pet., 312.

Where the record discloses jurisdictional facts, and where such record cannot be impeached as to such facts in the state where such judgment was rendered, it cannot be controverted in the tribunals of another state. Zepp v. Hager, 70 Ill., 223; Craft v. Clark, 31 Iowa, 77; Westcott v. Brown, 13 Ind., 83.

The record will be evidence of jurisdictional facts. Shumway v. Stillman, 6 Wend., 447.

ecution thereon, for that objection would be equally valid against the record when used in its proper state, but out of the jurisdiction of its proper court; and also against the sentences of foreign courts of admiralty under the law of nations.

The act of Congress communicates to the authenticated record the effect of record evidence in all courts within the United States, and does not limit it to the courts in any state, as supposed by the plaintiff in error.

March 11th. STORY, *J.*, delivered the opinion of the court as follows:

The question in this case is, whether *nil debet* is a good plea to an action of debt brought in the courts of this district on a judgment rendered in a court of record of the state of New York, one of the United States.

The decision of this question depends altogether upon the construction of the constitution and laws of the United States.

By the constitution it is declared that "full "faith and credit shall be given in each state "to the public acts, records and judicial pro- "ceedings of every other state; and the Con- "gress may, by general laws, prescribe the "manner in which such acts, records and pro- "ceedings shall be proved and the effect there- "of."

By the act of 26th May, 1790 (ch. 11), Congress provided for the mode of authenticating the records and judicial proceedings of the state courts, and then further declared that "the "records and judicial proceedings, authentica- "ted as aforesaid, shall have such faith and "credit given to them in every court within "the United States as they have by law or **484***] "usage in the courts of *the state from "whence the said records are or shall be taken."

It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it.

It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.

But it is said that admitting that the judgment is conclusive, still *nil debet* was a good plea; and *nul tiel* record could not be pleaded, because the record was of another state and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel* record; and when Congress gave the effect of a record to the judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged that the record could not be inspected. The law however is *undoubted that [***485** an exemplification would in such case be decisive. The original need not be produced.

Another objection is that the act cannot have the effect contended for, because it does not enable the courts of another state to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect independent of the right to issue execution.

The last objection is, that the act does not apply to courts of this district. The words of the act afford a decisive answer, for they extend "to every court within the United States."

Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest however that the constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision.

On the whole the opinion of a majority of the court is that the judgment be affirmed with costs.

JOHNSON, *J.* In this case I am unfortunate enough to dissent from my brethren.

I cannot bring my mind to depart from the cannons of the common law, especially the law of pleading, without the most urgent necessity. In this case I see none.

A judgment of an independent unconnected jurisdiction *is what the law calls a for- [***486** eign judgment, and it is every where acknowledged that *nil debet* is the proper plea to such a judgment. *Nul tiel* record is the proper plea only when the judgment derives its origin from the same source of power with the court before which the action on the former judgment is instituted. The former concludes to the country, the latter to the court, and is triable only by inspection.

If a different decision were necessary to give effect to the 1st section 4th article of the constitution, and the act of 26th May, 1790, I should not hesitate to yield to that necessity. But no such necessity exists; for by receiving the record of the state court properly authenticated

as conclusive evidence of the debt, full effect is given to the constitution and the law. And such appears, from the terms made use of by the legislature, to have been their idea of the course to be pursued in the prosecution of the suit upon such a judgment. For faith and credit are terms strictly applicable to evidence.

I am induced to vary in deciding on this question from an apprehension that receiving the plea of *nul tiel* record may at some future time involve this court in inextricable difficulty. In the case of *Holker and Parker*, which we had before us this term, we see an instance in which a judgment for $150,000 was given in Pennsylvania upon an attachment levied on a cask of wine and debt brought on that judgment in the state of Massachusetts. Now if in this action *nul tiel* record must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting then the object of the constitution by removing all cause for state jealousies, nothing could tend more to enforce them than enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits. But if the states are at liberty to pass the most absurd laws on this **487***] subject, and we *admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that article of the constitution in direct hostility with the object of it.

I will not now undertake to decide, nor does this case require it, how far the courts of the United States would be bound to carry into effect such judgments; but I am unwilling to be precluded, by a technical nicety, from exercising our judgment at all upon such cases.

Cited—3 Wheat. 235; 13 Pet. 326, 328; 11 How. 175, 176; 5 Wall. 302; 7 Wall. 148; 9 Wall. 123; 16 Wall. 619, 637; 18 Wall. 462; 5 Otto, 422; 7 Otto, 336; 10 Otto, 186; Hemp. 51; 9 Blatchf. 277; 2 McLean, 129, 478, 480, 513; 3 Mason, 519; 2 Paine, 508; 3 Biss. 271; 1 Wood. & M. 175; 2 Wood. & M. 4.

OLIVER
v.
THE MARYLAND INSURANCE CO.

Absent—WASHINGTON, *J. and* TODD, *J.*

The length of time a vessel may wait to take in her cargo, without discharging the underwriters, does not depend on the usage of the trade.

The danger which will justify a vessel in remaining in port a long time, without discharging the underwriters, must be obvious, immediate, directly applied to the interruption of the voyage, and imminent, not distant, contingent and indefinite.

If, according to the usage of the trade, a vessel be permitted to go from one port to another to collect her cargo, and she unnecessarily exhaust at one port the whole time allowed according to the usage of the trade to complete her cargo, she cannot go to the other port without being guilty of such a deviation as will avoid the policy.

What is a reasonable apprehension of danger is a question of law to be decided by the court. (*Quære.*)

ERROR to the Circuit Court for the District of Maryland. The case arose upon a policy of insurance on the Snow Comet, "at and from "Baltimore to Barcelona, and at and from "Barcelona back to Baltimore."

She arrived at Barcelona on the 25th of July, 1807, and after remaining forty days under quarantine, went up to the city where she remained until the 8th of January, 1808. She then proceeded to Salou for the principal part of her cargo, which she took in there and sailed from thence on her return voyage to Baltimore on the 28th of January, 1808, and was captured by the British and condemned under the orders in council of the 7th of November, 1807.

At the trial the defendants insisted on the delay at Barcelona and the stopping at Salou as deviations which destroyed the plaintiff's right to recover upon the policy. The plaintiff justified the stopping at Salou *by the [***488** usage of the trade. To justify the delay at Barcelona he relied on two grounds, 1st, a reasonable apprehension of capture; and 2d, the usage of the trade. But the court below decided that these excuses, under the circumstances stated in the bills of exceptions, were insufficient. Verdict and judgment were rendered for the defendants, and the plaintiff brought his writ of error.

The circumstances relied upon to show a reasonable apprehension of danger were stated in the captain's protest to be as follows: that hearing, in the month of August, news respecting the dispute between Great Britain and the United States respecting the Chesapeake frigate, the agents recommended their remaining in Barcelona until they should hear how the differences should terminate, as part of their return cargo was to be purchased by bills on London. That when they were in the act of sailing for Salou on the 1st of December, they were informed that the Algerine cruisers were out capturing American vessels, and they were advised to remain until they received further information.

Harper, for the plaintiff in error, contended,

1st. That the vessel had a right, under the usage proved, to remain at Barcelona till her cargo was provided at Salou, and then to go to Salou to take it in. And, 2d. That she had a right to remain at Barcelona till the danger of the Algerine cruisers had passed away. (1 Marshall, 204; 1 Johnson, 181, 301; 2 Johnson, 138; 3 Johnson, 352.)

Martin and Pinkney, contra,

Did not deny that a reasonable apprehension of great danger would justify a reasonable delay; but contended there was no sufficient evidence of such reasonable apprehension. And with regard to the usage of trade they insisted, that if the vessel exhausted her time for loading at Barcelona, she was not justified by the usage of the trade in going to Salou. That the court, and not the jury, was to judge from the facts whether the apprehension of danger was reasonable.

Harper*, in reply, contended, [*489**

That the question, whether there was reasonable apprehension of danger, was a question

of fact for the jury to decide; or it was a question in which the law and fact were so blended as to be a matter properly cognizable by the jury.

March 13th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This was an action brought on a policy insuring the Snow Comet at and from Baltimore to Barcelona and at and from thence back to Baltimore. The Comet arrived at Barcelona on the 25th day of July, in the year 1807, where she was compelled to perform quarantine. On the 28th of November, the Comet cleared out from Barcelona for Salou, a port of Catalonia, about sixty miles south of Barcelona, where her return cargo was ready to be taken on board. On the first of December, when in the act of sailing, the officers of the vessel were informed that the Algerine cruisers were out capturing American vessels. They were advised to remain until they received further information. On the 8th day of January, 1808, they sailed for Salou and arrived on the 10th. They were detained by high winds till the 28th of January, when they sailed for Baltimore. On the 5th of February the vessel was captured by a British cruiser, while on her return voyage, and carried into Gibraltar, where she was condemned under the orders of council of the 8th of November, 1807. Evidence was given that it was usual for vessels trading to Barcelona to touch at Salou or some other port on the same coast, to take in the whole or part of their return cargo, and that in some instances vessels had remained in the port of Barcelona four, six, and even eight months, waiting for a return cargo.

On this evidence the counsel for the defendants moved the court to instruct the jury that the plaintiff could not recover in this cause by reason of the length of time the vessel remained at Barcelona. The court refused to give the direction as prayed, but did instruct the jury that, if they believed the facts stated, the plaintiff was not entitled to recover **490***] unless from the whole *testimony in the cause they should be of opinion that the vessel did not remain longer at Barcelona than the usage and custom of trade at that place rendered necessary to complete her cargo. To this direction of the court the plaintiff, by his counsel, excepted.

This exception was not much pressed at the bar, nor does it appear to this court to contain any principle to which he could rightly object.

Unquestionably an idle waste of time, after a vessel has completed the purposes for which she entered a port, is a deviation which discharges the underwriters. If the Comet remained without excuse at Barcelona an unnecessary length of time while her cargo was ready for her and she might have sailed, she would remain at the risk of the owners—not of the underwriters.

There is however some doubt spread over the opinion in this case in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed that this was regulated by usage and custom. The usages and customs of a port or of a trade are peculiar to the port or trade. But the necessity of waiting where a cargo is to be taken on board until it can be obtained is common to all ports and to all trades. The length of time frequently employed in selling one cargo and procuring another may assist in proving that a particular vessel has or has not practiced unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion however appears to have been, and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be considered as evidence.

The defendants then moved the court to instruct the jury that if the said vessel continued at Barcelona as long as was justifiable by the usage of trade at that place for completing and taking in her cargo, and did not complete and take in her cargo there, but afterwards *went to Salou and remained there the [***491** length of time as stated in the said protest, in such case the plaintiff is not entitled to recover.

The court instructed the jury that if the vessel remained at Barcelona as long as the usage of trade justified for the purpose of taking in a cargo there, that she could not afterwards go to another port and take it in without vacating the policy.

To this opinion also the counsel for the plaintiff excepted. Upon this exception there was some difference of opinion in this court. For myself, I considered the direction as attaching the departure, which would avoid the contract, to the act of sailing to and continuing in Salou for the purpose of completing her return voyage, and am of opinion that although the Comet might have remained at Barcelona long enough to have taken in a return cargo there, for which she might or might not be blamable, yet that no additional fault was committed by touching at Salou for the purpose of completing her cargo, if to touch at Salou for that purpose was the usage of the trade.

A majority of the court, however, is of a different opinion. The usage to stay at Barcelona for a return cargo, and to touch at Salou for a return cargo, as disclosed in the plaintiff's evidence, are considered by them not as independent but as auxiliary usages which are to be taken in connection in ascertaining whether there was or was not unreasonable delay in the conduct of the voyage. The assured had a right, under these usages as they are called, to take in part of the cargo at Barcelona and part at Salou, or the whole at either port. The delay necessary for these purposes would be justifiable at either port; but if the assured exhausted the whole time at one port, which, according to the usage, was allowable only for the purpose of taking in the whole cargo, the subsequent delay at another port, for the purpose of taking in the cargo, must be considered as unreasonable. The delay at Barcelona, under such circumstances, could not be necessary for the purposes of the voyage, and therefore would determine the policy. But the deviation would rest merely in intention, until the time of sailing for Salou,

492*] for until that *time the assured would have a right to lade his cargo at Barcelona, and thus retroactively justify his stay there under the usage. The delay could not be a consummated deviation until the whole time allowed by the usage was exhausted and the party had definitively abandoned the lading of a cargo which would justify that delay. The opinion of the court below appears to the majority of this court to have procceded ou this ground, and to be correct.

The plaintiff then, in addition to the former testimony, gave evidence that it was usual for vessels to remain at Barcelona until their return cargoes, or so much thereof as might be neccssary for their completion, was provided and collected at Salou, or some other southern port in Catalonia, and then to sail to such port, for the purpose of taking in the cargoes so collected.

The defendants then moved the court to instruct the jury that since it appeared from the protest of the master and others on board the Comet, and from the sentence of condemnation produced by the plaintiff, that all the return cargo, which the said vessel took in at Barcelona, was taken in on or before the 28th of November, that the said vessel was then ready for sea, and was actually cleared out on the first of December; and that being there, and about to sail immediately for Salou, the said Snow Comet, in consequence of a report that the Algerine cruisers were out cruising in the Mediterranean against American vessels, remained at Barcelona until the 8th of January, 1808, before she sailed from Barcelona, if the jury believed these facts the plaintiff could not recover. This opinion was given by the court, and the plaintiff excepted to it.

Had not the testimony on which this application was founded been spread upou the record the court would have found some difficulty in deciding on the propriety of the opinion which was given from the terms employed in stating the applicatiou to the Circuit Court. It appears however from a comparison of the application to the court with the testimony on which it was founded, to have been intended to obtain from the court the opiniou that the testimony respecting the report that the Algerines were out capturing American vessels was **493***] *not a suffieient justification for remaining at Barcelona from the 1st of December, 1807, till the 8th of January, 1808.

No doubt is entertained that the danger of capture from the Algerines, if proved to be real and immediate, would justify the continuance in the port of Barcelona.

And the apprehension of such danger, if fouuded on reasonable evidence, would produce a like effect. But in each case the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port, would become excusable, for there would always be danger of capture from the enemy's cruisers. Nor is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent and indefinite. In the present case it is not shown that there was any danger in proceeding from Barcelona to Salou. No Algerine force is shown to be interposed between those ports. Whatever might be the danger elsewhere, if there was none in proceeding to and remaining in Salou, it was the duty of the captaiu to have proceeded to that place, taken in his cargo, and remained there for further information. The captain was bound to have gone as far on his voyage as he could consistent with the general safety.

The judgment is affirmed with costs.

LIVINGSTON, *J.*

I concur in the opinion that the judgment of the Circuit Court be affirmed; but in coming to this result I have thought it necessary to examine only the fourth exception which was taken below. It is, according to my view of this cause, very immaterial to inquire whether the plaintiffs succceded in establishing the usage, as it has been incorrectly termed, for a vessel to remain several months at Barcelona for the purpose of obtaining *a return [***494** cargo: or whether at one period the master of the Comet entertained a well grounded apprehension of danger of capture by British vessels; or whether it was the course and usage of the trade for vessels bound from Barcelona to any foreign ports to touch at Salou, or at some other port south of Barcelona, on the coast of Catalonia, in order to take in their return cargoes; I say, whether these facts were established, or what opinion the court gave on them in the course of the trial, are, in my judgment, as this case comes up, totally irrelevant in the decision of it, because there are other facts proved, and that by the plaintiffs themselves, which are in the opinion of the whole court fatal to their claims. The facts are these: "That after all fear from British cruisers had "ceased, to wit: ou the 28th of November, "1807, being ready for sea, the vessel cleared "for Salou on the 1st day of December follow- "ing, and when in the act of sailing, informa- "tion was received that the Algerine cruisers "were out capturing American vessels; the "master was therefore advised to remain in "port uutil they received other intelligence, "and did not sail for Salou until the 8th of "January, 1808."

On this evidencc the Circuit Court instructed the jury, that if they believed these facts to be true, the plaintiffs were not eutitled to rccover. In giving this opinion the court in effect said, that the information which was received at Barcelona respecting the Algerine cruisers did not justify a stay there from the 28th of November to the 8th of January.

To this opinion two objections are made.

The one is, that the court took upon itself to decide whether the delay last mentioned proceeded from a justifiable cause, instead of leaving it to the jury to determine both the law and the fact. In doing so, I think the court committed no error. What will excuse a delay, apparently unreasonable, so as to repel the charge of a deviation on that account, must ever be and ought to be a question of law, to be decided by a court under all the circum-

stances of the particular case. In this way only can anything like certainty be attained; but if it be left to a jury not only to find the facts, **495***] which is *exclusively within their province, but also to pronounce what is the law resulting from them, it will be next to impossible to form a system of rules by which a merchant may safely regulate his conduct. Nor will it help the matter to consider it as a mixed question of law and fact, because that gives to the jury a right to disregard the opinion of the court, which they will have no right to do in case it be considered exclusively as a question of law on which the court alone has a right to decide. In civil cases every man has an interest in confining a jury as much as possible to their proper sphere, which is to decide on facts; while a court does not encroach on their province, care should be taken not to encourage any improper encroachment on their part by unnecessarily throwing on them any exercise of what are the legitimate functions of a court. Among these none appear to me to be better settled than that it is the exclusive privilege and bounden duty of a court to decide whether an act, which is to be done within a reasonable time to entitle a party to maintain his action, has been performed within such time or not. So, also, where a party sets up an excuse for an act which will otherwise defeat his right to recover, it appertains exclusively to the court to decide on the sufficiency of the matter alleged, and if a jury, after deciding on the facts, take upon themselves the further office of determining the legal effect thereof as to the case under consideration, in opposition to the declared opinion of the court, they forget their duty and act contrary to law.

But if this be a question of law, the plaintiff still supposes that the Circuit Court erred in not thinking that the facts proved constituted a valid excuse for the last forty days' stay at Barcelona, and in not instructing the jury accordingly. This excuse was, in my opinion, properly disposed of by the judge below, but instead of stating at length why I consider the alleged apprehension of capture by the Algerines as furnishing no justification for this delay, it is sufficient to say that I entirely concur, not only in the opinion which has already been delivered on this point, but in the whole of the reasoning on which it is founded.

STORY, *J.*, concurred with Judge Livingston.

496*] *MARSHALL, *Ch. J.* My own opinion was that the jury was to find the fact whether there was danger in passing between Barcelona and Saloñ; and that they ought to have been instructed that if there was danger it justified the delay, otherwise not.

Cited—12 Wheat. 390; Olcott. 370.

BRIG CAROLINE, WILLIAM BROADFOOT, CLAIMANT.

v.

THE UNITED STATES.

A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offense.

An informal libel, or information *in rem*, may be amended by leave of the court.

ERROR to the Circuit Court for the District of South Carolina, in a case of seizure for violation of the acts of Congress respecting the slave trade.

The libel was in the words following:

"At a special district court for South Carolina district, Be it remembered, That on the day of in the year of our Lord one thousand eight hundred and the United States of America, by Thomas Parker, their attorney for the district aforesaid, came here into court and gave Thomas Bee, Esq., judge of the said court, to understand and be informed that on the day of they, the said United States, by their proper officers of the customs, did cause to be seized, arrested and secured, a certain brig or vessel called the Caroline, her tackle, furniture, apparel and other appurtenances, as forfeited to them, the said United States; for that the said brig or vessel since the twenty-second day of March, 1794, was built, fitted, equipped, loaded, or otherwise prepared within a port or place of the said United States, by a citizen or citizens of the said United States, or a foreigner, or other persons coming into, or residing in the same, either as master, factor, or owner of the said brig or vessel for the purpose of carrying on trade or traffic in slaves to a foreign country; and also for that, the said brig or vessel, since the day and year last aforesaid, *was [**497** built, equipped, loaded or otherwise prepared within a port or place of the said United States, or caused to sail from a port or place within the said United States by a citizen or citizens of the said United States, or a foreigner or other persons coming into or residing within the same, either as factor, master or owner of the said brig or vessel for the purpose of procuring from a foreign kingdom, place or country, the inhabitants of such kingdom, place or country, to be transported into a foreign place or country, port or place, to be disposed of and sold as slaves, in violation of a certain act of Congress of the said United States, passed the 22d March, 1794, entitled 'An act to prohibit the carrying on the slave-trade from the United States to any foreign place or country.' Also for that since the 1st day of January, 1808, the said brig or vessel was built, fitted, equipped, loaded or otherwise prepared in some port or place within the jurisdiction of the said United States, or caused to sail from some port or place within the said United States by some citizen or citizens of the said United States, or some other person for the purpose of procuring negroes, mulattoes, or persons of color from some foreign kingdom, place or country, to be transported to some port or place within the jurisdiction of the said United States to be held, sold, or disposed of as slaves, or to be held to service or labor, in violation of a certain act of Congress of the United States, passed the second day of March, in the year of our Lord one thousand eight hundred and seven, entitled 'An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the first day of January, in the year of our Lord one thousand eight hundred and eight.' Wherefore the said

United States, by Thomas Parker, their attorney aforesaid, pray the advice and opinion of this honorable court in the premises, and that on due proof of the allegations aforesaid, the said brig or vessel, her tackle, apparel, furniture and other appurtenances, may be decreed and adjudged as forfeited to them, the said United States, and that such proceedings may be had thereon as are agreeable to law and justice, and the style, usage, and practice of this honorable court. THOMAS PARKER,

"Attorney United States, S. C. District."

498*] *To the transcript of the record which came up was annexed the following statement of facts:

"The information which was filed in this case against the Caroline was founded upon an alleged violation either of the 1st section of an act of Congress, passed the 22d of March, 1794, entitled 'An act to prohibit the carrying on 'the slave trade from the United States to any 'foreign place or country,' or of the 2d section of an act, passed on the 2d of March, 1807, entitled 'An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the first day of January, in the year of our Lord one thousand eight hundred and eight.' By the act of 1794, the fitting or sailing of a ship, for the purpose of a traffic in slaves to any foreign country, subjects the ship, concerned in such traffic, to forfeiture."

"The act of 1807 enacts, that if any ship within the jurisdiction of the United States shall be fitted out or caused to sail by any person, either as master, factor or owner, 'for 'the purpose of procuring any negro, mulatto 'or person of color from any foreign country 'to be transported to any place whatsoever 'within the jurisdiction of the United States, 'to be held, sold, or disposed of as slaves, or 'to be held to service or labor,' she shall be forfeited to the United States. It was admitted by the claimant that the Caroline came into this port equipped like any common merchant vessel, that she did, after her arrival, receive fitments and take on board articles calculated for the slave trade only. It was satisfactorily proved that the claimant, after receiving information that such equipments were illegal, restored the Caroline to the condition in which she was when she entered this port, but that this was not done till after her seizure; and that the wooden parts of the fitments for slaves were marked as they were taken out of the vessel. That in such condition she left Charleston, bound to the Havanna and to no other port. That she arrived at the Havanna on the 28th of June, 1810, and that there she was sold about the 6th of August, 1810, to Spanish subjects, who fitted her out for the African slave trade. His Honor the Circuit Judge, upon the ground of sufficient evidence having been adduced of intention to carry on the slave trade, either *abroad or at home, and a con- [***499** sequent violation either of the act of 1794, or of the act of 1807, decreed that the Caroline should be condemned as forfeited to the United States.

"We agree in the above statement of the case.

"WILLIAM DRAYTON,
"Proctor for Appellant,
"THOMAS PARKER,
"District Attorney."

C. Lee, for the appellant, contended,

1st. That the libel was not sufficient to support the condemnation; and,

2d. That the offense was not made out in point of fact.

1. The libel does not state any certain specific offense. It is altogether in the alternative. It does not state when, nor where, nor by whom the vessel was seized—nor when, nor where, nor by whom, nor in what manner the vessel was fitted out. It is altogether vague, uncertain and informal.

An information *in rem* ought to be as precise and formal as an information *in personam*. The civil law requires that a libel should be certain and positive in all material circumstances.

2. The statement of facts is as imperfect as the libel. The vessel is only liable to forfeiture when she shall have been actually fitted, equipped or prepared—not while she is fitting, equipping, or preparing. The degree of equipment ought to have been stated that the court might judge whether it were such fitting or equipment as is contemplated by the law. Upon every information for a penalty, the offense should be fully proved. (Parker, 22.) This case is like that of *Moodie* v. *Ship Alfred*, (3 Dall., 307,) in which this court *decided [***500** that the ship was not illegally fitted out, although she had taken on board some articles calculated for war.

J. R. Ingersoll, contra,

Contended that the case and the libel were sufficiently explicit. The intent was clearly shown. It is not necessary that everything necessary for the voyage should be on board before the forfeiture accrues. The libel states the offense in the words of the act of Congress.

The court, after taking time to consider, directed the following sentence to be entered:

"This cause came on to be heard on the "transcript of the record and was argued by "counsel, on consideration whereof, it is the

NOTE.—In the case of the Caroline, p. 496, 500, the ground upon which the sentence of this court was founded is understood to be as follows:

"The only offenses in the statute of the 22d of March, 1794, (Ch. 11) for which a vessel could be forfeited, are that the same vessel is 'fitted out' or 'caused to sail' for the purpose of carrying on the slave trade.

"The libel in this case alleges, in the alternative, that the brig Caroline 'was built, equipped, loaded, or otherwise prepared,' &c., or 'caused to sail,' &c., for the purpose of carrying on the slave trade. It does not, therefore, positively allege that the vessel 'was fitted out' or 'caused to sail;' and the libel might be true in the manner in which the charge was stated, and yet no offense committed which would induce a forfeiture of the vessel. For if the vessel was 'built, or loaded, or prepared' for the purpose of the slave trade, the alternative averment in the libel would be completely satisfied; and yet if she was not 'fitted out' or 'caused to sail' she could not be forfeited. The facts, therefore, constituting the offense, not being directly averred, the libel could not be sustained. But the court did not mean to decide that stating the charge in the alternative would not have been sufficient if each alternative had constituted an offense for which the vessel would have been forfeited.

The same observations are applicable to the count founded on the act of 2d of March, 1807 (Ch. 67)."

"opinion of the court, that the libel is too im-"perfectly drawn to found a sentence of con-"demnation thereon. The sentence of the said "Circuit Court is therefore reversed, and the "cause remanded to the said Circuit Court, "with directions to admit the libel to be amend-"ed."

The same point was also decided at this term, in the cases of the schooner Hoppet, the schooner Enterprize, the ship Emily, and the schooner Ann.

Approved—1 Wheat. 264.
Cited—8 Wheat. 397; 9 Wheat. 387; 4 How. 154; 5 Wall. 69; 10 Wall. 420; 16 Wall. 431; 20 Wall. 106; 5 Otto, 586; 8 Otto, 376; 4 Biss. 27; 4 Mason, 153; 11 Bank Reg. 107; 1 Bald. 406; 1 Blatchf. & H. 166.

RIGGS *v.* LINDSAY.

Absent—TODD, *J.*

The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills and damages and costs of protest (if he has paid the same) upon a count for money paid, laid out, and expended, and the bills of exchange may be given in evidence on that count.

If one defendant produce in evidence a letter from his co-defendant to the plaintiff, the latter may give in evidence the written declarations of that co-defendant to discredit the letter.

If, after the protest of the bills, the plaintiff sell the salt without orders, it shall not prejudice his right of action, although he render no account of sales to the defendants.

ERROR to the Circuit Court for the District of Columbia, in an action of *assumpsit* in which the verdict and judgment were in favor of the plaintiff, Lindsay.

The case was now argued by *Jones* and *Harper*, for the plaintiff in error, and by *F. S. Key* and *Morsell*, for the defendant.

The former contended, that Riggs was not to be considered as a joint contractor, but a sub-**501***] purchaser; and *that if the defendants were jointly interested in the purchase, they were severally interested in the sales. In support of this position, they cited Watson on Partnership, 24; 1 Vez., 242; Cowp., 449; 2 H. Bl., 298; Doug., 371, and 1 H. Bl., 37.

The facts of the case are stated in the opinion of the court, which was delivered as follows, by

LIVINGSTON, *J.*:

This was an action brought by the defendant in error, in the Circuit Court of the United States for the District of Columbia, against William Stewart, Charles J. Nourse, Aquila Beall, and the plaintiff in error, Elisha Riggs, as copartners, to recover from them the amount of certain bills of exchange and damages which had been drawn on them by the defendant in error to reimburse him for certain salt which he had purchased on their account, and which bills, being protested for non-payment, were afterwards paid, with damages, by the plaintiffs below. The defendant, Beall, was not found; the defendants, Nourse and Stewart, confessed judgment, and the other defendant, Riggs, pleaded the general issue.

The declaration contained several counts on the bills of exchange, and two general counts, the one for money laid out, expended and paid, the other for money had and received, under which last counts a verdict was found for the plaintiff.

It appeared in evidence, that some time in November, 1809, Stewart and Beall, two of the defendants below, wrote a letter to the plaintiff, ordering a purchase of salt, and stating that two other persons were concerned in the said order. This letter directed him to purchase from 10 to 30,000 bushels, and authorized him to draw for the amount of such purchases on the defendants, Stewart and Beall, or on George Price & Co., of Baltimore. Purchases of salt were accordingly made by Lindsay, who from time to time apprized Stewart and Beall of the same. On the 4th of January, 1810, one of the defendants wrote to Lindsay as follows:

*"SIR: [*502

"You will hold up what salt you may have "purchased, and send us a statement of your "purchases. You have no doubt received "Stewart and Beall's orders, requesting no "further purchase. We shall some time hence "direct you as to the disposal of the quantity "purchased. In the meantime you may draw "upon us, or upon Stewart and Beall, for the "amount," &c.

It appears that Lindsay afterwards drew several bills of exchange on the parties who had subscribed the last-mentioned letter, and who were the defendants, in favor of certain persons therein named, including his commission for purchasing. These bills were presented to the drawees, who refused to accept or pay the same, on which they were protested and returned to Lindsay, who took them up. By the laws of South Carolina ten per cent. damages are allowed on the return of such bills under protest, and there was proof that these damages had also been paid by Lindsay. After the return of these bills and payment of them by Lindsay, he sold the salt, and the proceeds on such resale were stated by Lindsay's counsel at the trial to the jury, who were desired to deduct the same from his demand against Riggs, which was done, and a verdict given for the balance. There was no other evidence of the proceeds than such admission, and the defendant, Riggs, denied that the sum stated by Lindsay's counsel was the amount thereof.

In the course of the trial, the counsel of Riggs produced a letter from Nourse to the plaintiffs, which, as he supposed, contained a statement favorable to his client. To discredit this statement, the plaintiff produced certain interrogatories, which had been exhibited to Nourse, with his answers, which were at variance with the letter produced by Riggs.

The first exception taken, at the trial, to the conduct of the court, was to its admission of proof of the several bills which had been drawn by Lindsay, and protested and paid by him, and the instruction which it gave to the jury, that under the count for money paid, laid out, and expended, Lindsay might recover, not his *commissions which were included in [*503 the bills, but the ten per cent. damages, if the jury were satisfied that they had been actually paid by him.

Neither in the admission of this testimony, nor in the instructions given on it, was any error committed by the Circuit Court. As Lindsay was expressly authorized to draw, by the letter of the 4th of January, 1810, he certainly had a right to do so, and whether the defendants accepted his bills or not, so as to render themselves liable to the holders of them, there can be no doubt that as between Lindsay and them, it was their duty, and that they were bound in law to pay them. Not having done so, and Lindsay in consequence of their neglect having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety (as he may well be considered from the moment he drew the bills), it may well be said that in paying the amount of these bills, which ought to have been paid, and was agreed to be paid by the drawees, he paid so much money for their use. Nor can any good reason be assigned for distinguishing the damages from the principal sum, for if it were the duty of the defendants to pay such principal sum, it is as much so to re-imburse Lindsay for the damages which, by the law of South Carolina, he was compelled to pay, and which may therefore also be considered as part of the debt due by the defendant in consequence of the violation of their promise contained in the letter which has just been mentioned.

The second exception which appears on the record is to the admission of certain interrogatories which had been propounded to the defendant, Nourse, with his answers to the same, having an indorsement upon the same, purporting to be an acknowledgment of Nourse that the same were correct.

In the opinion of this court, this paper was rendered proper evidence by the conduct of the defendant, Riggs, who had read as evidence for himself a letter from Nourse to Lindsay, dated the 14th April, 1810, containing, as he supposed, some matters favorable to his defence. This letter having been thus produced **504***] by Riggs himself, *it was certainly right to allow Lindsay to discredit the representations made in that letter by showing that Nourse had himself at another time given a very different account of the same transaction.

The other opinions of the court below, to which exceptions were taken, may be comprised in these two: that the court erred in thinking the defendants jointly liable as copartners, and that the resale of the salt did not destroy the Plaintiff's right of action. In both these opinions this court concur with the Circuit Court.

It is perhaps as clear a case of joint liability as can well be conceived. Whatever doubt there might be independent of the letter of the 4th of January, 1810, most certainly that letter puts this question at rest. Every one of the defendants sign it, and there is now no escape from the responsibility which they all thereby incurred to the plaintiff. Nor did Lindsay's selling the salt after he had taken up these bills destroy his right of action against the defendants. If he has acted irregularly in so doing, he will be liable, in a proper action, for the damages which the defendants have sustained by such conduct, but such sale could not be pleaded or set up in bar to the present suit. Nor will the defendant, under the circumstance of this case, be injured by the sum which the jury have discounted from Lindsay's demand, if it shall hereafter appear that as much was not allowed the defendants on that account as ought to have been.

The judgment of the Circuit Court is affirmed with costs.

Cited—9 Pet. 567; 2 Story, 242.

M'INTIRE *v.* WOOD.

Absent—WASHINGTON, *J.*, *and* TODD, *J.*

The power of the circuit courts of the United States to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.

THIS case came up from the Circuit Court for the District of Ohio, upon a certificate stating that the judges of that court were divided in opinion upon the question, whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding *him to issue a final certifi- [***505** cate of purchase to the plaintiff for certain lands in that state.

Harper, for the plaintiff, referred the court to the case of *Marbury* v. *Madison* (ante vol. 1, p. 137).

The constitution of the United States extends the judicial power to all cases in law and equity arising under the constitution and laws of the United States.

By the 11th sect. of the judiciary act of 1789 (vol. 1, p. 55), the circuit courts have original cognizance of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the value of 500 dollars, &c. And by the 14th sect. of the same act they have power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law. This is a suit of a civil nature at common law, and the matter in dispute exceeds the value of 500 dollars. The writ of *mandamus* is necessary to the exercise of their jurisdiction, and is agreeable to the principles and usages of law. (3 Burr. 1266.)

The power given by the constitution is divided between the supreme and the circuit courts. It has been decided, that the power to issue a *mandamus*, in such a case, does not belong to the Supreme Court; it must, therefore, be in the circuit courts.

March 15th. JOHNSON, *J.*, delivered the opinion of the court as follows:

I am instructed to deliver the opinion of the court in this case. It comes up on a division of opinion in the Circuit Court of Ohio, upon a motion for a *mandamus* to the register of the land-office, at Marietta, commanding him to grant final certificates of purchase to the plaintiff for lands to which he supposed himself entitled under the laws of the United States.

This court is of opinion that the Circuit Court did not possess the power to issue the *mandamus* moved for.

Independent of the particular objections which this case presents from its involving a

506*] question of freehold, *we are of opinion that the power of the circuit courts to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court, and this provision the legislature has thought sufficient at present for all the political purposes intended to be answered by the clause of the constitution which relates to this subject.

A case occurred some years since in the Circuit Court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a *mandamus* to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that *mandamus* was issued upon the voluntary submission of the collector and the district attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria.*

Distinguished—5 Pet. 206; 3 Wood. & M. 332.
Cited—6 Wheat. 598, 599, 604; 12 Pet. 615, 616, 617, 618, 626, 627, 633; 13 Pet. 609; 14 Pet. 601; 8 How. 449; 6 Wall. 189, 198, 488; 7 Wall. 349; 8 Wall. 577; 9 Wall. 311, 575; 19 Wall. 660; 12 Otto, 393; 3 Blatchf. 169; 6 Blatchf. 396, 397; 7 Blatchf. 433; 6 McLean, 456; 1 Paine, 455; 2 Dill. 234; 1 Wood. & M. 432, 438; Woolv. 312; 3 Cliff. 61; 5 Cranch, C. C. 172, 187, 242, 245, 247, 255.

LIVINGSTON & GILCHRIST
v.
THE MARYLAND INSURANCE COMPANY.

Absent—LIVINGSTON, *J.*, *and* TODD, *J.*

To constitute a representation (in making insurance), there should be an affirmation or denial of some fact; or an allegation which would plainly lead the mind to the same conclusion.

If, by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the plaintiff's right to recover upon the policy.

In general, concealment of papers amounts to a breach of warranty.

A Spanish subject who came to the United States in a time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license, and who continues to reside here and carry on that trade, after the breaking out of war between Great Britain and Spain, is to be considered as an American merchant, although the trade could be lawfully carried on by a Spanish subject only.

If the letter submitted to the underwriters, ordering the insurance, refers to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact and to know that the vessel would take all the papers necessary to make the voyage legal.

The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country.

The question whether the abandonment were made in due time, is not a question of fact to be exclusively left to the jury, but to be decided by them under the direction of the court.

No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy.

If the plaintiffs do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased should be the risk of rightful capture according to the law of nations.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant upon a policy of insurance *(against capture [***507** only) upon the cargo of the ship Herkimer, "from Guayaquil, or her last port of departure in South America, to New York," "warranted American property, proof of which to be required in the United States only," "and warranted free from seizure for illicit trade." The declaration was on a loss by capture.

The case was stated as follows by MARSHALL, *Chief Justice*, in delivering the opinion of the court:

Julian Hernandez Baruso, a Spanish subject, having obtained from the crown of Spain a license to import from Boston into the Spanish provinces of Peru and Buenos Ayres, in South America, in foreign vessels, a certain quantity of goods in the license mentioned, and to take back the proceeds in produce on payment of half duties, came to New York in September, 1803, (Spain being then at peace with Great Britain), for the purpose of carrying on trade under his said license.

On the 24th of August, 1804, he entered into a contract with a certain Anthony Carroll for the transportation of a certain quantity of goods to Lima, in Peru, under the said license. Carroll died without carrying the contract into full effect.

On the 25th of January, 1805, war having then broke out between Great Britain and Spain, B. Livingston, who had been bound as Carroll's surety for the performance of the contract, entered into a new contract with Baruso for the transportation of the same goods.

The preamble recites the license, and says: The said Baruso has agreed with the said B. Livingston to make an adventure to Lima, on the conditions and stipulations following, to wit:

1. In consideration, &c., he agrees to the following partnership with the said B. L., in virtue of which he transfers to the said firm all his powers, &c., (under the license) of sending an American vessel belonging to the said L. or chartered, in which vessel shall be embarked goods to the amount of 50,000 dollars, the funds and vessel to be furnished and advanced by said L.

*2. Baruso to obtain the necessary [***508** papers from the Spanish consul. and B. L. to pay the duties. Baruso answerable for detention or confiscation by the Spanish government

or vessels on account of any defect of right to send under said license, &c.

3. L. agrees in four months to embark the goods on board a vessel to Lima, to proceed thither, and to return to the United States with a cargo.

4. L. to choose the supercargo and instruct him; and as the adventure will appear on the face of the papers to belong to B., he shall give the supercargo a power, and recognize him the master of the cargo, so that the consignees at Lima shall follow literally his orders. The consignees, who were partners of B., to receive a commission.

6. The said L. and B. agree to divide equally, and part and part alike, the profits of the adventure. L. to have commissions on sale.

7. Optional in L. to sell in United States, or convey the return cargo to Europe. If he sells in the United States, B. may take out, at the price of sales, as much as will be equal to his rights.

8. If L. sends the cargo to Europe, he is to choose the supercargo, but the consignees to be chosen jointly.

9. In case of loss B. to claim nothing, as his share in the profits only accrues on the safe return of the vessel to the United States. Optional with L. to insure or not. L. not to be allowed for risk, if no insurance, more than 15 per cent. No insurance to be on the risks of the Spanish government.

12. If any loss accrues from causes not stipulated, B. to lose only his privilege. If loss on sale of return cargo, B. to sustain half.

Livingston soon afterwards chartered the ship Herkimer for the voyage, and entered into a contract with the other plaintiff Gilchrist, one James Baxter, and Edward Griswold, for joint-
509*] ly carrying on, with them, *the said voyage. The cargo was purchased with their joint funds, and was shipped to Lima, where, and at Guayaquil, a return cargo was received, purchased with the proceeds of the original cargo.

On the 25th of March, 1806, Mr. Gilchrist addressed to Alexander Webster & Co., at Baltimore, a letter containing an order for insurance on the cargo of the ship Herkimer, from Guayaquil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account of seizure for illicit or prohibited trade. It says, "the owners are already "insured against the dangers of the seas and all "other risks, except that of capture." "You "have already had a description of the ship "from Messrs. Church and Demmill, the agent "of Mr. Jackson, and which I presume is cor-"rect." "I think proper to mention that the "insurance will be on account of Mr. Brock-"holst Livingston and myself. Mr. Baxter and "Mr. Griswold are also concerned, but the first "gentleman thinks there is so little danger of "capture, that in his letter from Lima, he ex-"pressly directs no insurance to be made for "him against this risk, and Mr. Griswold is not "here to consult. Both these gentlemen, as "well as those for whom you are desired to "make insurance, are native Americans."

The letter of Church and Demmill was dated 13th Feb., 1806, and after describing the ship, adds, "she sailed from Boston the 12th of May "last for Lima, with liberty to go to one other "port in South America, not west of Guaya-"quil, and from there to New York. She "has permission to trade there."

This letter was laid before the board of directors, and the application at that time rejected.

The letter from Gilchrist to Webster & Co. was afterwards laid before the board, and the company made the insurance for the plaintiffs at 10 per cent.

The Herkimer, on her return voyage, was captured near the port of New York, by the Leander, a British ship of war, and sent to Halifax, where she was condemned.

*The plaintiffs gave the underwriters [***510** notice of the capture, and obtained their permission to prosecute a claim for restoration without prejudice to their right to abandon. On receiving notice of the condemnation, they wrote a letter of abandonment, which was delivered to the underwriters, who refused to pay for the loss, whereupon this suit was brought.

On the return voyage, just after doubling Cape Horn, Baxter, who was supercargo and part owner, gave to Edward Giles, the third mate, a bundle of papers, partly in Spanish, telling him at the same time that in all probability they might fall in with privateers, who might overhaul the trunk in the cabin, and if they found the papers, it was probable the vessel might be detained as the papers were in Spanish, and they might not be able to translate them. Giles put the papers in his trunk.

After the capture, Giles was taken out of the Herkimer into the Leander, and on being asked if he had any objection to have his trunk searched, replied that he had not. The trunk was then searched, and this bundle discovered. It contained papers, covering the cargo as the property of Baruso, mixed with others which showed that in fact it was the property of the plaintiffs and of Baxter and Griswold. Evidence was given to prove that the usage of the trade made these papers necessary. There was also an estimate of the probable value of the cargo, if shipped to Europe.

The Herkimer arrived before the Leander; and Baxter, upon his examination on the standing interrogatories, described truly the character of the voyage, and stated correctly the property in the cargo, but denied his knowledge of any papers other than those which were exhibited as belonging to the ship.

Issue was joined on the plea that the defendants had not broken their covenant, and the jury found a verdict in their favor.

On the trial, 28 bills of exception were taken, partly by the plaintiffs and partly by the defendants. Only those taken by the plaintiffs are now before the court.

*The plaintiffs prayed the court be- [***511** low to instruct the jury, that the letter, ordering the insurance, does not contain a representation that no person, other than the said Livingston, Gilchrist, Griswold & Baxter, was interested in the return cargo of the Herkimer; nor that all the persons interested therein were native Americans. The judges were divided on this point, and the instruction was not given.

The 5th bill of exceptions stated, that the plaintiffs prayed the court to instruct the jury, that if they believed the testimony offered by

them, then there was no such concealment of the said papers as can affect the right of the plaintiffs to recover in this action, which instruction the court refused to give, but directed the jury that if they should be of opinion that from the usage and course of trade it was necessary to have the Spanish and other papers delivered by Baxter to Giles, the 3d mate, as aforesaid, than the delivery by Baxter to Giles, and the finding and taking of the said papers by the officers of the Leander, was not such a concealment as affects the right of the plaintiffs to recover.

The 6th bill of exceptions states, that the plaintiffs then prayed the court to instruct the jury, that Baruso having removed to New York, in the United States, while Spain was neutral, for the purpose of carrying on trade, and having continued to reside in New York until after the capture of the Herkimer, the said Baruso could not, at the time of the voyage, be considered as a belligerent. This instruction the court also refused to give, but did instruct the jury that if they should be of opinion that the said Baruso settled in New York before the war between Spain and Great Britain, and remained there domiciliated and carrying on trade generally until the capture of the Herkimer, he is to be considered as a neutral; but if they should be satisfied from the testimony that he went to New York for no other purpose but to carry on trade as a Spanish subject, which he could not engage in as a neutral, and that he was not engaged in any other trade than as a Spanish subject, he cannot be considered as a neutral.

The 7th bill of exception states, that the court then, on the prayer of the defendant, gave to the jury the following opinion:

512*] *"The court having already given "an opinion, that Baruso was not a joint own- "er with the plaintiffs and Griswold and Bax- "ter, in the return cargo of the Herkimer, do, "in compliance with the opinion of the Su- "preme Court, leave it to the jury to deter- "mine whether Baruso had an interest in the "return cargo which increased the risk of the "said voyage, and if the risk was increased, "that the policy was thereby vitiated." This opinion was given on the prayer of the defendants to instruct the jury, that the non-communication to the underwriters of papers showing Baruso to have an interest, and to be a Spanish subject, vitiated the policy.

The 8th bill of exceptions stated, that the defendants then prayed the court to instruct the jury, that if they should be of opinion that the papers which were delivered to Giles by Baxter, or any of them, increased the risk, and that if any of the papers which did so increase the risk were not necessary by the laws and usages of Spain, or the course and usage of trade between the United States and Lima, and that it was not communicated to the defendants that such papers would accompany the cargo, then the plaintiffs were not entitled to recover. The court gave the opinion.

The 9th bill of exception stated, that the plaintiffs prayed an instruction to the jury, that in estimating the increase of risk on the return voyage of the Herkimer, they were to consider it as a voyage which the defendants were informed, in and by the letter of Church and Demmill, was carried on under a license from the Spanish government; and the question for them to decide was, whether the risk of such a voyage, carried on under such a license, was increased by any of the circumstances relied on by the defendants to show an increase of risk in this case. This opinion the court refused to give.

The 11th bill of exception stated, that the plaintiffs produced a witness to prove the usage of the trade, who said that by the laws, regulations and usages of the trade, it was necessary that the property imported into, or exported from the colony, by a foreigner, should be under a Spanish license, and appear to be Spanish *property. Whereupon the de- [***513** fendants moved the court to instruct the jury, that this evidence is not competent to prove the municipal laws of Spain, or the usage and custom of trade established by their municipal laws. The opinion of the court was, that "no parol evidence is admissible to the jury, or if given, can be regarded by them, to prove the legislative edicts or acts of the Spanish government, or to prove any usage, custom or course of trade conformable to such edicts or acts; but that such evidence is admissible to prove the general usage and course of trade that may depend on instructions to the government of Peru."

The 13th bill of exceptions stated, that the plaintiffs produced witnesses, ignorant of the laws of Spain, to prove their understanding of the usage of the trade; and the defendants produced counter testimony on the usage; whereupon the defendants moved the court to instruct the jury, that the testimony of the plaintiffs, if believed, was not competent to show the usage or course of trade that the Herkimer, on her return voyage, should be accompanied with papers giving the cargo the appearance of Spanish property. The court refused to give this opinion, but instructed the jury, that if they were of opinion that the usage or course of trade from or to the province of Peru by foreigners, was to have a license from the King of Spain to trade, and to have Spanish papers on board, to show or give color that the cargo was Spanish property, the defendants were bound to take notice of such course of trade; but if the jury should be of opinion that the trade was prohibited by the laws of Spain, the plaintiffs must prove that the defendants had notice or information of such prohibition.

The 20th bill of exceptions is to an opinion of the court, that whether the abandonment was in reasonable time or not, is not a fact to be exclusively left to the jury, but to be decided by them under the direction of the court.

The 24th bill of exceptions stated, that the defendants moved the court to instruct the jury, that the insurers are not liable for any increase of risk, in consequence of any acts done by the insured to avoid seizure *and confisca- [***514** tion under the laws and regulations of the Spanish government, which instruction the court gave.

The 25th bill of exceptions stated, that the counsel for the plaintiffs then moved the court to instruct the jury, that the right of the plaintiffs would not be affected by any increase of risk produced by such acts as were stated in the preceding exception, if such acts were ac-

cording to the course and usage of trade on the voyage insured. This opinion the court refused to give.

The 28th bill of exceptions stated, that the plaiutiffs moved the court to instruct the jury, that the increase of risk, by which alone the right of the plaintiffs to recover in this action can be effected, is an increase (by reason of some act or omission of the plaintiffs, or their agents) of the danger of rightful capture or condemnation under the law of nations. The court refused to give this opinion.

The verdict and judgment being against the plaintiffs, they sued out their writ of error.

Harper, for the plaintiffs in error.

1. The 1st question is that upon which the court below was divided in opinion, viz., whether the letter of Gilchrist to Webster & Co., ordering the insurance, contains a representation that no other person than Livingston, Gilchrist, Griswold and Baxter was interested in the return cargo of the Herkimer, or that all the persons interested therein were native Americans. It certainly does not contain a direct affirmation of either of those facts. It contains at most a negative pregnant; an ambiguity of which the underwriters, if they deemed it important, should have required an explanation. Nothing can amount to a representation which is not certain to a common intent; so certain as not to admit of a doubt, provided the veracity of the party be not questioned, and he be not uuder a mistake. There is no difference between a representation and a warranty, except that the one is contained in the policy and the other is out of it. They must both be equally certain.

STORY, *J.* Do you admit this question to be relevant to the cause?

515*] **Harper*. No. That is another branch of the argument; I shall contend that it was immaterial whether Baruso were a neutral or not; but that he was, *quoad hoc* neutral.

2. The second question arises upon the 5th bill of exceptions, which was the first takeu by the plaiutiffs. It is to the refusal of the court to instruct the jury that there was no such concealment of papers as could affect the plaintiff's right to recover; and to the opiniou which the court gave, whereby they made the effect of the concealment depend upon the question whether the papers were necessary according to the usage and course of the trade, the plaintiffs object to the opinion giveu.

1. Because it makes the effect of Baxter's conduct relative to the papers depend on the usage and course of the trade; whereas, independently of any such usage, that conduct could not affect the right of recovery; inasmuch as it did not amouut to a concealment of papers, and as the concealment of papers cannot affect such a right.

2. Because it requires that the usage and course of the trade. in order to make this couduct of Baxter inuocent, should render it necessary to have those papers on board; whereas, if the usage and course of trade permitted the having them, it was sufficient.

3. Because it extends to all the papers delivered by Baxter to Giles, many of which were perfectly immaterial and inuocent in themselves, iudependently of any usage or course of trade.

The act did not amount to a concealment. It was only putting the papers from one trunk to another less liable to be searched. It must be such au act as would be likely to prevent discovery; and it must be done with intent to deceive the belligerent, and to defraud him of some belligerent right. When the prayer for an instruction is hypothetical, the facts constituting the hypothesis are to be considered as found by special verdict. If these facts had been fouud by a special verdict, they would uot have been a finding of a concealment. But concealment of papers is not a violation of neutrality. It is no ground for condemnation, nor even *for [**516** detention. The answer to the Russian memorial expressly disclaims concealment and even destruction of papers as a legal ground of condemnation. It is only a ground to refuse costs or damages on restitution; or to refuse further proof, where there is *prima facie* ground of condemnation independent of the concealment. (1 Rob. append. 5, answer to the Russian memorial, 2 Rob., 88; the Rising Sun.) Even spoliation of papers would affect Baxter's property only; and the plaintiffs would be permitted to give further proof.

Some of the papers delivered to Giles were wholly unimportant, and unnecessary to the prosecution of the voyage in safety, and yet the opinion of the court (to be in favor of the plaintiffs) required that they should be necessary according to the usage and course of the trade. Among those papers was an estimate of the value of the cargo if reshipped from New York to Cadiz. This certainly was not necessary by the usage of the trade. There were several other papers equally unimportant. Yet in the opinion of the court the concealment of these papers violated the warranty of neutrality.

3. The 3d question arose on the 6th bill of exceptions which was to the opinion of the court which made Baruso's character, as a neutral or belligerent, depend upon the kind of trade he carried on, as well as upon his domicile.

The plaintiffs object to this opinion, 1st. Because the place of domicile acquired in time of peace is the criterion of a man's character as neutral or belligerent, and not the nature of the trade. In the case of the Harmony (2 Rob., 266), G. W. Murray residing in France, was considered as a belligerent, while his partners in the same adventure, residing in the United States, were considered as neutrals. (3 Rob., 21, *The Indian Chief;* 3 Rob., 37, *The Citto;* 1 Rob., 323, standing interrogatories: 12th interrogatory as to resideuce of the parties; 5 Rob., Appendix, order in council of the 24th of June, 1803, relating to inhabitants of certain colonies; 8 T. R., 31, *Wilson* v. *Marryat;* 1 Caine's cases in error, 25, *Duguet* v. *Rhinelander.*) The nature of the trade has nothing to do with the question. If neutral by domicile he may trade with belligerents, provided *it [**517** be not in articles contraband of war. His neutrality was not inconsistent with his privilege as a Spanish subject. He does not lose his privilege by becoming a neutral American. As between him aud the government of Spain, he was still a Spanish subject. But as between him aud the government of Great Britain, he was, according to the principles of the British prize courts, an Americau merchant.

The plaintiffs also object to the opinion of

the court because there was no evidence upon which the court could ground the hypothesis that Baruso came to this country to carry on that trade only. Although the fact might be that he carried on no other trade, yet it does not follow that he came here for no other purpose.

4. The 4th question arises under the 7th bill of exceptions, which states that the court (in compliance with the opinion of the Supreme Court[1]) left it to the jury to determine whether Baruso had an interest in the return cargo which increased the risk of the voyage; and directed the jury that if the risk was increased, the policy was thereby vacated.

The plaintiffs object to this opinion of the court,

1. Because it leaves it to the jury to decide a mere question of law, viz., whether the contingent interest of Baruso in the voyage could have the effect of defeating the plaintiff's right to recover, by increasing the risk; instead of directing them, as ought to have been done, that such an interest was not subject to capture; that the plaintiffs were not bound to disclose it; and that therefore it could not in law affect their right to recover.

2. Because it does not, as it ought to have done, make the effect of Baruso's interest on the right of recovery depend on his national character, it being clear, as the plaintiffs contend, that if he was a neutral, and not a belligerent, his property was not liable to capture, and no interest which he had in the voyage could affect their right.

518*] *3. Because it does not, as it ought to have done, make the effect of this interest on the right of recovery depend on the usage and course of the trade; it being clear as they contend, that if the usage and course of the trade authorized the use of a Spaniard's name to cover the voyage, a mere contingent interest of that Spaniard in the voyage could not, nor could any interest which he could have in it consistently with the warranty, effect the right of the plaintiffs.

4. Because the defendants, having protected themselves, by a warranty of neutrality, against the effect of any belligerent interest in the voyage, were not entitled to a disclosure of that of Baruso, even could it be considered as a belligerent interest.

The court below misunderstood the opinion of this court upon every point on which an opinion was given when this cause was before this court on the former writ of error. (Ante, vol. 6, p. 274.)

Whether Baruso had an interest in the return cargo was a question of law dependent upon the construction of this contract.

The opinion of this court was that if Baruso had an interest in the return cargo, the materiality of that interest to the risk of the voyage was a fact to be decided by a jury under the direction of a court. This court did not decide that the question whether Baruso had such an interest was to be left to the jury. The court below ought to have directed the jury that Baruso had no interest. He was not to share the loss unless that loss happened by a defect in his license. He was only to share in the profits after the vessel should arrive. It was only a contingent interest in the success of the voyage, like the interest of a consignee who is to have a commission on the sales. Suppose a consignee in a neutral country should be a subject of a belligerent nation, would his contingent interest vitiate the policy? It would afford no just ground of interference by a belligerent. The question is not what would furnish a just pretext for rapacity, but what would be a just ground of detention under the law of nations. (1 Caine's Ca. *in error, 25, *Duguet* v. [***519** *Rhinelander;* 9 East, 282, *Baker* v. *Blakes.*)

The court below ought to have told the jury that Baruso, being domiciliated in the United States, was to be considered as a neutral, and as such, his property was safe under the law of nations, whatever pretext his name might have afforded to a rapacious cruiser.

The connection of a belligerent interest with a neutral interest does not render void a policy on the neutral interest.

Besides, the course of the trade made it necessary that the property should be in the name of Baruso, and this was known to the underwriters.

But with submission to any opinion which this court may have given, the interest of Baruso was wholly immaterial to this case. The defendants have guarded themselves by the warranty of neutrality. If the property be neutral their mouths are stopped. When they take a warranty, they waive all questions of this kind. The premium was calculated upon the warranty. When a contract is reduced to writing all antecedent negotiations are merged in the conclusive act. The plaintiffs were not bound to give notice of any belligerent interest. As to everything against which the warranty is a protection, no disclosure was necessary. (Marshall, 475.) If Baruso's interest did not violate the warranty it was immaterial.

5. The 5th question arose upon the 8th bill of exceptions which was taken to the opinion of the court, "that if the jury should be of "opinion that the papers which were delivered "by Giles to Baxter, or any of them, increased "the risk, and that if any of the papers which "did so increase the risk were not necessary by "the laws and usages of Spain, or the course and "usage of trade between the United States and "Lima, and that it was not communicated to "the defendants that such papers would ac-"company the cargo, then the plaintiffs were "not entitled to recover."

To this opinion the plaintiffs object,

*1. Because it requires that those [***520** papers, in order to be considered as innocent, should be necessary by the usage and course of the trade; whereas, it was sufficient if the usage authorized them, although it might not have rendered them necessary.

2. Because the defendants, having protected themselves by a warranty of neutrality against unneutral conduct, were not entitled to a disclosure of the fact that those papers would be on board.

The effect of the Spanish papers was neutralized by the real American documents on board, showing clearly the real state of the interest of the plaintiffs. If the Spanish papers had stood alone they might have been a ground of detention, or perhaps of further proof; but they of themselves showed a neutral character,

1.—See ante, vol. 6, p. 274.

though not the same ownership. They showed the property to belong to Baruso, and that he was a resident of Boston. But the papers which accompanied them in the same bundle, showed the real ownership and clear neutrality of the cargo. The Spanish papers, therefore, did not prove the property to be belligerent; and if they did not falsify the warranty, they were perfectly immaterial.

6. The 6th question was upon the 9th bill of exceptions, which was taken to the refusal of the court to instruct the jury that in estimating the risk they were to take into consideration the circumstance that it was a voyage which the defendants were informed was carried on under a license from the Spanish government. It is clear that the connection of Baruso with such a voyage could not increase the risk.

7. The 7th question was upon the 11th bill of exceptions, which was taken to the opinion of the court that parol evidence was not admissible to prove any usage, custom, or course of trade, conformable to the legislative edicts or acts of the Spanish government. But that such evidence was admissible to prove the general usage or course of trade, that might depend upon instructions to the government of Peru.

The plaintiffs object to this opinion because it precluded them from parol proof of the usage [*521] and course *of trade, in case that usage and course thould have arisen out of, or even should happen to be in conformity with the legislative acts or edicts of Spain. Whereas the usage and course of trade are in all cases facts capable of parol proof, and seldem susceptible of any other.

8. The 8th question arose upon the 13th bill of exceptions, which was taken to the opinion of the court that the defendants were bound to take notice of the usage and course of trade, but not of the laws of Spain prohibiting the trade.

To the latter part of this opinion the plaintiffs object,

1. Because, whether the trade was generally prohibited by the laws of Spain or not, was a matter wholly immaterial; and their right of recovery ought not to depend on the knowledge which the defendants might or might not possess of an immaterial fact.

2. Because if the prohibition of this trade by the laws of Spain was legally proved, and was a material fact, the defendants were bound to take notice of it.

3. Because there was no legal evidence given in the cause, or stated in any of the bills of exceptions, that this trade was generally prohibited by the laws of Spain; the only evidence being that it could not, according to the usage and course of the trade, be carried on to a foreign port, except under a special permission, a Spanish name, and Spanish papers. Therefore it ought not to have been left to the jury to find that this trade was prohibited by the laws of Spain, as a foundation for requiring the plaintiffs to prove that the defendants had notice of the prohibition.

9. The 9th question was on the 20th bill of exceptions, which was taken to the opinion of the court, that the question whether the abandonment was or was not in reasouable time, was not a question of fact to be exclusively decided by the jury, but was to be decided by them under the direction of the court. The plaintiffs contend that under the opinion of this court in this case upon the former writ of error (antc, vol. 6, p. 274) *it is a merc ques- [*522] tion of fact to be found by the jury. But as some doubt arose in consequence of what was said by this court in the case of the *Chesapeake Ins. Co.* v. *Starke* (antc, vol. 6, p. 268), this bill of exceptions was taken that the opinion of this court may be fully understood.

MARSHALL, *Ch. J.*, said he understood that the court might instruct the jury that certain facts constitute reasonable notice; but that in a special verdict it must be stated whether the time was reasonable.

Harper.

10. The 10th question arises upon the 24th and 25th bills of exception, in which the court instructed the jury in substance that the insurers were not liable for any increase of risk in consequence of any acts done by the insured to avoid seizure and confiscation under the laws and regulations of the Spanish government, although such acts were according to the usage and course of the trade on the voyage insured.

The plaintiffs object to this opinion,

1. Because it is in vague and indefinite terms; whereas, it ought to have specified the acts which were to have the effect in question; to the end that they might appear to be acts of which there was evidence before the jury, and which, if proved, were capable in law of producing that effect.

2. Because the effect of those acts on the right of recovery is not made to depend on the course and usage of the trade.

11. The 11th question was upon the 28th bill of exceptions, which was taken to the refusal of the court to instruct the jury in substance that the only risk, the increase of which could affect the plaintiff's right to recover, was the risk of rightful capture under the law of nations.

The plaintiffs contend that what would give a mere pretext for unjust capture, was not sufficient to charge *the plaintiffs with an [*523] increase of the risk insured against, so as to avoid the policy. Everything was immaterial which did not increase the risk of rightful capture and condemnation; and which did not furnish at least a ground of condemnation which the belligerent has holden to be a rightful ground.

Baruso had no interest in the ship, and yet the ship as well as the cargo was condemned—no doubt on the principle that it was a trade in time of war, not permitted in time of peace. But the license diminished the risk because it showed that it was a trade permitted in time of peace.

Pinkney, Attorney-General, contra.

1. As to the division of opinion in the court below.

It is true the letter ordering the insurance does not in direct terms deny that no other person had an interest in the cargo, but it contains a strong implication to that effect. If any transaction requires *bona fides* it is a representation for insurance. It is the act of the insured and they ought not to shelter themselves under an ambiguity. If it be calculated to mislead it is sufficient.

It is true that nothing is stated negatively.

But why name others as concerned who were not to be insured, unless to inform the underwriters respecting the whole transaction with reference to the national character of all parties concerned. It is calculated to excite in the minds of the underwriters a belief that it contains information on that subject. They who undertake to convey information must take care that it do not excite an idea which they did not mean to convey.

This point, however, is not considered as of very great importance.

2. The next question is much more important. This question arises on the 5th bill of exceptions.

The court gave, in substance, the instruction which the plaintiffs prayed, and yet the plaint-
524*] iffs excepted because *it was not exactly in their own words. The plaintiffs had, among other things, given evidence that the papers found in Giles's trunk were necessary according to the usage and course of the trade, and then prayed the court to instruct the jury that if they believed the evidence so offered, then there was no such concealment of the said papers as could affect the right of the plaintiffs to recover; and this was in truth the direction which the court gave.

But the court ought not to have given the direction as prayed. The concealment of the papers was unneutral; although the parties were justifiable in using them to protect their illegal trade. The whole transaction was unneutral: first, in concealing the papers, and secondly, in denying a knowledge of them. The belligerent had a right to see the papers. It was a clear belligerent right flowing from the right of search.

No court of admiralty, however rapacious, has ever considered concealment of innocent papers as, *per se*, a ground of confiscation. But this was not a concealment of innocent papers. It was a concealment of papers tending to prove the property to be belligerent. It increased the suspicious already excited by other circumstances. Baxter was supercargo, and his acts bind the others, although he was a partner. All the partners are affected by the fraud of any one of them. (1 Rob., 105, *The Welvaart.*) If this unneutral conduct brought the property into suspicion it is sufficient. If it subjects the property to such detention as would authorize abandonment, the plaintiffs were not entitled to the opinion prayed in the 5th exception. In a case where there was concealment of such papers as were calculated to induce such suspicion as would require further proof, and this concealment followed by prevarication, we could not expect a prize court to acquit. It would at least produce detention continued by an adjournment of the case.

This concealment, connected with the other circumstances, justified the condemnation. There were documents showing the property to be in four Americans. Among the concealed papers was a copy of the royal Spanish license, au-
525*] thorizing a Spanish subject resident *in Boston to import goods into the United States from the Spanish colonies. The adventure appeared to be Spanish. It could only be carried on by a Spaniard. There was also concealed another paper of great effect—a power of attorney from Baruso to Baxter, the supercargo, in which Baruso says the cargo "is laden for me and on my account and risk." It proved the property to be in Baruso, and that he was a Spanish subject. It calls him a Spanish merchant. It showed his national character to be belligerent, although he was resident in a neutral country.

It is not residence only which gives the national commercial character. The intention, the nature of the erraud, the permanency of the residence, are all necessary ingredients.

The circumstances of suspicion were very strong. Baxter's receipt, &c., states him to be the agent of Baruso. The letters from Baruso's friends, the clearances, &c., &c., were all "on account of the royal license," and stated that the cargo was to be delivered to Baruso. He was the cloak of the transaction, and he could only be a cloak by his Spanish character. When there are two sets of documents it is immaterial to the captors which they wished to conceal. All these circumstances created too strong a suspicion to justify an acquittal. The case might have been explained but for the unfortunate conduct of the supercargo, which induced a denial of further proof. He, who could and ought to have explained the concealment, did not, but increased the suspicions by his prevarication. There were only three alternatives before the court—to acquit, to condemn, or to allow further proof. The suspicion was too strong to acquit—the prevarication precluded further proof. There was nothing left but to condemn.

The first and most essential of all belligerent rights is that of visitation and search. The right to see all the documents is a necessary consequence of that right, or it would be nugatory. It was the duty of the supercargo, as a neutral, to show all the papers. Why did he show the neutral papers only? The object of the supercargo was to defeat an acknowledged belligerent right, and he endeavored to deceive the adjudicating court.

*STORY, *J.* I wish you to consider [***526** whether, if the trade be necessarily belligerent, the concealment of these papers can be considered as material.

Pinkney. That is, whether they can make the case worse? Perhaps not.

3. The third point is as to the neutral character of Baruso by reason of his residence in the United States.

Locality is something; but not everything. So is the time of emigration.

The general principle of the law of nations is, that the belligerent character belongs to the subject of the hostile nation wherever found. Mere change of place does not alter the character. It is easier for a neutral to slide into the character of an enemy, than for an enemy to fall into that of a neutral. But even in such cases, that great expounder of the law of nations, Sir W. Scott, examines all the circumstances of the case, time of removal, permanency of residence, motive, and nature of his business. The case of *Collett* (8 T. R., 31, *Wilson* v. *Marryat*) has no bearing upon this case. The special verdict found Collett to be a citizen of the United States, and the case depended upon the treaty of 1794.

The case of Mr. Johnson is not more to the point. His office of American Consul prevented his residence in London from affecting his national character. If he had not had the

animus revertendi before the voyage of the Indian Chief was commenced, and had not departed before the arrival of the ship, the trade would have been adjudged unlawful.

The next case is that of G. W. Murray. Sir W. Scott not only forgot to administer justice in mercy, but pushed his principles of commercial law infinitely too far. The commissioners, under the 7th article of the British treaty,[1] gave Murray compensation on the ground that the decision of Sir W. Scott was **527***] wrong. *But, even upon the principles on which that case was decided, residence alone does not constitute national character. The time of his removal and the nature of his employment were also considered.

So also in the case of the *Citto* (3 Rob., 38), the nature of Mr. Bowden's residence in Holland was examined.

The question always is, whether he has become, not a citizen or subject, but a merchant of that country; *i. e.*, a general merchant. But did Baruso become a general American merchant? Was his trade American? Was it neutral? No. He carefully wrapped himself up in the folds of his license, and fenced himself round to exclude the American character.

The case of *Duguet* v. *Rhinelander* is not more applicable than the others. The plaintiff was a naturalized citizen, had been long resident, and was embarked in the general trade of the country.

As to the plaintiff's 2d objection to the opinion—because there was no evidence upon which the court could raise the hypothesis that Baruso came to this country for no other purpose than to carry on that particular trade—the fact is otherwise. There was evidence from which the jury might infer the fact supposed by the court; and they have found it.

4. The 4th question arises upon the 7th bill of exceptions, and is whether the court ought to have left it to the jury to decide whether Baruso had an interest in the cargo.

Perhaps it was a question of law dependent on the construction of the contract, and ought to have been decided by the court. But the plaintiffs cannot complain that the court left it to the jury to decide a question of law which the court ought to have decided against him. Baruso had an interest. He was a partner. The written contract says "he agrees to the following partnership." It is not contended that they are bound by the word "partnership" if the contract does not in law amount to a partnership. But the term may explain other doubtful expressions. Livingston was to **528***] contribute *vessel and funds—Baruso the license, and services, as far as his services were necessary to give effect to the license. Here was a joint contribution for common benefit. It was not necessary that the losses should be equally borne, nor the profits equally divided. Here was also a participation of profits, even in an equal degree, in a certain event. So there was a contribution in loss. If the expedition failed, Livingston would lose his goods, and Baruso the use of his license for a certain time. The suffering, in their own estimation, would be equal. In case of loss upon the sales, Baruso was to contribute, and if the cargo should be lost by reason of a defect in the license, the whole loss would fall upon him. He is guaranty also for the consignees in South America. He had also an interest in the specific goods. In a certain case he was to have a right to take a portion of the goods themselves. The policy was underwritten while the vessel was on her return voyage, and while he had this interest. It was not a mere contingency, but a vested interest.

It is contended that if the usage and course of the trade authorized the use of a Spanish cover, a real Spanish interest would not increase the risk. But the warranty of American property forbids a mixture of a belligerent interest; at least it would in a court of admiralty.

5. The fifth question was upon the 8th bill of exceptions.

This opinion will not bear the construction which the plaintiffs have put upon it. It does not mean to say that the papers to be innocent must be necessary according to the usage of the trade; but if it was the usage of the trade to have such papers, then they were innocent.

6. The plaintiffs were not entitled to the instruction prayed for in the 9th bill of exceptions, because it was an instruction as to a fact; viz., that the defendants had notice that the voyage was to be carried on under a royal Spanish license. Whether they had such notice depended upon the question whether they recollected the letter of Church and Demmill, and whether they knew it was the same ship and the same voyage.

*7. The 7th question was upon the [***529** 11th bill of exceptions, and was whether parol evidence could be given of an usage which grew out of a law, inasmuch as the law itself was not proved by competent evidence.

It was supposed that the law should be first proved before evidence could be given of the usage dependent on that law.

8. The 8th question arose on the 13th bill of exceptions, and was whether the defendants were bound to take notice of the Spanish laws of trade.

There is no adjudged case which requires underwriters to take notice of such laws, although they are bound to know the usage of the trade. If there was no evidence of the law, the opinion was immaterial and could not injure the plaintiffs.

9. The 9th question arose upon the 20th bill of exceptions, and was whether reasonable notice was a question exclusively for the jury.

The plaintiffs had no right to except to this opinion.

Reasonableness of time is a matter of fact to be found by a jury under the direction of a court. And the court may direct them from certain facts, whether it be reasonable. In the same manner as, *in trover*, the court may instruct the jury that a demand and refusal are evidence of a conversion.

10. The 10th question arises upon the 24th and 25th exceptions, and was whether the defendants were liable for an increase of risk in consequence of any acts done by the plaintiffs to avoid seizure and confiscation by the Spanish government for illicit trade, the plaintiffs having taken that risk upon themselves.

The principal objection to this opinion seems to be that it is too abstract, and does not state

1.—Of whom Mr. Pinkney was one.

the facts which were supposed to increase the risk. But there were facts enough stated in the bill of exceptions to ground the instruction upon. All the paraphernalia of the Spanish garb were acts done to protect the cargo from **530***] *confiscation by the Spanish government for illicit trade, and certainly increased the risk of capture by the British, which was the only risk which the defendants took upon themselves. (1 Marshall, 416, Condy's edition; 1 N. Y. T. R., 549.)

11. The 11th question arose upon the 28th bill of exceptions, and was whether the risk, the increase of which could affect the plaintiff's right to recover, could be any other than the risk of rightful capture under the law of nations.

It was not necessary that the risk should be of just condemnation under the law of nations. It was sufficient if it increased the risk of condemnation upon any principle recognized by the courts of the captor.

The court was not bound to give an opinion unless prayed; and if the opinion prayed be not correct the court is not bound to give any other. (1 Marshall, 473, Condy's American edition, *Sterry* v. *Delaware Insurance Co.*)

Harper, in reply.

1. Even if the letter ordering the insurance did contain the intimations supposed, yet it did not amount to a representation; which must always be a positive affirmance or denial of some fact. (See the opinion of this court in this cause, ante, vol. 6, p. 274, and Marshall, 33).

2. As to the 5th exception, it is said that the court gave in substance the opinion prayed; yet if the prayer and opinion were both wrong, the plaintiffs had a right to except. But it is not in substance the same. Perhaps if taken alone it might be so considered, but when taken in connection with the refusal to give the instruction as prayed it is, or must be understood as being different.

It was not merely the delivery of the papers to Giles, but it was also the conduct of Baxter in denying the existence of the papers, &c., which was insisted upon by the defendants as constituting the concealment. The defendants were still at liberty to argue to the jury that **531***] *the concealment by Giles, in connection with the conduct of Baxter, was such a concealment. By refusing the plaintiffs' prayer and giving the instruction as they did, the inference was plain that it did amount to such a concealment.

But there is another more important objection to the opinion. The concealment, even of criminal papers, is not a ground even of detention—nor even to deny further proof. Spoliation alone has that effect. (See the answer to the Prussian memorial in the case of the Silesia loan.) If the papers are found and produced, it excites only a slight suspicion that other important papers may be concealed. But even if it did authorize a denial of further proof, yet it is only in a case where so strong a suspicion exists from other circumstances that the court cannot acquit. But here no such suspicion was raised by the other circumstances. The concealed papers themselves proved the neutrality of the property.

The case did not need further proof. The power of attorney of Baruso was irrevocable—if not expressly, yet by implication.

There is no case which decides that concealment of papers is a ground to refuse further proof. There is a great difference between concealment and spoliation of papers, as to the degree of suspicion excited. When the papers are destroyed, the mind is left to conjecture and the strongest suspicion may be justified. But when the papers are found and produced, the whole extent of their criminality appears at once.

It is true that the act of an agent binds his principal—but *civiliter*, not *criminaliter*.

Spoliation is a criminal act in the eye of a court of admirality.

Upon the whole, then,

1. This was not a case which required further proof. 2. Concealment even of criminal papers is not a ground to refuse further proof if the case required it; and, 3. The papers were innocent.

This trade was within the exception of the order in council of the 25th June, 1802, and therefore the property * was not liable [***532** to condemnation on account of Baruso's being a Spanish subject, he being an inhabitant of a neutral country, and so stated to be upon the face of the papers. It was a trade from an enemy's colony to a neutral country. The papers therefore, in the eye of a court of admiralty, were perfectly innocent. The king in council has a right to relinquish part of the belligerent rights which the nation might claim according to the law of nations. He has done so. He has said that the property of a Spanish subject, being an inhabitant of a neutral country, shall not be liable to confiscation.

If the papers had been destroyed, suspicion might have been thrown upon the transaction because their innocence could not appear. But when found they showed Baruso's interest to be as free from capture as Livingston's.

3. As to the 6th exception.

We admit that something more than mere residence is necessary to constitute national character. We admit there must be an intent to trade. Time also is a necessary ingredient. But no particular length of time is required. The residence must be so long only as to show his real intention. It is not necessary that he should embark in all the trade of the country. It is sufficient if he carry on a part of it. It is sufficient to make it the trade of this country, if the benefits of it belong to this country and not to Spain. He employed our ships, our seamen and our merchants, all of whom were to make a profit. It was a trade between a Spanish colony and the United States. Great Britain never complained of such a commerce as this. She complained only of a commerce between the colony and the mother country. If he had come to this country with a view to the war, and to carry on a trade belligerent in its nature, or not usual in time of peace, there might be some ground for the objection. But this commerce was neutral in its nature. The court meant to say that if the trade was such that a neutral could not carry it on, then, &c. There was no evidence that he came to carry on a trade which, as a neutral, he could not carry on. It is true it was a trade which, as an *American, he could not carry on; but [***533** that did not make the trade belligerent. The Spanish government might have permitted an

American to carry it on, and it would still have been a neutral trade.

4. As to the 7th bill of exceptions.

If the question of Baruso's interest be a question of law, then we contend that he had no such interest as could falsify the warranty.

He was not a partner. To constitute a partnership there must be an universal participation in gain and loss in all events. But in some events he was not to participate in either. In one event only was he to share the gain, and in one only was he to participate in the loss. He was not a joint owner of the cargo. In trover or replevin, he could not have proved an interest. If he had sold the cargo the vendee would have had no title. If he had given a note in the name of all, he only would have been bound. This interest was merely contingent, like that of a consignee in his commissions.

5. As to the 8th bill of exceptions.

The warranty of neutrality was a protection to the defendants against all belligerent interests and belligerent appearances, and therefore it was not necessary to disclose the belligerent cover of the real neutral interest. It is sufficient that the property insured was strictly and really neutral.

6. As to the 9th exception.

The letter of Church and Demmill, stating that the vessel was to trade under a license, was referred to in the letter which ordered the insurance and which was laid before the defendants. It is a principle of law that they are supposed to know what they had the means of knowing and what it was their interest to know. It was proved that the letter of Church and Demmill had been laid before them on a former day, and when they were again referred to it, they ought to have recollected its contents, or have asked for it again.

7. As to the 11th bill of exceptions.

534*] *An usage cannot be against law, and yet we were prevented from proving it, because it was conformable to law. According to the opinion of the court, we were bound to prove that the usage was contrary to law before we could prove it by parol.

8. As to the 13th bill of exceptions.

The defendants were as much bound to know the laws of the trade as the usages of the trade.

10. As to the 24th and 25th bills of exceptions.

The knowledge which the defendants had of the trade and its usage at the time of underwriting the policy, authorized the plaintiffs to use all the means necessary to make the voyage legal.

11. As to the 28th bill of exceptions.

The case cited is, that if there be an edict under which the belligerent does condemn, although unlawfully, it ought to be disclosed.

But here was no such edict, the condemnation was not only unlawful but unauthorized.

The court ought not wholly to reject the opinion prayed, if it be not exactly correct; because it leaves the jury to infer that no part of it is correct. They ought to go on and state what the law is.

March 15th. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court as follows:

This perplexed and intricate case, which is rendered still more so by the manner in which it has been conducted at the circuits, has been considered by the court. Their opinion on the various points it presents will now be given.

If the question on which the court was divided be considered literally, the answer must undoubtedly be, that the letter of the 25th of March, 1806, contains no averment that no person other than Livingston, Gilchrist, Griswold, *and Baxter, were interested in the re- [***535** turn cargo of the Herkimer, nor that all the persons interested therein were native Americans. This would be perceived from an inspection of the letter itself, and there would be no occasion for an application to the court concerning its contents. But the real import of the question is this: Is the language of the letter such as to be equivalent to an averment that the owners named in it are the sole persons who were interested in the return cargo? If it does amount to such an averment, then it is a representation, and if it be untrue, its materiality to the risk must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it.

Upon reading the letter on which this insurance was made, the impression would probably be that the four persons named in it were the sole owners of the return cargo of the Herkimer. The inference may fairly be drawn from the expressions employed. Such was probably the idea of the writer at the time. The writer, however, might have, and probably had other motives for his allusion to other owners than to convey the idea that there were no others. The premium might in his opinion be affected in some measure by stating the little apprehension from capture, which was entertained by others, and especially by that owner who was the supercargo. If, however, it was not supposed by Mr. Gilchrist that the persons named in his letter were the sole owners of the cargo, or if in fact they were not the sole owners, he has expressed himself in so careless a manner as to leave his letter open to misconstruction, and, in the opinion of some of the judges, to expose his contract to hazard in consequence of it.

But that part of the court which entertains this opinion, is also of opinion, that the letter ought not to be construed into a representation of any interest to grow out of the voyage distinct from actual ownership of the cargo. "The owners," says Mr. Gilchrist, "are already insured against the dangers of the seas," &c. His application was for the owners; and when he proceeds to state that others were concerned, he must be understood to say that they were concerned as owners. Consequently, if the letter implies an averment that he has named all the owners, *it implies noth- [***536** ing further, and ought not to be construed into a representation that there were no other persons interested in the safe return of the cargo.

Others are of opinion, that to constitute a representation there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not

substitute his own conjectures for an alleged representation. In this opinion the majority of the court is understood to concur. The instruction, then, applied for by the counsel for the plaintiffs, on which the circuit judges were divided, ought to have been given.

5th. A majority of the court is also of opinion that the instruction prayed for as stated in the 5th exception ought to have been given. If the jury believed the facts offered in evidence by the plaintiffs—which were, that by the usage of the trade to Peru from any foreign port, it was necessary for the ship to have on board, on her return voyage, the Spanish and other material papers delivered by Baxter to Giles, then there was no such concealment of said papers as can affect the right of the plaintiff to recover in this action. In general, concealment of papers amounts to a breach of warranty. But when the underwriters know, or, by the usage and course of the trade insured, ought to know, that certain papers ought to be on board for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property. The use of the Spanish papers was to give a Spanish character to the property in the Spanish ports; and, of the American papers, to prove the American character of the property to other belligerents. But to have exhibited the Spanish papers to a British cruiser and thus to induce a suspicion that the property was belligerent, would have been not less improper than to have exhibited the proofs of American property in a port of Peru, and thus to defeat the sole object for which Spanish papers were necessarily taken on board.

6th. A majority of the court is also of opinion, that under all the evidence in the cause, **537***] Baruso was to be *considered as an American merchant, whether he carried on trade generally or confined himself to a trade from the United States to the Spanish provinces. The Circuit Court, therefore, erred in making the neutral character of Baruso to depend on the kind of trade in which he was engaged, instead of its depending on residence and trade, whether general or limited.

7th. The instruction of the Circuit Court to which the 7th exception was taken, is obviously formed on a plain and total misconstruction of the former opinion of this court. In no part of that opinion has the idea been indicated that the interest of Baruso was a question solely for the consideration of the jury unaided by the judge. It is certainly a question on which it was proper for the judge to instruct the jury. The opinion given by this court was, that "if the jury should be of opinion that the Spanish papers, mentioned in the case, were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact that they would be on board, would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy." The instruction of the Circuit Court to the jury ought to have conformed to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury the regular usage of trade. They refuse to allow any influence to a fact to which this court attached much importance. It is the unanimous opinion of this court, that in giving this instruction the Circuit Court erred.

8th. The Circuit Court seem also to have varied from the directions formerly given by this court, in the opinion to which the 8th exception is taken. This court placed the innocence or guilt of having on board the Spanish papers, mentioned in the case, on the regular usage of trade; the Circuit Court has made their innocence to depend on their being necessary.

The counsel for the defendants contends, that this is a distinction without a difference; but it is impossible to say what difference this distinction might make *with the jury. [***538** It is also the opinion of this court that, in estimating the materiality of the papers to the risk, their effect, taken together, should be considered, not the effect of any one of them taken by itself.

9th. The opinion which the court refused to give, to which refusal the 9th exception is taken, depends on several distinct propositions which must be separately considered.

The letter, on which this insurance was made, contains a direct reference to a previous letter written by Church and Demmill, which was laid before the company, for a description of the ship. The first question to be considered is, did this reference make it the duty of the directors to see that letter, and are they, without further proof, to be considered as having read it? The letter was addressed to, and it is to be presumed remained in the possession of, the agent who made this insurance.

It is a general rule that a paper which expressly refers to another paper within the power of the party, gives notice of the contents of that other paper. No reason is perceived for excepting this case from the rule. It is fairly to be presumed that, on reading the letter of Gilchrist, the board of directors required the agent of the plaintiffs to produce the letter of Church and Demmill, unless they retained a recollection of it. In that letter they were informed that the vessel had sailed for Lima, with liberty to go to one other port in South America, and that "she had permission to trade there."

What was the amount of the information communicated by this letter?

The permission to trade was unquestionably a permission granted by the authority of the country. It was a permission from the Spanish government. But whether this permission was evidenced by a license, or by other means, was to be decided by other testimony; whether it conveyed notice to the underwriters that such a license was on board the ship, depends, in the opinion of part of the court, on the usage of the trade. Those who entertain this opinion think, that as this was submitted *to [***539** the jury, the court committed no error in refusing to say that the defendants were to be considered as knowing that the Herkimer sailed with a Spanish license on board. In estimating the increase of risk, it was certainly the duty of the jury to consider it as a voyage known to the underwriters to be carried on for the purpose of trading to Lima, and that the Herkimer had such papers on board as were usual in such a trade, but whether the license be such a paper

or not, the jury were to judge as of other facts.

A majority of the court, however, is of a different opiniou. The uuderwriters, having full notice that the voyage was permitted, might fairly infer that it was licensed by the Spanish government; because in uo other way would it be permitted. The whole question turned upon the construction of a written document which it belonged to the court to make.

11th and 13th. The 11th and 13th exceptious may properly be considered together, since they are taken to opiuious giveu on the same subject, aud do not essentially vary from each other. The Circuit Court appears to have supposed that the geueral usage and course of trade could not be given in evidence, or, if given in evidence, ought to be disregarded, if the jury should be of opinion that such usage was fouuded ou the laws or edicts of the government of the country where the usage prevailed. That is uot the opinion of this court. The usage may be proved by parol, and the effect of the usage remains the same, whether it originated in an edict or in instructions given by the government to its officers. Any conjectures, which the jury or the wituesses may make on this subject, can be of no importance, and ought to have no influence on the case. Neither can it be more necessary to give notice of a usage founded upon statute, than of a usage founded on instructions. The Circuit Court, therefore, erred in directing the jury that the underwriters were not bound to take notice of the usage of trade, if they should be of opinion that the trade was prohibited by the law of Spain.

20th. The opinion of the Circuit Court to which the 20th exception was taken, appears to be entirely correct.

540*] *24th and 25th. The 24th and 25th exceptions are to the same opiuion somewhat varied in form, and rendered more explicit, on the application of the plaintiffs, than it had been in the instruction given on the motiou of the defendants. It is essentially the same with that to which the 7th exception was taken, and appears to have been founded on a total misapprehension of the former opinion given by this court. In that opinion it was expressly stated, that such papers as, conformably to the regular usage of trade, were to be taken on board a vessel, would not vitiate the policy. "The acts done by the insured to avoid seizure and confiscation uuder the laws and regulations of the Spanish government," which are mentioued in the applicatiou made to the court by the counsel for the defendants, comprehend these papers. This question, therefore, was decided by this court ou the former argument of this cause, and the court is now unanimously of opinion that the Circuit Court erred, both in granting the prayer of the defendauts and refusing that of the plaintiffs.

28th. In the opiniou, to which the 28th exceptiou was taken, this court coucurs with the Circuit Court. The direction asked by the counsel for the plaintiffs ought not to have been giveu. It is expressed in terms which, if assented to, might misguide the jury. Rightful capture according to the law of natious might be construed to mean capture for a cause which would justify condemnatiou according to the law of nations as construed in the United States. But capture will always be made ou suspicion of what the belligerent construes to be cause of forfeiture, and capture authorizes abandonment. Such acts or omissions, therefore, of the plaintiffs, as would induce a capture aud detention according to the common practice of the belligerents, are proper for the consideration of the jury iu estimating the risk.

This court is of opiniou, that there is error in the proceedings of the Circuit Court iu this cause, in refusing to give the opinion on which that court was divided; and also in the opinions to which the 5th, 6th, 7th, 8th, 9th, 11th, 13th, 24th and 25th exceptions are taken. This court doth therefore reverse and annul the judgmeut rendered by the Circuit Court, and doth remand the cause to the said court that a *venire facias* **de novo* may be awarded, [**541** and other proceedings had therein according to law.

STORY, *J.*

I concur in the judgment of reversal which has just been pronounced. But as in some instances I differ from the opinions expressed by the majority, aud in others I concur upon grouuds somewhat variant, I have ventured to express my own views at large upon the important poiuts which have been so fully and ably argued.

The first question which presents itself is on the certificate of division. To constitute a representation there should be an explicit affirmation or denial of a fact, or such au allegation as would irresistibly lead the mind to the same couclusion. If the expressions are ambiguous, or such as the parties might fairly use without inteuding to authorize a particular conclusion, the insured ought not to be bound by the conjectures, or calculations of probability, of the underwriter. The latter, if in such case he deems the facts material, ought to make further inquiries. In the letter of the 26th of March, 1806, there are no words negativing the existeuce of other iuterests thau those of the plaintiffs and Messrs. Griswold aud Baxter.

The negative, if any, is to be made out by mere inference or probable conjecture, and as there is no reason to suppose that the statement was made with that intent, I am satisfied that it did uot amount to a representation negativing the existence of such interests. The court below ought therefore to have given the direction prayed for by the plaintiffs' counsel.

But, even admitting that the letter did contain the representation contended for, I am well satisfied that it was substantially true. It is not pretended that any other person except Baruso had auy iuterest in the cargo; and it is very clear that, whatever might be his contingent interest in the possible profits of the voyage, he had no vested interest in the cargo itself. He was not a partuer, for he wanted one of the essential characteristics of partnership—a direct vested interest in the joint funds. He possessed a mere possibility which, in *the successful termination of the voy- [**542** age, might entitle him to a right of action for a proportion of the profits, or, in a specified case of election, to take a proportion of the property itself. But it was not such an interest as was liable to capture, or such as could be

claimed or condemned in a prize court.' It was less certain than even a *respondentia* or bottomry interest, which have not been allowed to be asserted before the prize jurisdiction. The commissions of a supercargo upon the sales might, with as much propriety, be deemed a vested interest in the cargo consigned to his care.

I pass over, for the present, the fifth exception.

The sixth exception points to the national character of Baruso. As Baruso emigrated from Spain to the United States during a time of peace, no question arises as to the ability of a belligerent subject to change his national character *flagrante bello*.

It is clear by the law of nations that the national character of a person, for commercial purposes, depends upon his domicile. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject and yet engaged in neutral trade; or he may be a neutral subject and yet engaged in hostile trade. Some of the cases respecting the colonial and coasting trade of enemies have turned upon this distinction.

But whenever a person is *bona fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled *bona fide* in a country with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicile, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business are ingredients which may properly be weighed in deciding on the nature of an equivocal residence or **543***] *domicile. But when once that domicile is fixed and ascertained, all other circumstances become immaterial.

The prayer of the plaintiffs (which was refused by the court), in effect asked that if Baruso was *bona fide* settled in New York, and had no domicile elsewhere, he was not to be considered as a belligerent. The court in effect declared that the character of his trade, and not his mere domicile, fixed his national character. There was therefore error both in the refusal and in the direction of the court.

The seventh exception arose from a misconception of the opinion of the Supreme Court. The court did not mean to intimate that whether an interest increased the risk or not was a mere question of fact for the jury. On the contrary, the court considered that it was a mixed question of law and fact on which the court were bound to direct the jury as to the law. As the court below were of opinion that Baruso was not a joint owner of the cargo (in which opinion I concur), the question ought not to have been left to the jury in the broad and unqualified terms which are used. Strictly and legally speaking, Baruso had no interest in the cargo; and, therefore, "his interest could not be material to the risk;" and if the point meant to have been left to the jury was, whether the concealment of the name or the possibility of interest of Barnso increased the risk, it should have been left with proper directions as to the effect of the usage of trade and neutral character of Baruso in settling that question. If the usage of trade allowed or required such cover, or if Barnso were a neutral, I am not prepared to say that, in point of law, the risk could thereby have been increased. It would have been a mere inquiry into the possible hazards from the rapacity of belligerents, or the possible effects of one Spanish name instead of another. Men reason differently upon such speculations.

Nor am I prepared to say that it is ever necessary for the assured to declare the national character of other distinct interests engaged in thesame adventure, unless called for by the underwriter. If such interests are not warranted or represented to be neutral, the underwriter must be considered as calculating upon the possible *existence of belligerent interests, or as [***544** waiving any inquiry.

The fifth and eighth exceptions may be considered together, as they are founded upon the legal effect of the taking on board and the concealment of the papers, by Baxter, from the belligerent cruiser. The prayer of the plaintiffs in the 5th exception was for a direction that under all the circumstances of the case there was no such concealment as would avoid the plaintiffs' right to recover. And if, in point of law, the plaintiffs were entitled to such direction, the court erred in their refusal, although the direction afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury.

The opinion of the court in effect was, that the concealment of any papers, which were necessary to be on board by the usage and course of the trade, did not affect the plaintiffs' right to recover. But (in conformity with the prayer of the defendants in the eighth exception) that if any of the papers increased the risk, and were not necessary by the usage and course of trade, and the fact that such papers would accompany the cargo was not disclosed to the underwriters, the plaintiffs were not entitled to recover.

It is undoubtedly true that the warranty of neutrality extends, not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral character. It must also be conceded that the acknowledged belligerent right of search draws after it a right to the production and examination of the ship's papers. And if these be denied, and the property is thrown into jeopardy thereby, there can be no reasonable doubt that such conduct constitutes a breach of the warranty.

Concealment, and even spoliation of papers, do not ordinarily induce a condemnation of the property; but *they always afford [***545** cause of suspicion, and justify captnre and deten-

tion. In many cases the penal effects extend in reality, though indirectly, to confiscation. For, if the cause labor under heavy doubts—if the conduct be not perfectly fair, or the character of the parties are not fully disclosed upon the papers before the court—the concealment or spoliation of papers is made the ground of refusing further proof to relieve the obscurity of the cause; and all the fatal consequences of a hostile taint follow on the denial.

But the question must always be whether there be a concealment of papers material to the preservation of the neutral character. It would be too much to contend that every idle and accidental, or even meditated concealment of papers, manifestly unimportant in every view before the prize tribunal, should dissolve the obligation of the policy. And if, by the usage and course of trade, it be necessary or allowable to have on board spurious papers covered with a belligerent character, whatever effect it may have upon the rights of the searching cruiser, it would be difficult to sustain the position, that the concealment of such papers, which, if disclosed, would completely compromit or destroy the neutral character, would be a breach of the warranty. In such case the disclosure of the papers produces the same inflamed suspicions, the same legal right of capture and detention, the same claim for further proof, and the same right to deny it, as the concealment would. If the concealment would induce the conclusion that the interest was enemy's covered with a fictitious neutral garb, the disclosure would not in such a case less authorize the same conclusion. In such case it would depend upon the sound discretion of the court, under all the circumstances of the case, to allow the veil to be drawn aside, and admit or deny the claimant to assume his real character. Whenever, therefore, the underwriter has knowledge and assents to the cover of neutral property under belligerent papers, (as he does in all cases where the usage of the trade demands it) he necessarily waives his rights under the warranty, so far as the visiting cruiser may demand the disclosure of such papers. In other words, he authorizes the concealment in all cases where it is not necessary to assume the belligerent national character for the purpose of protection.

546*] *If this view be correct it is clear that the court ought to have given the direction prayed for by the plaintiffs. Sitting here under a clause in the policy which enables us to look behind the sentence of condemnation, we see that the property was really neutral; and if the jury believed the evidence, the concealment was of papers which were authorized by the course of trade for the voyage, and so far from giving a hostile character, was the only means of preventing a strong presumption of that character. If we but consider the known course of decisions in the British courts on questions of this nature, we shall find that, independent of the question of the neutral or hostile character of the ostensible owner, the trade between the belligerent mother country and its colony affects with condemnation the property engaged in it, although such property be neutral, and there be an interposition of a neutral port in the course of the voyage. On examining the papers in this case it will be found that they point, though obscurely, to such an ultimate destination. And at all events the existence of contradictory papers, one set American, the other Spanish, would, in a Spanish trade, afford an almost irresistible inference in a prize court that the property was really Spanish—*Noscitur ab origine.* It would take its character from its origin.

But it is immaterial, in my view, whether a prize court would under such circumstances acquit or condemn. When the cover of a Spanish character was allowed, it was allowed for the purposes of protection; and the disclosure of it was not required elsewhere than in the Spanish dominions. One of the risks against which the insured meant to guard himself was, in my judgment, a loss on account of the use of the Spanish character; a loss which might have been more plausibly resisted, if there had been a disclosure instead of a concealment of it.

The court also erred in declaring (in the eighth exception) that the taking on board of any of the papers, which were not necessary by the usage of the trade, if the risk thereby were increased, avoided the plaintiffs' right to recover. The effect of the whole papers should have been taken together. The evidence did not authorize the court to consider and separate the effect of *each single paper. If [***547** one unnecessary paper might have increased the risk, if singly considered, and yet, if accompanied by the others, it would not have had that effect, certainly the existence of that paper with the others would not have destroyed the right of the plaintiffs. Yet the opinion of the court would have authorized the jury to draw a different conclusion.

The court should have directed the jury that if the papers were authorized by the usage and course of the trade, the concealment of them, under the circumstances, did not vitiate the policy; and that if some were authorized and others not, yet the possession or concealment of the latter with the former did not vitiate the policy, unless the unauthorized, so connected with the authorized, papers increased the risk.

The question presented by the 9th exception, is whether the defendants are to be considered as having notice that the voyage insured was to be pursued under a Spanish license. The letter of the 26th March, 1806, expressly refers to the letter of 17th of February, 1806, which had been laid before the underwriters; and they must therefore be deemed conversant of all the facts therein stated. A party shall be taken to have notice of all facts of which he has the means of knowledge in his own possession, or is put directly upon inquiry by reference to documents submitted to his inspection. In the letter of the 17th February the ship is declared to have a permission for the voyage, which in this trade can be understood in no other sense than a license. The court ought therefore to have given the direction prayed for by the plaintiffs.

The court erred in the opinion expressed in the 11th exception. The course and usage of trade may in all cases be proved by parol, whether such course and usage of trade arise out of the edicts or out of the instructions of the government, and whether the trade be allowed or prohibited by such edicts or instructions.

The court erred also in the latter part of their direction to the jury under the 13th exception. It was immaterial whether the trade was or was not prohibited by the laws of Spain. In either **548***] case the underwriters *were bound to take notice of the usage and course of the trade. The public laws of a country, affecting the course of the trade with that country, are considered to be equally within the knowledge and notice of all the parties to a policy on a voyage to such country.

The 20th exception cannot be supported. The opinion of the court was entirely correct.

The 24th and 25th exceptions ought to be considered together in order to present the opinion of the court below with its full effect. It is clear that any acts done by the assured in the voyage according to the course and usage of the trade, although such acts may increase the risk, do not vitiate the policy. This opinion was pronounced by this court on the former argument of this case, in reference to the Spanish papers to which the present application of the defendants obviously pointed. The court, therefore, erred in granting the prayer of the defendants, and in refusing that of the plaintiffs.

The last (the 28th) exception cannot be sustained. The proposition is conceived in too general terms, and might mislead the jury. Any acts or omissions of the insured or his agents which, according to the known edicts or decisions of the belligerents, though not according to the law of nations, would enhance the danger of capture or condemnation, might, if such acts or omissions were unreasonable, unnecessary or wanton, form a sound objection to the right of recovery. The insured can have no right to jeopardize the property by any conduct which the fair objects of the voyage, or the usage of the trade do not justify.

S. C. 6 Cranch, 274.
Cited—1 Wheat. 55 (n); 8 How. 248, 250; 1 Gall. 103; 3 Wood. & M. 536.

YOUNG *v.* GRUNDY.

Although the consideration of a promissory note fail, by reason of the failure of the payee to perform his part of the agreement upon which it was given, yet if a new agreement as a substitute for the old one be entered into between the original parties to the note, this failure of the original consideration creates no equity in favor of the maker of the note against the indorsee, even in Virginia.

THIS was an appeal from a decree of the Circuit Court for the District of Columbia, sitting in Alexandria, as a court of equity.

549*] *Young brought a bill in equity against Grundy to be relieved from a judgment at law, obtained by Grundy against him on a promissory note given by him in Virginia, to one William Chambers from whom it passed, by several intermediate indorsements, to Grundy. It was given in 1795 for part of the purchase money of a large tract of land in Virginia, which Chambers and others contracted to sell and convey to Young. It was afterwards discovered that Chambers and others had been imposed upon, and that they had title only to a very small part of the land they had sold to Young; whereupon a new agreement was entered into on the 6th September, 1798, between Chambers and others and Young, by which the original contract was rescinded and compensation made to Young for the injury he had sustained by their breach of contract, and provision was made to re-imburse him the moneys he had paid and to take up paper of his, equivalent to that which was then outstanding, and which he had issued for the original purchase money.

Young, in his bill contended, that Chambers and others had not complied with this new agreement, but that they owed him more than enough to cover this note.

In the court below the injunction was dissolved, and upon final hearing the bill was dismissed. Young appealed to this court.

E. I. Lee, for the appellant,

Contended, that there was an original defect of consideration for this note, which, according to the laws of Virginia, followed it into the hands of the present holder. (Laws of Virginia, vol. 1, p. 36; 1 P. Wms., 497, *Turton* v. *Benson;* 1 Dall., 23, *Wheeler* v. *Hughes's ex'r;* 2 Wash., 233, *Norton* v. *Rose;* 6 Cranch, 204, *Stewart* v. *Anderson*).

Swann, contra.

There is no ground of equity as to Grundy.

There was no original want of consideration. Young held the bond of the payee to convey the land, and had *his remedy upon [***550** that bond. The new contract was a substitute for the old one, and was made after Grundy became the holder of the note without notice of any defect of consideration. By the new agreement it was understood that Young should take up this paper, unless it was taken up by Chambers and others, who had an option to take up this or any other equivalent paper of Young's.

March 16th. LIVINGSTON, *J.*, delivered the opinion of the court as follows:

Whatever equity the complainant may once have had against the payee or holder of the note for 433*l.* 15*s.* which was assigned to George Grundy, in consequence of the non-performance of the agreement of the 15th of May, 1795, this court is of opinion that all such equity was done away by the contract of the 6th September, 1798. This last contract was made for the express purpose of making the complainants a compensation for the loss they had sustained, by the non-performance of the other, and was evidently received as an equivalent or substitute therefor. By this latter contract, then, they were placed, as it respected the holders of all their notes, precisely in the same situation as if there had been no want or failure of consideration of the agreement made in 1795. Whether the agreement of 1798 has been complied with it is not material to inquire, because previous thereto, this note was held by Grundy, who cannot be affected by any claim which the complainant may have against the other defendants in consequence of any subsequent transactions between the parties.

The court is of opinion that the decree of the Circuit Court be affirmed with costs.

PALMER *v.* ALLEN.

Absent—TODD, *J.*

In the District of Connecticut, the marshal may, upon an attachment for debt, without a *mittimus*, commit the defendant to prison for want of bail.

ERROR to the Supreme Court of Errors of the state of Connecticut, in an action of assault and battery and false imprisonment, **551***] *brought by Allen against Palmer, who was a deputy-marshal of the United States for the District of Connecticut and had served a process of attachment upon Allen, and committed him to prison for want of bail, without such a *mittimus* as is usual upon commitment on like process issuing from the state courts.

Palmer pleaded a special justification under the writ of attachment issued out of the District Court of the United States for the District of Connecticut. His plea was, upon demurrer, adjudged bad, for want of showing a *mittimus;* and that judgment was affirmed in the Supreme Court of errors.[1]

The question was now submitted to this court, who were furnished with copies of the following opinions, delivered in the court below:

Opinion of Judge Brainard, in which the majority of the court below concurred.

"The original action was trespass, for an assault and battery and false imprisonment, in which the defendant in error was plaintiff; and to which the defendant below, now plaintiff in error, pleaded specially that he was a deputy to the marshal of the United States for the district of Connecticut, and in that capacity had in his hands to serve a writ of attachment issued under the authority of the United States, returnable to the District Court of the United States for the said district; in virtue of which he attached the body of the plaintiff below, read the writ in his hearing, and for want of bail committed him to the keeper of the jail in New Haven, &c., with whom he left a true and attested copy of said writ and process which he avers to be the same imprisonment and pretended trespass complained of, &c., to which there was a demurrer and joinder in demurrer, and adjudged by the superior court to be insufficient. On which this writ of error is brought—plea nothing erroneous.

552*] *"The first action was debt brought on a statute law of the United States for an alleged breach thereof.

"Whether that law be constitutional or not, as it is unnecessary, it would perhaps be indecorous to discuss; and whether debt be the proper action to be brought on it or not, is unimportant for my purpose. The process was under a law, issued under the authority, in the hands of a marshal of, and returnable to a court, all of the United States. The service appears to be arrest of the defendants body, reading in his hearing, and for want of bail, commitment, &c. The authority of the jailer to receive and keep the defendant was a copy of the process without a *mittimus*.

"Is this a justification? Is this a defense?

"The first question is, in the state of Connecticut, in an action of debt, for instance, in point of service of an attachment returnable to a state court, is a *mittimus* necessary to authorize a committment? If not, it settles this case, and there is manifest error. But if it be, the next question is, whether a *mittimus* be necessary in a process issued under the laws and authority of the United States, returnable to and cognizable by a court of the United States, to be served in this state on a citizen of the same.

"This proposition I think correct, that such is the constitution of the state of Connecticut, and from the infancy of her laws and jurisprudence has been.

"That no man's person shall be imprisoned unless by judgment of court, or direction and order of a magistrate.

"In every instance of final process there is an order of commitment, a *mittimus*, contained in the body of the instrument—in the execution itself.

"In all cases where the subject matter has been adjudged by a court of competent jurisdiction, the officer's duty is pointed out and the extent of the debtor's or delinquent's liability is ascertained, the result is made, the end is known.

*"On attachments, it will be agreed [**553** on all hands, that a man shall not be committed to prison, if he procure reasonable bail of the reasonableness or sufficiency of this bail, who is to judge? is the officer in all instances? I apprehend not.

"In case of an attachment, the direction to the officer indeed is, for want of estate, to attach the body of A B, and him safely keep and have to appear before the court. But the mode of this safe keeping and having to appear is pointed out and provided for by law.

"The most ancient statute I find on the subject, entitled 'An act for regulating jails and jailers,' says, that no person or persons whatsoever shall be committed to prison, although arrested or seized by attachment, execution, or any other writ, or for non-payment of rates, debts or fines, or for any misdemeanor or capital, or criminal offense, or any other cause, without a *mittimus*, granted and signed by civil authority, declaring the cause and ground of his commitment, requiring the jailer to receive and keep such person or persons in the prison until discharged according to law.

"In a subsequent statute passed in May, 1706, entitled 'An act concerning officers levying executions,' it is enacted, that when any officer shall have a writ of execution to levy, &c., and doth seize the body, &c., and commit him to prison, a copy of the writ of execution signed by the officer and delivered to the jailer, shall be sufficient warrant or order for him to receive such person, and him hold in safe custody till delivered by law.

"In the revision of the statutes, in the year 1750, the phraseology of the former statute was altered, and the latter was incorporated with it, under the title of 'An act concerning arrests and imprisonments for debt, damages, fines,' &c. This statute has remained the same ever since, and its reading in relation to this subject is: That no person or persons for the non-payment of rates, fines, debts, or for any crime or

1.—The following judges being present: Mitchell, *Ch. J.*, Swift, Trumbull, Edmond, Smith, Brainard, Baldwin and Ingersoll; Judges Swift and Baldwin dissented, and Ingersoll gave no opinion, having been counsel in the cause.

offeuse, shall be committed to prison without a *mittimus* grauted and signed by eivil authority, declaring the cause and ground of his eommitment, requiring the jailer or keeper of the prison, to receive and keep such person or per-**554***] sons in the *prison until diseharged aeeording to law, unless where any proper offiecr, for want of estate, seize the body or bodies of any person or persons by an execution or distress or warrant for fines and rates, and comunit him or them to prison, in whieh case a copy of the exeeution or distress attested and signed by such offieer, and delivered to the jailer or keeper of the prison, shall be a sufficient warrant or order for him to receive sueh person or persons, and him or them to hold in safe custody till delivered by law.

"From the broadness of the aneient statute it is apparent that in relatiou to all proeess, civil or criminal, mesne or final, no person could be committed to prison without a *mittimus*, an instrument statiug the eause, orderiug the reeeption, and directing the detention, signed by a magistrate, or as the expression is, eivil authority.

"In 1706, it oecurred to the legislature that part of this provision was unneeessary; that in final process there was a *mittimus* in relation to that subject from the highest authority; henee the legislative dispensation with *mittimus* in cases of exeeutions.

"Wheu the legislature in 1750, ineorporated the latter statute, whieh had made a distinetiou between final and mesne proeess, into the former, can it be supposed that they intended to narrow the grounds of the aneient provisions aud regulations?

"At the revision iu 1750, it also occurred to the legislature that there were other eases than exeeutions where a *mittimus*, in the sense generally understood, would not only be unnecessary, but improper; henee the exemption was extended to distress or warrants for fines or rates.

"The present statute says, that no person, for the non-payment of rates or fines, shall be committed to prison without a *mittimus*, uuless, indeed, a distress or warrant for such rates and fines has been granted by proper authority, having eompetent jurisdietion.

"The word *debts*, iu the statute, still remains **555***] to be *satisfied with a fair and reasonable eonstructiou. The original title of the aet was an aet eoncerning arrests and imprisonments for debt, damage, fines, &e. Suppose the reading to be that, in an aetion for debt, no person shall be imprisoned without a *mittimus*. This would comprehend all aetions of debt in a proper and technieal sense, of course the present.

"But this I suppose is too narrow a construction. The true meaning is commensurate with all aetions by attachment, which sound in or claim debt or damage, and whieh by the proeess of a court may be redueed into debt or damage. In all which eases, while in mesne proeess, before adjustment, there shall be a *mittimus* to authorize a commitment, after whieh, when liquidated, the execution speaks the order of the court.

"But the statute, sinee its existenee in its present form, seems pretty generally to have had an uniform practieal eonstruction; the best comment perhaps that ean now be made upon it. So far as I ean learn, it has received in practiee, in relation to mesne process, the same construction that was given to the former statute in relation to the same subjeet, aud whieh the words of that statute absolutely and necessarily require. Both under the former and present statute, iu all eases of attachment, a *mittimus* has been deemed neeessary to authorize a commitment.

"But the second and perhaps more important question remains.

"In a mesne process by attachment for debt, issued under the law and authority of the United States, returnable to a eourt of the United States, to be served on a eitizen of this state, within the same, to authorize a eommitment, is a *mittimus* neeessary?

"The United States have a right to preseribe what mode of service for their own proeesses they may deem proper; and if they have poiuted out a mode, that mode must be pursued; if they have not, it should seem fair reasoning to couclude that they had left that subject to the existing regulations of the several states. The Uuited States have a statute, entitled 'An act for regulating *proeesses in the eourts [***556** of the United States,' in which, section 2d, volume 2d, laws of United States, page 103, it is enacted, 'that the form of writs, exeeutions aud other proeesses, exeept their style, and the forms and mode of proeeeding in suits at common law, shall be the same as are now used in the said eourts respectively, in pursuauee of the aet entitled 'An aet to regulate the proeesses in the courts of the United States.'

"What those forms and modes are the statute nowhere specifies, other than by the above referenee; and the saune statute expressly repeals the whole of the act referred to.

"On recurrence, however, to that statute, we find it there enacted, 'That the forms of writs, &e., and modes of proeess in the circuit and district eourts, in suits at eommon law, shall be the same in each state respectively, as are now used or allowed in the supreme courts of the same.'

"But it has been said that *mittimus* is no part of the proeess. If I am eorrect in my conelusion on the first point, it is, by the law of this state, a part, and essential to the eompletion, of service in case of eommitment.

"If part of the serviee, it is part of the proeess—process in one sense is the method taken by law to eompel a complianee with the original writ, by giving the party notiee to obey it—a warning to appear in court at the return of the original writ. On failure of obedienee, further process is said to be had by attachment, &e.

"I understand that the word proeess, as used by the legislature of the United States, in the statute referred to, is to be received in its broadest and most extensive sense. It is to be taken for all proceedings, in any action from the beginning to the end.

"Mode of process includes mode of serviec. Whatever is necessary to complete the serviee of a writ returnable to a state eourt, is by that statute made necessary to eomplete the serviee of a writ returnable to a district or eircuit eourt. A *mittimus* is as necessary in the one case as in the other.

*"But it may be said that there is no [***557** provision in the laws of the United States for

procuring a *mittimus;* that, of course, there may be a failure of justice. When the legislature of the United States referred to the laws of the several states, they were bound to know them and to make provisions correspondent with them; and I am not prepared to say that they have not. I am not prepared to say that it would not be the duty of the judge and justices of this state, on application of the marshal, to grant a *mittimus*. Besides, they have in each district at least one judge peculiarly their own. Sufficient is it that they have the power of making all necessary provision. They do in many instances call into their service the judges and justices of the state courts, and make them *pro hac vice* their own: such as taking bonds of recognizance in cases of prosecutions for breaches of the laws of the United States, and various other instances. But in the words of a great man and eminent judge, 'If the law does not work right, let the legislature mend it; it's their business. I am of opinion that there is no error.'"

Opinion of Judge Baldwin, in which Judge Swift concurred..

"I differ in opinion, only on the necessity of a *mittimus*, for a legal commitment by the marshal of the United States, for the Connecticut District, on an attachment for debt.

"I am of opinion that a *mittimus* is not necessary, by the statute of Connecticut, to authorize a commitment on attachment, in any civil cause, and if it were, it is doubted whether it would be obligatory on the marshals of the United States.

"Before proceeding to give the reasons for my opinion on either of these points, I would remark, that it is presumed it will uot be contended that the marshals are bound by a mode of proceeding which may have been used by the executive officers of the state, unless the same was required, or has been sanctioned, by the laws of the state.

"If the practical construction of the state officers can give a binding effect to the statute **558***] of the state on *them, which the letter does not require; I apprehend that a contrary construction, by the marshals, sanctioned by the subsequeut act of Congress in 1792, requiring that the forms of proceedings in suits should be the same in future as had then been adopted, and used in pursuance of the former act, will be equally binding on them.

"I do not know that there has ever been a judicial construction of the statute in question. I admit that the practice among our state officers (through abundant caution) has been to commit, by *mittimus*, in all cases of arrests, except on executions; but it will also be admitted that the practice was never followed by the marshals of the United States.

"Ever since the establishment of the judiciary of the United States, a period of more than twenty years, they have uniformly committed, in cases of attachment, by copy of their writ; we ought, then, as the question now comes up for judicial decision, to give the proper effect to the provisions of the two statutes, independent of such practical constructions.

"I will then examine, whether the statute of Connecticut requires a *mittimus* for commitment on attachments.

"1. This statute, owing to repeated alterations and compilations, from materials enacted at different times, is not explicit, or very intelligible. Its history will probably give some aid in its construction.[1]

"As early as 1650, it was enacted that no man's person should be arrested, or imprisoned for any debt or fine, if satisfaction could be found from his estate.

"At that time no arrest, or attachment of the person, was allowed for debt.[2]

*"The ordinary process was by sum- [***559**
mons, and on default of appearance, an attachment for the coutempt issued by order of the court.

"By subsequent provisions, and particularly at the revision in 1672, an attachment was allowed as au original process in certain cases, and the form was then given. Iu 1702, the plaintiff was allowed a summons, or an attachment at his option, in all civil actions.

"In 1693, a *mittimus* was first required to authorize a commitment, and at the revision of 1702, it was extended and made necessary in all cases, civil or criminal. The words are, 'that no person shall be committed to prison, although arrested or seized by attachment, execution, or any other writ, or for non-payment of rates, debts or fines, or for any misdemeanor, or capital or criminal offense, or any other cause, without a *mittimus*,' &c.

"Inconvenience was soon experienced, and in 1706 a commitment by copy was authorized, in case of arrest on execution.

"At the revision in 1750, the statute took its present shape, viz., 'That no person shall be arrested and imprisoned, for any debt, damage or fine, where sufficient of satisfaction can otherwise be found from his estate. Provided, that no person, for the non-payment of rates, fines, or debts, or for auy crime or offense, shall be committed without a *mittimus*, granted and signed by civil authority,' &c., 'unless the body has been taken by execution, or distress, or warrant for fines or rates, in which case a copy of the execution or distress, attested, and signed by the officer, and delivered to the jailer, shall be a sufficient warrant or order,' &c.

"By omitting in the last statute, in the clause requiriug a *mittimus*, the expressions 'arrested by attachment, or any other writ, or any other cause,' and by adding to the exception, 'an arrest by distress or warrant,' for which a copy only is requested, it is evident the legislature meant to limit the necessity of a *mittimus*. By the letter of the act as it now appears, it is not required on an attachment for trespass, tort, case, or any other civil cause, unless it is on an *attachment [***560**
for debt, and it can hardly be presumed that the legislature would thus dispense with it in all other cases, and retain it in that; or that under an expression of doubtful import they meant to include all manner of attachments.

"All doubt, it appears to me, will be removed by giving that meaning to the word *debt*, as here used, which it had when first introduced

1.—Stat. Conn. latest revision, printed in 1808. Index heads—mittimus reference to arrests, No. 5, 6, page 58—and in notes there. Also exceution No. 17, stat. p. 283, Sec. 5.

2.—See title, aetions, eivil, page 31, Sec. 1, and in notes there.

into the statute, before an attachment of the person was allowed on mesne process in any case.

"It there evidently means a judgment debt (for there could then be no arrest for non-payment of any other), in which sense it will include as well damages recovered for tort as for money due on contract.

"As no mention is made in the existing statute of mesne process by attachment in any case, and the word debt cannot apply to the variety of demands which may be the subject of attachment, and as no reason can be assigned why that alone should be selected, I conclude the legislature, when they altered the statute, did not mean to include any arrest, by attachment, on mesne process.

"The terms, also, of the ancient statute were, that no person shall be committed without a *mittimus*, although arrested by attachment, or for non-payment of rates, debts or fines.

"Those of the present statute are only, that no person for 'non-payment of rates, debt, or fines,' shall be committed without a *mittimus*, unless by executions, &c. The first makes a distinction between a commitment on attachment, and a commitment for non-payment of a debt, &c.—a distinction which is obvious. At the time of the attachment, no debt is ascertained—the officer has no power to collect any. He is merely to secure the appearance of the person attached, before the proper court, to try the question of indebtedness. The officer has no power to commit, if the person attached will procure bail for his appearance, if not, he is to be imprisoned, not for the non-payment of the debt, but to secure his appearance at court. Whether he is in debt, is a question *sub lite;* to **561***] say he withholds the debt, is to *prejudge the cause. I am therefore of opinion, that the non-payment of the debt mentioned in the statute has no reference to mesne process, and that there is no occasion by our statute for a *mittimus*, to commit in any case except for crimes. Such I contend is the true construction of the statute in question, and such I think is the construction all would give it, if a different practice of our officers had not created a doubt.

"2. If it were evident that our statute required a *mittimus* in such case, doubts are entertained whether it is applicable to the process of the United States.

"It seems to be agreed that the *mittimus* required by our statute must be 'granted and signed by civil authority' of this state. This they are neither authorized nor compelled by any law either of the United States or of this state to do in such case.

"In cases where it is deemed necessary for the civil authority of this state to aid in executing the laws of the Union, power is specially given them to do so; as in all cases of a criminal nature, and in taking depositions, &c. But there is no authority given to them, or duty imposed on them as magistrates, to aid the execution of their civil process, and to expect it of them, or leave it optional with them to give or withhold the aid, would be derogatory to the general government.

"They are an independent sovereignty. Their officers must have all the power incident and necessary to the execution of the duties of their offices.

"By a statute of this state, passed in 1794 (stat. p. 368), 'permission is given to marshals and other offices of the United States, to use our jails, to confine persons under the authority of the United States, with the same authority in the keeping of prisoners, under the authority of the United States, as the keepers of said jails, under the authority of this state have.' The effect is, and was intended to be, to take away all control or responsibility from keepers of the jails, under the authority of this state, as to prisoners confined by the authority of the United States. The prison-keeper of the sheriff, as such, has no power to receive a prisoner under the *authority of the United States. [***562** He must have a special power from the marshal, to enable him to act as keeper under their authority. Such part of the prison as may at any time be used for such purpose by the officers of the United States, is as distinct from the other, and from the control of the state officers, as though it were a distinct building. Neither the sheriff nor the county are responsible for the safe-keeping of the prisoners. The keepers may be, and some times are, different; or if the same person is the keeper of both, he acts in different capacities, and under different authority.

"Hence, I infer, that the keeper of the prison of the United States has no power to commit on civil process by the authority of the state, nor, I contend, have the civil authority of the state any power to require it; and yet, if a *mittimus* is necessary by our statute, it must be 'granted and signed by civil authority' of the state, directed to the keeper of the jail of the United States, commanding him by authority of the state of Connecticut to receive and hold the prisoner, under the authority of the United States. I may add, also, that if the *mittimus* is to be considered as a writ or process, included in the act of Congress, its form must be that of commitment, but the style, that of the United States; that is, it must issue by the authority of the United States, bear test of the proper judge, and be sealed and signed by the clerk; but in such case, it would not have the requirements of our statute, by being granted and signed by civil authority of the state; and the United States have no analogous civil authority to execute the power.

"Does it then follow, as has been said, that the process by attachment must be abandoned? I think not. The party claiming a debt has a right to the advantages of such a writ, and when the officer shall have done his duty, in making the arrest, if no provision is made by law directing the mode of commitment, he must take a reasonable course, such as would be sanctioned by the principles of the common law, and such as was probably used before we had any law requiring a *mittimus* in any case.

"Having arrested the prisoner by legal process, the *officer became responsible for [***563** his appearance at court, and on failure to procure bail, he was bound to hold him in custody. His place of custody is the prison.

"The same warrant which commanded the arrest required the officer to keep his prisoner safely, so that he might be had before the court. The officer was therefore authorized to commit. Still it is reasonable and proper that the keeper of the prison should be able to show

the cause and ground of the commitment, and of his holding the prisoner in custody. This he will be enabled to do more fully, and more satisfactorily, by the copy of the process, and the doings of the officer thereon, than by the *mittimus* usually granted. This is the course required by our statute, on commitment by execution, distress, or warrant, and is that which I apprehend the common law in similar cases would require.

"It therefore appears to me, that on either ground, and most clearly on the first, there was no occasion of a *mittimus* to complete the justification of the officer, and that his plea was sufficient, and ought so to have been adjudged."

March 16th. JOHNSON, *J.*, delivered the opinion of this court as follows:

This suit comes up from the state court of Connecticut, to reverse a judgment of that court. The defendant here brought an action below, against Palmer, and recovered damages for a supposed assault and false imprisonment. The facts of the case were these: Palmer is a deputy-marshal, and in that capacity arrested the body of Allen, on a writ sued out by the United States, to recover a penalty which Allen was charged with having incurred by a violation of a law of the United States. In this suit bail was demanded, and upon Allen's failing to give it, he was committed to prison. The illegal act with which Palmer was charged was committing the defendant to jail without a *mittimus* from a magistrate. It appears that it is the practice of that state, and in this case the majority of the judges decided it to be the law, that such a *mittimus* must be obtained before a defendant in a civil suit can be committed **564***] *to prison. The practice, however, in the courts of the United States in that district, has been the reverse.

To this action the defendant pleaded a justification; and on demurrer, the state court adjudged the plea insufficient, for want of setting forth such a *mittimus;* no question was made of the correctness of taking the body of Allen, or detaining him, until he should give bail. It was supposed that the law of the United States which enacts, that the form of writs, executions, and other processes, "and the forms and modes of proceeding in suits of common law, shall be the same as are now used" in the state courts respectively, gives efficacy to the laws of Connecticut on this subject, and imposes upon the officers of the United States an obligation to conform their conduct to the provisions of those laws.

But this court are unanimously of a different opinion. The plea made out a sufficient justification and ought to have been sustained as such. A writ, known to the jurisprudence of that state, issues to the marshal in the alternative, commanding him to attach the goods of the defendant to a certain amount, and for want of such goods, to take his body; under this writ, not only in conformity to the literal meaning, but according to the established usage and received opinions of that state, the officer was sanctioned in taking the person of the defendant into actual custody—and the 56th section of the collection law of March 2d, 1799, expressly authorizes a demand of bail. Detention, therefore, until bail was given, was strictly authorized by law, and the defense to the assault and imprisonment was complete. Committing the defendant to the state prison was but one mode, and the least exceptionable mode of detaining his person, and if it was not so, it would only be the ground of a special action on the case against the officer for maltreatment, or oppression.

But it is equally clear to this court, that the law above alluded to, commonly called the process act, does not adopt the law of Connecticut, which requires the *mittimus* in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint upon their *state officers in the execution of the [***565** process of their courts, and is altogether inoperative upon the officers of the United States, in the execution of the mandates which issue to them. The judgment below must be reversed, and judgment entered for the defendant.

Cited—10 Wheat. 37-41; 6 Pet. 659; 1 How. 306; 2 How. 17; 2 Curt. 493.

YOUNG ET AL. *v.* BLACK.

If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards becomes interested in the share of one of the joint owners, he cannot, in an action brought against him by the three joint owners to recover the amount of sales, set off his share of that amount. Upon the issue of *non assumpsit*, the defendant may give in evidence the record of a former judgment between the same parties on the same cause of action.

It is a matter of discretion with a court whether it will compel a party to join in demurrer to evidence. A demurrer to evidence ought not to be allowed where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions.

Quære, whether the refusal of a court to compel a party to join in a demurrer to evidence, can in any case be assigned for error?

ERROR to the Circuit Court for the District of Columbia.

The suit was brought by Young, Deblois and Lawrason, against Black to recover the proceeds of the sales of a cargo shipped by the plaintiffs to the West Indies, on board the brig Active, of which the defendant was master, and to whom the cargo was consigned.

The plaintiffs, Young and Deblois, had each an interest of three-eighths in the cargo, and the plaintiff, Lawrason, the other two-eighths. Upon the general issue a verdict and judgment were rendered for the defendant.

At the trial the plaintiffs took four bills of exception.

The 1st was to the admission in evidence of a record of a judgment between the same parties together with parol evidence that it was for the same cause of action.

The 2d and 3d bills of exceptions were to the admission of parol proof that the defendant had an interest in Lawrason's two-eighths of the cargo, after the plaintiffs had shown their written instructions to the defendant with his promise to obey them, his bill of lading of the cargo, and his account of sales of it.

The 4th bill of exceptions states the whole

evidence offered as well by the plaintiffs as by the defendant, and that the plaintiffs of-
566*] fered to demur to the whole *evidence, but the defendant refused to join in demurrer, and the court refused to compel him to join.

E. I. Lee, for the plaintiffs in error.

1. The record mentioned in the first bill of exceptions was not admissible evidence, because it was for a different cause of action. The former action was for a breach of orders, and founded upon a disavowal of the conduct of the defendant; but the present action affirms his conduct and seeks for payment of the balance due upon his account of sales.

2. The court ought not to have permitted the defendant to use parol evidence to contradict the written documents which proved the property of the cargo to be in the plaintiffs.

3. The court ought to have compelled the defendant to join in the demurrer. (3 Bl. Com., 372, 373; 1 Wash., 150, 220; 2 Call., 555, 571; 3 Tucker's Blackstone, 372, note.)

Swann, contra.

The record and parol evidence were properly admitted, and the jury were to decide whether it was for the same cause of action as the present.

As to the demurrer: it does not appear that the whole evidence was stated. The defendant was not bound by any rule of law to join in the demurrer, nor was the court bound to compel him. It was a matter entirely within the discretion of the court.

March 16th. STORY, *J.*, delivered the opinion of the court as follows:

The present action was brought by the plaintiffs in error as joint owners of the brig Active and cargo to compel the defendant, who was master of the said brig, to account for the proceeds of said cargo, which was sold during a voyage to the West Indies. Young owned three-eighths, Deblois three-eighths, and Lawrason two-eighths of the cargo.

567*] *At the trial upon the general issue several exceptions were taken by the plaintiffs, which have been argued, and we are now to pronounce our decision respecting their validity.

The defendant offered in evidence a record of a former suit between the same parties, in which judgment was rendered for the defendant, supported by parol proof that the former suit was for the same cause of action as the present suit. The plaintiffs denied its admissibility under the general issue; and we are all of opinion that the objection cannot be supported.

It has been long since established that under *non assumpsit* the defendant may give in evidence anything which shows that no debt was due at the time when the action was commenced, whether it arise from an inherent defect in the original promise or a subsequent discharge and satisfaction. And the precise point now in controversy has been adjudged to be completely within the rule. If the former judgment had been for the plaintiff, there would be no doubt that it would have extinguished the demand; and it is not less conclusive because it was for the defendant. The controversy had passed in *rem judicatam*, and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question.

The second exception was taken to the decision of the court admitting evidence to show that the defendant had a sub-interest in that portion of the joint cargo which belonged to Lawrason—an interest which was not proved to have been known to or acknowledged by the other owners. And we are all of opinion that the Circuit Court erred in admitting that evidence. The other owners had nothing to do with any private contract between Lawrason and the defendant. Any right of retainer which the latter might have against Lawrason could be enforced only in an action against Lawrason himself; but it offered no legal defense to the express contract proved to have been made with all the joint owners. It might have been contended with as much propriety that the defendant was entitled in such an action to a set-off of a separate debt due from either of the owners. Nor is there any equity in such a claim *against the plaintiffs. [*568 As joint owners they had a lien upon the proceeds for the general balance between them; and had a right to have them applied in the first instance in discharge of the joint debts. Whether, after a final settlement of the accounts of the voyage, anything would have been due to Lawrason does not appear; and yet this evidence, admitted as it was, would have applied the general property to discharge his private contracts, although the joint account might have finally turned out against him. We hold it a sound rule of law, that a joint contract can never be defeated by the mere private contract of an individual of the concern, to whom the other parties have confided no authority for this purpose. Our opinion on this exception disposes also of the third, which is taken to parol evidence offered to show the acknowledgment of Lawrason of the sub-interest of the defendant.

The last exception is of a novel character. The plaintiffs upon the whole evidence offered to demur, and prayed the court to compel the defendant to join in the demurrer. The court refused to do this, and in our opinion their refusal was perfectly correct.

A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it ought never to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions. In the present case the plaintiffs admit that they denied the whole defense of the defendant, and offered evidence to contradict the evidence by which that defense was attempted to be supported. There would therefore have been the most manifest impropriety in acceding to the prayer of the plaintiffs.

The court give no opinion whether a refusal to compel a party to join in a demurrer to evidence can in any case be assigned for error.

*On the whole, for the error of the [*569 Circuit Court in admitting the evidence disclosed under the second and third exceptions

the judgment must be reversed and the cause remanded with directions to award a *venire facias de novo*.

LIVINGSTON, *J.*

I concur with this court in reversing the judgment of the Circuit Court, and for the error assigned in the second exception. But I give no opinion on the refusal of that court to compel the defendant to join in the demurrer to evidence which was offered by the plaintiffs, not because I have any doubt of the correctness of the decision which a majority of the judges have formed on that point, but because I entertain a very strong conviction, and think it my duty to express it, that such refusal can never be the subject of revision upon a writ of error —the contrary of which seems to be implied by the opinion just read. Such applications must ever be made to the discretion of the court which tries the cause, and such court will generally be in a situation to decide more correctly, having all the circumstances of the case before it, than an appellate tribunal; and if it should commit a mistake in the exercise of its mere discretion in refusing to compel a party to join in a demurrer to evidence, or in refusing to grant a new trial, or in refusing to continue a cause, or in any other matter resting solely in discretion, I have no hesitation in saying that less mischief and injury will arise from obliging parties now and then to submit to such inconveniences, than to open a door to the endless litigation which will be produced by permitting appeals in all the variety of cases of this nature which must necessarily arise in the progress of every contested action, and which in Great Britain have never yet been assigned for error.

JOHNSON, *J.*, said he did not wish it to be understood that a writ of error would lie to a decision within the discretion of the court below.

STORY, *J.*, said he did not mean to be understood, in delivering the opinion of the court, as stating that the refusal to compel a party to join in demurrer to evidence was a ground for **570***] *a writ of error. He concurred in opinion with Judge Livingston.

MARSHALL, *Ch. J.* On that point the court has not given any opinion. The former opinions of this court on the subject of discretion, &c., are to be considered as law; but they are not to be extended further.

Cited—9 Wheat. 577; 11 Wheat. 183 (n); 20 How. 436; 24 How. 344, 579; 6 Wall. 234; 7 Wall. 101; 7 Otto, 336; 5 Mason, 436.

THE SCHOONER ANNE

v.

THE UNITED STATES.

Absent—TODD, *J.*

A libel may be amended after reversal for want of substantial averments.

A libel must aver specially all the facts which constitute the offense.

The non-intercourse act of March 1, 1809, was in force between the 2d of Feb. and 2d of March, 1811, by virtue of the President's proclamation of Nov. 2d, 1810.

THIS was an appeal from the sentence of the Circuit Court for the District of South Carolina, condemning the schooner Anne for violation of the non-intercourse law of March 1, 1809 (§ 6, vol. 9, p. 247).

C. Lee, for the appellant.

1. The libel in this case is too imperfect to warrant a sentence of condemnation. It does not state what kind of goods were taken on board; it merely says certain articles prohibited by law. If they were French goods it was lawful to take them on board. This is a penal prosecution, and this court has decided at this term in the case of the *Hoppet* (ante p. 389), that the offense must be specially set forth in the libel. The place of lading is not stated, nor the time, so that it may be known whether the act was done while the law was in force. It does not state whether the goods were put on board with the knowledge of the owner, or with the knowledge of the master, but without naming either the master or the owner, it says, in the alternative, that the goods were put on board with the knowledge of the owner or master. The evidence cannot cure the defects of the libel.

2. When these goods were put on board (between the 2d of February and the 2d of March, 1811) the act of *March 1, 1809, was [***571** not in force, unless by virtue of the President's proclamation of November 2d, 1810. That proclamation is not set forth in the libel, so that the act done does not appear by the libel to be contrary to law. The libel ought to have stated that France had before the 2d of March, 1811, so revoked her edicts as that they ceased to violate the neutral commerce of the United States; and that the President had declared it by his proclamation. This is not like the revival or continuance of a law by a law; but when the revival of a law is to depend upon a matter of fact, the libel ought to state the fact, that the court may judicially know whether the law be revived or not.

STORY, *J.* This court has decided at this term that the act of March 1, 1809, was in force in February, 1811.

C. Lee. If that point has been decided it was when I was not present, and shall forbear to make any further observations; but if it had not been decided, I should have adduced the new evidence communicated to Congress by the late documents to show that in March, 1811, the Berlin and Milan decrees were not repealed, and that the repeal did not take place till the 28th of April.

JOHNSON, *J.* That point was considered in the case of the *Aurora*. (Ante, p. 382.)

Jones, contra.

The cases of the *Hoppet* and the *Aurora* have settled all the points in this case, except the omission to state in the libel the President's proclamation. The court can take notice of the law, and therefore can notice the proclamation authorized by that law.

JOHNSON, *J.* That point was decided in the *Aurora*.

Jones. Then as to the objections to the form of the libel. This is not a case in which the appellant could plead not guilty, and put the United States upon the proof of everything alleged. But he is to put in his claim upon oath, like an answer to a bill in chancery.

572*] *All that is necessary in the libel is to state, generally, the grounds on which the forfeiture is claimed. By referring to the law it is made certain. It is clear, by the terms of the law alluded to in the libel, that the goods must have been of British growth or manufacture; and such was the proof in the case.

The doctrines relative to indictments at common law do not apply to the case.

March 16th. MARSHALL, *Ch. J.*

The sentence of the Circuit Court in this case must be reversed for the defects in the libel, for the reasons stated in the case of the *Hoppet.*

Sentence reversed, and the cause remanded with leave to amend the libel.

THE UNITED STATES
v.
JANUARY AND PATTERSON.

Absent—TODD, *J.*

When a collector of revenue has given two bonds for his official conduct at different periods and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond.

ERROR to the Circuit Court for the District of Kentucky.

This case was submitted to the court without argument, and

DUVALL, *J.*, delivered the opinion of the court as follows:

In this cause the opinion of the court is required on a single point. The facts are these:

The supervisor of the revenue, for the District of Ohio, in due form of law appointed 573*] John Arthur collector *of the revenue for the first division of the first survey of the said district. Arthur, on the 25th day of August, 1797, together with the defendants, his sureties, executed a bond to the United States, in the penalty of $4,000, with condition that Arthur should truly and faithfully execute and discharge all the duties of said office according to law. The supervisor, for greater security to the government, was in the habit of renewing the commission, and renewing the office bond; and on the 23d day of March, 1799, Arthur executed another bond to the United States with Robert Patterson, surety, in the penalty of $6,000 with this condition, "that if the said John Arthur has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office, and shall also render and settle his accounts according to law, then the obligation to be void," &c.

Arthur proceeded to make the collections, and from the commencement of his duty to the 30th of June, 1802, was charged with the collection of $30,584.99 1-2. On the settlement of his account in the year 1803, he was in arrear $16,181.15 1-2, and suits were instituted on each of the bonds. The pleadings were the same in both actions. There was a plea of performance to which the plaintiffs reply and allege, as a breach of the condition, that the defendants have failed to collect and pay over the revenue arising within his district, &c., and are in arrear to the United States, &c., on which issue was joined. Pending the suits, Arthur died; and they were prosecuted to judgment against the sureties only.

The supervisor kept one general account only against the collector. On the trial the plaintiffs exhibited, on their part, the general account between them and the defendant on which the balance, as before mentioned, is $16,181.15 1-2. They also exhibited the balance appearing to be due by terminating the account with the period when Arthur gave the second bond at the time his first commission was revoked, which was $6,483.59 1-2.

The defendants, to support the issue on their part, offered the deposition of a witness who proved that James Morrison, the late supervisor of the revenue, informed him that Arthur had paid a sufficient sum to discharge *the [*574 bond first given, and that what he had paid should be so applied. After reading the deposition, the plaintiffs introduced the supervisor himself to contradict the defendant's witness. In his testimony he admits that the payments made by Arthur if applied to the first bond would discharge it; and that he might have frequently told January and others that the whole of the bond would be paid off, if the payments made by Arthur were appropriated exclusively to its discharge; and that he himself had entertained the opinion that they ought to be so applied. To repel the testimony of the supervisor and to support that of their witness, the defendants produced a clerk in the supervisor's office, who proved "that the defendant, "January, several times called at the office of "the supervisor on the subject of his bond, "expressed his uneasiness about its remaining "out and his desire to get it up. That that su- "pervisor assured him that Arthur had paid "enough to discharge that bond, and that he "might make himself easy; but refused to give "up the bond because he thought that such "bonds ought to remain as vouchers in his "office."

The plaintiffs, on this state of the case, moved the court to instruct the jury, that the promise of the supervisor as to the application of the payments in discharge of the boud, was not of itself an appropriation of the payments, unless it was followed by some act of appropriation. The court overruled the motion, and, at the instance of the defendants, instructed the jury that if they believed that the supervisor had made the election and promise as proven, it was a declaration of his election how the payments made by Arthur should be applied; and that whether a formal entry, in the books of their appropriation, corresponding with that election, were made or not, was immaterial, and that the jury ought to consider the application as made.

To the opinion of the court thus given, the plaintiffs excepted, and this court must now decide as to the correctness of the opinion of the court below.

The law, with respect to the application of particular payments when the debtor owes dis-

575*] tinct debts, has long *since been settled. The debtor has the option, if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application.

In this case a majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is; where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge, of the first bond, without manifest injury to the surety in the second bond; and *vice versa*, justice between the different sureties can only be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any in the possession of the parties interested.

The court is of opinion that the Circuit Court erred in the opinion given, and that it be reversed.

Judgment reversed.

Approved—1 How. 261; 7 Id. 691.
Distinguished—1 Wood. & M. 168.
Cited—12 Wheat. 511; 7 How. 688; Gilp. 126; 1 Story, 602; 4 Mason, 335; 5 Id. 87, 92, 94; 2 McLean, 502, 505.

THE UNITED STATES *v.* PATTERSON.

Absent—TODD, *J.*

A debtor of the United States, who puts evidence of debts due to himself into the hands of a public officer of the United States, to collect and apply the money when received to the credit of such debtor in account with the United States, is not entitled to such credit until the money gets into the hands of a public officer of the United States entitled to receive it. Its being in the hands of an agent of a person who at the time when the claims were put into his hands for collection was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States therefor.

THIS was also a writ of error to the Circuit Court for the District of Kentucky.

The case was submitted without argument, and DUVALL, *J.*, delivered the opinion of the court, as follows:

576*] *This case has been considered in connection with that against January & Patterson.

A suit was instituted on the bond dated 23d March, 1799, against Arthur & Patterson; and pending the suit Arthur died. The defendant pleaded performance, to which the plaintiffs replied, alleging as a breach of the condition, that the stipulations therein contained had not been performed, and that the defendant was in arrear to the plaintiffs the sum of $16,181.15½, &c., on which issue was joined.

The evidence exhibited in the suit against January & Patterson was produced in this case. On the trial the defendant took several exceptions, but not having appealed, they are not open to examination.

The plaintiffs also took an exception to the allowance of a credit to the defendant. The supervisor had received the evidence of a number of outstanding debts due to Arthur, which he undertook to collect, and promised to apply the proceeds to Arthur's credit. Among them was the bond of Beelor & Moore, which was sued; at the trial of this suit, it appeared that the amount of that bond had actually come into the hands of the agent of the person who had been supervisor, but that office being extinct, it was contended on the part of the United States, that the payment could not be considered as a payment to government. The court was of a different opinion, and instructed the jury accordingly; to which opinion of the court an exception was taken, and a writ of error prosecuted.

This court is of opinion that the Circuit Court erred in the decision thus made. The reception of the outstanding debts by the supervisor, for the purpose of having suits commenced for the recovery of them, was an accommodation to the defendant, who could not be justly entitled to credit until the money was in the hands of some public officer authorized to receive it.

Judgment reversed.

Cited—1 McLean, 498.

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*LIVINGSTON [*577
v.
DORGENOIS.

Absent—LIVINGSTON, *J.*, *and* TODD, *J.*

A writ of error does not lie to an order of the court below to stay the proceedings finally upon suggestion of the attorney for the United States, in a case to which the United States are not parties—but the court will award a *mandamus nisi*, in the nature of a *procedendo*.

THIS was a writ of error to the District Court of the United States for the District of Orleans, in a suit brought in that court, by Edward Livingston against F. I. Le Breton Dorgenois, marshal of the territory of Orleans, according to the forms of the civil law as established in that territory.

The petition of E. Livingston stated, that one John Gravier, on the 30th of April, 1803, was an inhabitant of the province of Louisiana; that he was the owner and possessor of a plantation or parcel of land adjoining, and next above the city of New Orleans, and bounded in front on the river Mississippi, which had been uninterruptedly owned and possessed by himself, and those under whom he claimed, for upwards of eighty years. That the said plantation or parcel of land had then, to wit, on the said 30th day of April, and long before, been greatly increased by the alluvion of the said river, which had always, from the several periods of its increase, been considered, pos-

sessed, and lawfully held, as parcel of the said tract of land, by the said Gravier and those under whom he held.

That the mayor, aldermen, and inhabitants of the city of New Orleans having, under some pretense of title to the said alluvion, or to a servitude therein, committed divers trespasses on the said land, the said John Gravier filed his petition in the Superior Court of the territory of Orleans, being a court of competent jurisdiction, and from whose judgment there is no appeal, praying for an injunction against the said trespasses, and that he might be quieted in the possession of the said land. And that such proceedings were had in the said court, on the said petition, that it was finally adjudged and decreed, that the said John Gravier should be quieted in his lawful enjoyment of the said alluvion, and that an injunction, before granted, should be made perpetual, which judgment was carried into execution. After which the petitioner (Livingston) took possession, under **578***] *Gravier, of the property in question, which he held as the legal owner in fee, by virtue of sundry conveyances from Gravier and others who legally held under him; and that the possession of Gravier, in which he was quieted by the said decree, was legally and uninterruptedly transmitted to the petitioner, Livingston, and that he held the same until the 25th of January, 1808, when he was forcibly dispossessed by the defendant, the marshal of the District of Orleans, who still retains the possession thereof, contrary to law.

The petitioner then prays that, in the first instance, without prejudice to his further claims, he may be restored to the possession of which he has been illegally deprived, and may have such further and other relief as the nature of his case may require.

To this petition the defendant answered, and pleaded in bar, that before and on the 25th of January, 1808, he was marshal of the district of Orleans, and in his official capacity received from the President of the United States an instruction or mandate to remove from the lands in question all such persons as should be found thereon and who should have taken possession thereof, or settled thereon since the 3d of March, 1807, which instruction or mandate was communicated to the defendant officially, by the direction of the President of the United States, in a letter written by James Madison, then Secretary of State, which letter is in the words and figures following, viz:

"*Department of State, Nov. 30, 1807.*

"SIR,

"In pursuance of the provisions of the act of Congress, 'to prevent settlements on lands ced-'ed to the United States, until authorized by 'law,' I am directed by the President to instruct you to remove immediately from the land known and called by the name of the Batture, in front of the suburb St. Mary, of the city of New Orleans, which was ceded to the United States by the treaty with France, and the settlement of which has not been authorized by any law of the United States, all persons who shall be found on the same, and who shall have taken possession or settled thereon since the **579***] *3d day of March, in the year 1807. Should any aid be necessary you will call for the assistance of the good citizens of the district, as the *posse comitatus*, or civil power of the territory.

I have the honor to be,
Very respectfully, sir,
Your obedient servant,
JAMES MADISON.

"FRANCIS JOSEPH LEBRETON DORGENOIS, Esq.
Marshal of the Orleans Territory."

And that the defendant did accordingly, on the said 25th day of January, as marshal as aforesaid, and in obedience to the said instruction or mandate of the President, remove the plaintiff and his servants from the lands aforesaid, the same having been taken possession of by the plaintiff since the 3d of March, 1807, which said removal is the same which the plaintiff has set forth in his petition, and this he is ready to verify, &c.

To this plea there was a general demurrer and joinder; but upon the day assigned for the argument, "Tully Robinson, Esq., attorney for "the United States, moved the court that the "proceedings be stayed, upon a suggestion that "the suit is fictitious and collusive; that the "defendant is entirely uninterested in the "cause, not having (though impliedly admit-"ting by the pleadings that he has) any right of "property or possession in the tract or parcel of "land called the Batture, but that the said suit "is carried on for the sole purpose of affecting "the interest of a third party, to wit, of the "United States, and of obtaining the posses-"sion from them." Whereupon sundry documents were filed in support of the suggestion, and against it; and the plaintiff offered to consent that the United States should intervene in the cause, but the counsel with the attorney for the United States replied that the offer could not be accepted, because the United States could not be made defendants in any case. The motion of the attorney for the United States was thereupon *argued, and the court hav- [***580** ing taken time to consider, and having also granted a re-hearing, ultimately decreed that the proceedings should be "finally stayed;" whereupon the plaintiff sued out his writ of error to the Supreme Court of the United States.

P. B. Key, for the plaintiff in error, contended,

1. That the suggestion of the District Attorney ought not to have been received to stay the proceedings.

2. That the rights of the United States (if they had any) could not have been injured by a decision in this case.

3. That to protect the interest of the United States, they had a clear adequate remedy by intervention, as known and used in the civil law.

1. A proceeding so novel and extraordinary, and so pregnant with mischievous consequences, ought to be supported by clear law, or decided usage and practice.

If proceedings are to be stayed at the mere suggestion of interest in the United States, it will be in the power of the District-Attorney, at any time, to stay proceedings in any cause by such a suggestion.

There is neither statute law nor practice to justify such a proceeding, nor can it be sustained by analogy to those cases in which courts of law have sometimes stayed the proceedings at

the suggestion of a third party. There is no case in which they have been stayed upon the mere allegation of the interest of such party, or upon the mere suggestion of collusion.

It is only in cases where the testimony leads to indecency, and is *contra bonos mores;* or where the peace of families, and the happiness and reputation of individuals are put to hazard by actions founded upon wagers made by indifferent persons, and where the injured party would be without remedy, that the court will interfere to stay proceedings, as in the case of *Da Costa* v. *Jones* (Cowp. 729), and *Cox* v. *Phillips, Ca. Temp.* (Hardw. 237.)

581*] *Here it is a mere suggestion of property in the United States, who, if they have any right, have a remedy. That right, if any, cannot be affected by this suit.

2. The question before the court upon the demurrer is, was the defendant justified in removing the plaintiff from his possession? If he was not, the plaintiff is entitled to restoration to his possession with damages, but the right of the United States is not affected. If the defendant was justified, then there is an end of the plaintiff's case. The judgment in this case cannot be given in evidence against the United States. It is *res inter alios acta.*

If this "suggestion" prevails, the plaintiff is ruined, because the United States are not suable, and he has no redress, however illegal the conduct of the officer who removed him.

Whenever the United States have a right, they must prosecute for the recovery of it. There is no obstacle in the way. It is every day's practice. In a case of trover for a ship between individuals, the United States would not be permitted to stay proceedings upon a suggestion that the suit was collusive—that neither of the parties had possession or property in the ship, but that she was forfeited to the United States.

3. But the United States had a clear adequate remedy to protect their rights by intervention, as known and used in the civil law. In 2 Domat, 676, the proceeding by intervention is defined. The petition of intervention ought to set out the interest of the party, with his proofs; the parties litigant are called upon to answer; and the party intervening is considered as plaintiff. This is what the plaintiff offered to permit the United States to do, but they refused, "because the United States could not "be made defendant;" whereas the process of intervention would have made them plaintiff. But the reason is obvious; intervention would have obliged them to show and establish their title; which they could not do, and therefore they resorted to this extraordinary mode of suggestion for the purpose of avoiding a judicial investigation of their right.

582*] *The consequences of such a proceeding, if supported, are too serious and glaring not to be perceived by the court.

Pinkney, Attorney-General,

Stated that he did not appear for the United States, nor for Dorgenois. The writ of error is not against Dorgenois, but against the United States. Yet no citation had been served on the United States or their attorney. He appeared as *amicus curiæ,* and objected to the court's hearing *ex parte* affidavits to prove the value of the matter in dispute to be more than 2,000 dollars; but the court overruled his objection, and heard the affidavits.

On a subsequent day, he stated that he should confine his argument to two questions.

1. Has this court any jurisdiction of the cause? Is it before them? And

2. How shall it be disposed of?

1. The cause is not before this court. The writ of error has issued improvidently. There is no authority nor precedent for a writ of error in such a proceeding. It is not a judgment; and a writ of error at common law, as well as by statute, lies only to a final judgment. This was not a final judgment; for the complaint is, that the court below refused to pronounce a final judgment. This proceeding is not between the parties to the suit. It was equally adverse to Dorgenois as to Livingston. It is not defended by Dorgenois. He opposed the motion, and had as good a right to do so as Livingston. He had a right to go on and get judgment for his costs, if the law was on his side. If the motion of the district attorney had failed, Dorgenois could not have had a writ of error. Nor could the United States. No person who is not a party or privy can have a writ of error. If it be a right, it ought to be reciprocal. There are no authorities directly in point, because the case must be rare; but in analogous cases no writ of error lies. The prayer for the benefit of clergy, which intervenes and prevents the attainder, produces a final *stay of the proceedings; yet no [***583** writ of error lies, because it was no judgment. The only remedy is a *certiorari* to bring the case into the crown office. (Cro. El., 489· *Long's* case; 9 Viner, 476, pl., 2; Id., 480, pl., 13.) So in the case of recusancy, where the conviction is by proclamation, error will not lie, because there was no judgment. So in the case of prohibition, error will not lie for refusing a prohibition, consequently it will not lie on the granting it. There is a strong analogy between that case and the present, which is in the nature of a prohibition. (1 Salk., 236.) So the refusal to grant a new trial, or to continue a cause, &c., are not the ground of a writ of error. (1 Henning, 222; 4 Cranch, 324; 2 Binney, 80, 93; 6 East, 633.)

2. But if this court is in possession of the cause, and if the merits of the case are against the plaintiff, the court can have no motive to interfere, or to reverse the proceedings.

The plaintiff never could be entitled to recover. He brought his action 18 months after the cause of action accrued; and the general rule of the civil law is, that it must be prosecuted within one year if the sole ground of action be the unlawful force. There is only one exception, which is where the defendant continues in the possession thus unlawfully and forcibly acquired. If the force be removed within the year, the action must be brought within the year. The action in the civil law is called *Interdictum unde vi.* (L., 1, ff. d. Tit., *de vi et vi armata*; 2 Pothier, 103; of possession and prescription, c. 6, § 2 & 5; 7 Pothier's posthumous works, 258, 259, c. 13, art. 3.)

The plaintiff's own case shows that the force was more than a year before his suit, and was discontinued within the year. The defendant was not in possession when the suit was brought. But it is said that the limitation

ought to have been pleaded, by analogy to the common law. At common law it was first decided, that if it appeared by the plaintiff's declaration, that his claim was within the statute of limitations, it need not be pleaded.

Afterwards it was held necessary to plead it, **584***] that the *plaintiff might have notice, and reply to the exceptions. But in the civil law there are no exceptions. It is not necessary to plead the limitation. If Dorgenois did not take advantage of the limitation in his favor, it is evidence of collusion.

But without insisting on this defense, the justification set up by the defendant is sufficient. This court will look into it to support the proceedings, but not to reverse them.

The plea sets up the act of Congress, and the order of the President. Every government causes its rights to be protected in the same way. In every republic we find the same. It was so in Rome, Sparta, Athens, &c. The act of Congress was indispensable. Its sole object was to guard against intrusions—to preserve the *status quo*. The President is to exercise a judicial power in deciding whether it be a case in which he was to execute the law. Wherever he was of opinion that the lands had been ceded to the United States, and that the settlement thereof had not been authorized by any law of the United States, and that a person had settled thereon since the 3d of March, 1807, it was his duty to execute the law. The instructions to the marshal stated that the lands had been ceded to the United States, and that the settlement thereof had not been authorized by any law of the United States, but did not state the fact that there had been an intrusion into those lands since the 3d of March, 1807. The President might have had an inquest to ascertain that fact, but he was not bound to do so. He left that fact to be decided by the marshal, who found that there had been such an intrusion. If the President had jurisdiction to issue the warrant, the marshal was justified in obeying it, whether the President decided right or wrong. If on the face of the warrant the jurisdiction be asserted, although falsely asserted, he is bound to obey. He cannot say that the President has overstepped his authority. The contrary doctrine would make the inferior the appellate tribunal. He is only to look to his precept. He could not inquire whether the United States had title or not. The President could not execute the law personally. He must **585***] act by inferior agents. An *officer who has an execution, on the face of which all appears right, is justified.

But another ground of objection to the justification is, that the warrant does not state that the intrusion was since the act. The President had a right to inquire, or to substitute an agent to make the inquiry. But the justification states the fact, that the lands were ceded to the United States, and that the plaintiff had intruded since the act. If the marshal were not competent to ascertain that fact, yet it appears from the other proceedings. If Gravier's possession be Livingston's possession, then the fact is stated, that Gravier's possession was since the act.

It is immaterial whether the United States had title or not. If the President had authority to decide, his decision is conclusive as to the officer. It differs from a common case where a man cannot delegate an authority further than he has title. Independent of the question of title, the act of Congress has given the President a judicial authority to ascertain facts, and to issue his warrant thereon.

Another objection to the plaintiff's claim is, that the United States are not suable. The judgment would have been nominally against the marshal, but would have affected the title of the United States. The execution, upon the judgment in an action of *interdictum unde vi*, is conclusive as to the possession. If the agents of government may be sued, all its rights may be subjected to judicial cognizance. The non-suability of government prevents the judicial decision directly on the property or rights of the government so as to affect permanently the interests of the United States. A contrary doctrine would be inconsistent with sovereignty. There are cases of forfeiture, &c., where the United States are plaintiffs, and there may be cases in which they may authorize suits to be brought against themselves.

It is immaterial whether the United States show their title or not. It is sufficient if it be set up; or if that question be necessarily in contest. That the right of the United States was in contest appears from the *President's [***586** message to Congress, communicating his proceedings relative to the batture, which the plaintiff has produced in evidence.

The case has been thus far considered, on the supposition that the plea of justification by the marshal is a good defense in law. But if it be an imperfect defense, will this court send the cause back to be risked by such a defense, or to be abandoned or betrayed? It is clear that the United States claim title, and this court will take care of the interest of the United States.

It is said that the plaintiff was willing that the United States should intervene. But who has authority to intervene, and submit the rights of the United States to judicial investigation? The President had no such right. But if they were to intervene, it must be as auxiliary either to the plaintiff or the defendant. The judge was therefore driven to stay the proceedings. He could not compel the defendant to amend his defense. The government could not intervene as an individual may. It cannot submit its rights as defendant. Probably the imperial code provided for the protection of the imperial rights. By analogy the United States ought to have the same privilege. If the defense be not good, there is no remedy for the United States but to stay the proceedings.

Every court has such a discretion to stay proceedings when the feelings, &c., of third persons are injured; a *fortiori* where the interests of the United States are concerned, even in cases where there is no collusion. But where there is collusion, the right is unquestionable.

If this court should reverse the decision of the judge, it can only send the case back with directions to proceed in the cause.

Harper, in reply, observed,

That he should be alarmed for himself and for his fellow citizens of the United States, if it could be supposed necessary to reply to many of the positions advanced by the Attorney-General. They find their refutation, *not [***587** only in the universal understanding of the

country, but in the heart of every person who hears them.

This case has no analogy to that of Cox, where the suit was only a pretext to intermeddle with the domestic concerns of third persons, and to harrow up their feelings.

The government of the United States has no greater right to stay the proceedings in a suit between third persons, than any other individual; and no individual can stay the proceedings in such cases upon the mere suggestion of interest or collusion, without becoming a party to the suit. It is true that the United States cannot be brought into court as defendant in all cases; but shall it therefore come when it pleases, and interfere in private concerns? It is sufficient that it can seize what it pleases, and hold what it seizes, without being compellable to account. But it is the only civilized government that refuses to submit its rights to judicial decision.

The question of collusion, being a question of fact only, he rested upon the argument of the appellant as contained in his printed statement of the case.

The action *interdictum unde vi*, is a possessory action only; and the only question is the forcible entry, and its legality. The title does not come in question. The only question is concerning the force and the damages. It was the only action he could have brought. If there had been a question of title, he might have had the *actio utilis* with his possessory action. If the United States had an interest, it ought to have been shown. In the case of the direct taxes, President Washington did not think that the dignity of the United States forbade a judicial investigation. He directed a case to be made and argued at the expense of the United States.

But the defense of the appellee is wholly untenable. It is no justification. The warrant of the President is not authorized by the act of Congress (March 3d, 1807, vol. 8, p. 317). The party to be ousted under the authority of that law must be one who had taken possession since the 3d of March, 1807. It does not apply to **588***] *one who had received peaceable possession from one who was in peaceable possession before and on that day. Its object was to prevent intrusion by strangers into the vacant lands ceded by the treaty. It means an original taking, not receiving a derivative possession. It must appear also that these lands were ceded. But they were not ceded. The cession was only of vacant lands. But the estate to which this alluvion had accrued, was in possession of Gravier at the time of the treaty, and had been in his possession, and in that of those under whom he claimed, for more than 80 years. The alluvion had been judicially decided to be the private property of Gravier by a competent tribunal, whose decision was conclusive.

But there is another fatal objection to the defense, which is, that the act of 1807 did not apply to any claims under French or Spanish grants, until the board of commissioners appointed by virtue of the act of Congress of 1805 (vol. 7, p. 291, 295, § 4) should have rejected them, or until they should be rejected by the Secretary of the Treasury, or by Congress, to whom there was a right of appeal. The report of this board of commissioners was not made until January, 1812, and was not transmitted to Congress by the Secretary of the the Treasury until November, 1812, long subsequent to the forcible removal of the appellant.

The defense ought to have averred that this claim had been submitted to the board of commissioners and rejected, &c.

It is said that the action *interdictum unde vi* is an annual action. But it is also stated in the books, that if the spoliator remain in possession, it may be brought at any time. The plaintiff states the defendant to be in possession, and the fact is admitted by the defendant. But it is said the truth of the fact is not so. Yet it appears that the defendant took possession by force, and kept the plaintiff out, and has not delivered the possession to any body else. The United States disclaimed possession. The possession, therefore, is to be presumed to remain with the defendant.

It is objected that a writ of error does not lie in such *a case. It may be admitted [***589** that at common law this is not such a judgment as will support a writ of error. But in the civil law, in equity, in admiralty and ecclesiastical cases, every decree or sentence of dismissal may be appealed from. But it is said not to be a final sentence, because the court below may rescind it at any time. A decree that a judgment shall be finally staid is a final decree, as much as a decree dismissing the bill.

It is also objected, that if the cause be sent back, the United States cannot have a hearing. But the United States may intervene, which is a process analogous to a bill of interpleader. It is not true that they cannot intervene but as auxiliary to the plaintiff or defendant. This is shown by Pothier, cited by the Attorney-General. He speaks throughout of the right of the third person who intervenes. But if the United States cannot intervene without joining one or the other party, why not join the defendant who claims under the United States? If his defense is imperfect, why not help him? If collusive, why not make a better?

Even under the Roman civil law, the Emperor himself cannot by rescript affect the property of a person who has not been heard. (Code, Tit. 4; Corp. Jur. civ., vol. 2, p. 258.)

March 16th. The counsel for the appellant dismissed his writ of error, and prayed a *mandamus nisi* to the judge of the District Court of Orleans in the nature of a *procedendo*, which was granted.

Mandamus nisi awarded.

Cited—5 Pet. 219.

OTIS *v.* BACON.

Absent—TODD, *J.*

By the 11th section of the act of 25th April, 1808, vol. 9, p. 150, the collector had no right to detain a vessel and cargo after her arrival at her port of destination, under a suspicion that she intended to violate the embargo; and such detention could not be justified by instructions from the Secretary of the Treasury, nor by the confirmation of the President.

ERROR to the Supreme Judicial Court of the State of Massachusetts, in a case involving

590*] the construction *of an act of Congress, and the justification of an officer of the United States, claiming justification under such act: the decision of the court below being against the justification thus set up.

The case was this: Bacon, the defendant in error, having obtained permission to import a cargo of flour from Baltimore into the port of Barnstable, arrived with his cargo at a place called the Mud-hole, in the district and port of Barnstable, on the 2d of October, 1808, and on the 3d obtained from Joseph Otis, the collector of the port, a permit to land the cargo. On the next day the vessel and cargo were seized by Simeon Crowell, the inspector of the port. Bacon called at the collector's office to inquire into the cause of the seizure, and was informed by Joseph Otis, the collector, that he had not authorized it. But William Otis, the deputy-collector, in answer to an offer by Bacon to give bond and security to any amount if he would release the vessel and cargo, said "I have got your vessel and I will keep her." Bacon then abandoned the property to William Otis, the plaintiff in error, and made a protest and abandonment before a notary public. On the 3d day after the seizure, Crowell removed the vessel to Bass river, six miles south-east of the Mud-hole, and on the 13th of October 233 barrels and 49 half barrels of the flour were landed and stowed in Crowell's house. The vessel and the residue of the cargo was afterwards carried away by persons unknown, and the cargo sold in the West Indies.

Bacon brought his action of trover against Joseph Otis, the collector, William Otis, the deputy-collector, and Simeon Crowell, the inspector. Joseph Otis died before the trial, and Crowell was never taken.

At the trial William Otis, the plaintiff in error, relied on the 11th section of the act of Congress of the 25th of April, 1808 (vol. 9, p. 150), by which it is enacted, "That the collector of "the customs be, and they are hereby respect- "ively authorized to detain any vessel ostensi- "bly bound with a cargo to some other port "of the United States, whenever, in their opin- "ions, the intention is to violate or evade any "of the provisions of the acts laying an embargo,

591*] "until the decision of *the President of "the United States be had thereupon," and offered in evidence certain letters from the Secretary of the Treasury, containing instructions to the collector, and stating that the President had confirmed the detention of the vessel: also written orders from Joseph Otis, the collector, to Crowell, the inspector, to seize the vessel and land the cargo. And also offered evidence that an unusually large quantity of flour had been imported into Barnstable about the same time, and also evidence of the declarations of the mate of the vessel the day before she was carried off; all of which evidence was rejected by the court.

The judge instructed the jury that if they believed the testimony relative to the declarations of William Otis, and the other circumstances, it maintained the issue on the part of Bacon.

And also, that the collector had no right, under the circumstances, to detain the vessel, she having arrived at her port of destination and obtained a permit to unlade.

And further, that if the collector had power to detain the vessel, his authority did not extend to the seizure of the cargo, which seizure was, of itself, unlawful, and a conversion of the cargo.

And that if Bacon had been aiding in forcibly rescuing the vessel and cargo, and had obtained any benefit from it, the verdict must be for the defendant.

The defendant took a bill of exceptions, and, the verdict and judgment being against him, brought his writ of error under the 25th section of the judiciary act of 1789.

Jones, for the plaintiff in error.

The declarations of the defendant were not sufficient evidence of the trover and conversion, and there was no evidence that he did any act. The judge ought to have left the jury to draw their own inference from those declarations.

*The vessel had not in fact arrived at [*592 her port of destination. Her clearance was for Yarmouth, which, although within the district of Barnstable, is six miles distant; she might even have gone to Provincetown on the other side of Cape Cod.

Part of the defense was that the vessel was carried off by collusion with the plaintiff, and yet the judge rejected the principal evidence which connected him with the transaction, the declarations of Martin, the mate, who ran away with the vessel and sold the cargo at Nevis.

The judge also rejected the evidence tending to show the motives for a fraudulent voyage, and the grounds of suspicion which the collector had.

He rejected also the letters of instruction from the Secretary of the Treasury, and the letter giving notice that the President had confirmed the detention of the vessel, which, even if they were not authorized by law, were yet good evidence in mitigation of damages.

Amory and *P. B. Key*, contra.

If the collector had no right to detain the vessel under any instructions which could be given, the letters offered in evidence must have been immaterial, and therefore inadmissible.

She was not ostensibly bound to any other port—she had arrived and obtained a permit to land her cargo. Yarmouth was not another port, it was part of the same port of Barnstable.

If a judge tells the jury that a fact is proved, when it is not, it is not an error in law. The jury are not bound to regard the opinion of the judge as to the existence of a fact. The sufficiency of any fact or facts to maintain the issue is a matter of law, and the instruction of the judge upon that point is proper.

As to the instructions, if they were merely conformable to the law they were immaterial; and if contrary to law, inadmissible.

*In *trover*, what is not a justification [*593 cannot be given in evidence in mitigation of damages. The damages are the value of the article converted. Vindictive damages are not to be given. It is a mere indemnification that is sought.

As to the declarations of Martin: he is not proved to be the agent of the plaintiff. Why was he not examined as a witness?

Jones, in reply.

The judge ought to have told the jury that if they found Martin to be the plaintiff's agent, then his declarations were evidence, otherwise not.

The President's confirmation of the seizure was a justification under the provisions of the law.

The jury may give vindictive damages in trover, if they will. Evidence may therefore be given in mitigation.

March 17th. WASHINGTON, *J.*, delivered the opinion of the court as follows:

This is an appeal from the Supreme Judicial Court of the commonwealth of Massachusetts, under the 25th section of the judiciary law. The judgment complained of was rendered in an action of trover and conversion, brought by the appellee against Joseph Otis, Crowell and the appellant for taking and converting a quantity of flour, the property of the appellee. The trial took place between the appellee and appellant, Joseph Otis having died after the commencement of the suit; and the process not having been served on Crowell. The verdict having been in favor of the plaintiff, the appellee, judgment was rendered thereupon in his favor.

By a bill of exceptions taken to the charge of the court the following facts appear to have been given in evidence. That Bacon having obtained from the Governor of Massachusetts such a certificate as authorized him under a provision in one of the embargo laws to transport a cargo of flour from some of the southern [*594] *states to the district of Barnstable, did accordingly procure such a cargo at Baltimore and arrived with it in the schooner Ann, at a place called the Mud-hole, in the port and district of Barnstable, on the 2d of October, 1808. On the 3d of the same month a permit to land the cargo was granted by Joseph Otis, the collector of the port. The day following the vessel and cargo were seized by Crowell, the inspector of the port. Bacon immediately called at the collector's office to inquire into the cause of the seizure, and was informed by Joseph Otis that he had not authorized it. But William Otis, the deputy collector, in answer to an offer made by Bacon to give bond and security to any amount if he would release the vessel, said, "I have got your vessel and I will keep her." The offer to give bond not to go any where with the vessel and cargo was repeated, but William Otis refused to give her up. Bacon then proposed to unlade the vessel and again offered bonds, which Otis, the appellant, refused, and said, "you may see the flour landed, but you shall not have it after it is landed." The appellee then abandoned the property to the appellant, and the next day made a protest and abandoned before a notary public. The seizure and detention of the vessel and cargo by Crowell is fully proved. On the third day after the seizure Crowell removed the vessel to Bass river, six miles southeast of Mud-hole; and on the 13th of October 233 barrels and 49 half barrels of the flour were landed and delivered to the appellee. The vessel, with the residue of the cargo, for the conversion of which residue this suit was brought, was afterwards carried away by persons unknown, and the cargo sold in the West Indies.

Upon this evidence the court charged the jury that if they believed the evidence of the declaration of William Otis, and of the other circumstances in this case respecting the seizure and detention of the said vessel and her cargo, it was sufficient in point of law to maintain the issue on the part of Bacon, and to prove the conversion of the 298 barrels and 21 half barrels of flour which were carried off in the vessel. That the collector had no right to detain this vessel and cargo, she having arrived at her port of discharge and obtained a permit to unlade, and that even if he had a right *to detain the vessel, this authority did [*595] not extend to a seizure of the cargo, and that such seizure was of itself a conversion, and that as the defendant, Otis, had failed to make out a justification, he must be considered as a wrong doer and chargeable to Bacon for the value of said flour. But that if the jury should believe from the evidence that Bacon aided or consented to the rescue and carrying off the vessel and cargo, or had by forcible or collusive means obtained any benefit from the sale of said cargo in consequence of said rescue, then the defendant, Otis, was entitled to a verdict.

It is apparent on the face of this record that this cause in the court below turned upon the construction of the 11th section of the act of Congress of the 25th of April, 1808, ch. 66, and the question for this court to decide is, whether that court erred in the opinion given to the jury upon that statute. The words of the 11th section are, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon."

If this section authorized the collector to seize and detain this vessel and cargo under the circumstances in the case as detailed in this record, then the opinion of the court below was erroneous. If it gave no such authority, then it was clearly right.

The power of the collector to detain is confined to a vessel ostensibly bound with a cargo to some other port of the United States. Can a vessel which has actually arrived at her port of discharge, and has received from the collector of the port a permit to land her cargo, be considered as a vessel ostensibly bound to some other port of the United States? We think not. The reason for authorizing the detention of a vessel before she has arrived at her port of discharge does not apply to one which has actually performed her voyage according to the stipulations of the bond given by the owner at the port of her departure. All rational ground of suspicion of an intended violation of the embargo laws is *then done away; for if [*596] such an intention at any time existed, it would be difficult to assign to the master or owner a motive for postponing the execution of it until after the arrival of the vessel at her port of discharge. It is, therefore, scarcely to be conceived that such a case was in the contemplation of the legislature.

It is true that this vessel had not arrived at Yarmouth, where her cargo was to be landed, at the time of the seizure. But it is sufficient, in the opinion of the court, that she had arrived at the port to which she was destined, and had received a permit to land. The voyage was as much at an end in relation to the question as if

she had arrived within 100 yards of the wharf at Yarmouth. It is, therefore, the unanimous opinion of this court that there is no error in the opinion of the court below on the construction given by that court of the above statute.

Other exceptions were taken, in the course of the trial of this cause, to the opinion of the court below on rejecting certain evidence offered by the appellant. But this court has no authority, under the law which authorizes this appeal, to notice any error, except such as appears on the face of the record and immediately respects the questions of validity of the constitution, treaties, statutes, commissions, or authorities in dispute.

The opinions of the court below, in relation to the evidence offered by the appellant, even if erroneous, which we neither affirm nor deny, have nothing to do with the construction of any statute of the United States; and therefore they cannot be regarded by this court.

Judgment affirmed.

Cited—2 Wheat. 23; 6 Wheat. 590.

THORNTON *v.* CARSON.

Absent—TODD, *J.*

An award is not void because it is in the alternative, and contingent, nor because one of the alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control.

ERROR to the Circuit Court for the District of Columbia, sitting at Washington.

597*] *Two actions of debt, commenced at law by Carson against Thornton, upon two bonds for the payment of money, were referred, by consent under a rule of court, to arbitrators, who awarded that the first action should "be "marked and considered settled; and that the "other also should be marked and considered "settled, provided, that the defendant, Thorn-"ton, in conjunction with the trustees of the "gold mine company of North Carolina, should "convey and secure by a deed and assurance "legally executed, with proper and usual cov-"enants, unto John K. Carson, his heirs and "assigns, for the benefit of the said John and "the heirs of Thomas Carson, deceased, on or "before the first day of January, 1811, one "eleventh part of all the minerals and mines "that might thereafter be found upon a tract of "land, in the county of Montgomery, and state "of North Carolina, which by deeds bearing "date the 5th of December, 1805, was conveyed "by the said John K. Carson to the said Will-"iam Thornton and by the said William "Thornton, to the said trustees of the gold mine "company; and that if such conveyance and "assurance should not be made on or before "the said 1st of January, 1811," then in the first suit judgment should be entered up by the court for the plaintiff (Carson), for the penalty of the bond, to be released on the payment of a certain sum expressed on the award, and also in the second suit, judgment should be entered for the plaintiff for the penalty of the bond to be released on the payment of another sum also expressed in the award; and that upon receiving such conveyance and assurance, Carson should convey to Thornton five shares in the gold mine company, of North Carolina, which Carson had subscribed for on the 1st of April, 1806.

Exceptions were taken to this award. 1st. Because it is not final. 2d. Because it is uncertain. 3d. Because it is unreasonable. 4th. Because it is contingent and conditional. 5th. Because it is against law, and 6th. Because it is no award.

But the court below overruled the exceptions and rendered judgment for the amount of the money mentioned in the award.

*The defendant, Thornton, brought [*598 his writ of error, and his counsel insisted upon the following errors:

1. That the award was not final or certain, because its final determination depends on a contingency, and would be an award in favor of the plaintiff in one event, and in favor of the defendant in another. It was also uncertain, because there was no way of ascertaining whether the act to be done by the plaintiff in error, and the other persons, was or was not done; nor whether the conveyances were made as directed; nor whether they were "proper and sufficient;" nor how, nor by whom the entry was to be made in the suit; and the arbitrators could neither reserve this to be determined by themselves, nor leave it to be done by others.

It was also uncertain, because it is not stated when the entry ("settled") was to be made in the suit in the one event, nor the judgment for the plaintiff in the other.

2. The award was bad because it required the plaintiff in error to do what was manifestly out of his power, viz., to get other persons to join him in executing a deed, which, if not impossible, was at least unreasonable.

It was also unreasonable, because it required a deed to be made by the plaintiff in error, who is stated to have no title nor interest in the thing to be conveyed; and because it only required that the deed should be made; not that it should be delivered; so that the same would not have been binding upon the defendant in error; and therefore the award being uncertain, unreasonable and inconclusive as to one party, was to be so considered as to both. And

3. That the award was repugnant and void, being at first in favor of the plaintiff in error, and determining that the suit should be entered "settled," and afterwards awarding that a judgment should be entered for the defendant in error, upon a certain contingency.

The case was submitted without argument, *Morsell*, *for the defendant in error, [*599 having cited Kyd on awards, 137, and 12 Mod. 586, *Lee* v. *Atkins*.

WASHINGTON, *J.*, delivered the opinion of the court as follows:

This is a writ of error to a judgment of the Circuit Court for the District of Columbia.

Under a rule which was served upon the plaintiff in error to show cause, during the term at which the rule was made, why judgment should not be entered on the award, he appeared and assigned for cause, that the said award was uncertain, not final, unreasonable, conditional and void.

These objections are strictly technical, and

referable solely to defects supposed to appear on the face of the award, and do not aim to impeach it for any one of the causes which the law of Maryland, passed in October, 1778 (ch. 21), declares to be sufficient for setting aside an award.

This court, not meaning to decide whether any and what other objections than those stated in the statute of Maryland may be alleged against entering judgment upon awards made under orders of reference, will proceed to consider those which were stated in this case.

It is contended that this award is not final or certain, because it depends on a contingency, and will be an award in favor of the plaintiff in one event, and in favor of the defendant in another. This court does not so understand the effect of this award. It is clearly in favor of the defendant in error, in either event contemplated by the referees. The plaintiff is required, in conjunction with certain other persons, to convey to the defendant, for the benefit of himself and the heirs of Thomas Carson, on or before a fixed day, certain property specified in the award, or to pay the amount of the two bonds in suit. If he made the conveyance, then the referees have awarded certain property to the defendant; and if he failed to do this, judgment was to be entered against him for the amount of those bonds. The defendant had his **600***] election to do either; and upon *satisfying the court, at the time he was required to show cause why judgment should not be entered on the award, that he had made such a conveyance as the award prescribed, the court ought to have ordered the suits to have been entered "settled."

If the plaintiff had made the conveyance, and the defendant, who, upon that act being done, was required by the award to transfer five shares in the gold mine company of North Carolina, to the plaintiff, had failed to do so, the court ought to have ordered the suits to be entered "settled." But the plaintiff, having failed to perform the act, upon which alone this transfer was to be made and the suits were to be entered "settled," became liable to pay the sums awarded by the referees as the equivalent for the property to be conveyed, and consequently the court was right in entering the judgment for the sums awarded.

There is no uncertainty in all this; or at least none which might not be rendered certain by the act of the plaintiff in conformity with the award, and which must not necessarily be certain at the time the court was to render judgment on the award.

The plain meaning of the award is that the plaintiff was to pay the amount of the bonds in suit, unless, by a certain day, he made a conveyance to the defendant of the property described in the award, in which latter event he was to receive from the defendant a transfer of five shares in the gold mine company, and to be discharged from the payment of the money, by an entry to that effect to be made in the suits referred. But if he refused to make the conveyance, then judgment to be entered against him for the amount of the bonds in suit. If he entitled himself to this entry in his favor, by performing the other branch of the alternative, and the defendant failed to perform his part of the award, then the defendant could receive no benefit from the award, and the suits were to be entered "settled." Whether the conveyance from the plaintiff, and the transfer by the defendant, were made in due form, were questions proper for the consideration of the court.

The award is said to be uncertain, because the names *of the trustees who are to [***601** join in the conveyance, and of the heirs of Thomas Carson, are not stated, nor does the award declare who is to prepare and tender the deed. These, too, were questions proper for the consideration of the court below, but form no objections to the award. It does not appear from the record that the defendant had refused or failed to do every thing which the law required him to perform to entitle him to the judgment of the court, and we must therefore presume that no delinquency on his part was shown by the plaintiff; that if it was necessary for him to prepare and tender the deed such as the law required, he did so to the satisfaction of the court. If he failed to do that which would warrant the court in entering judgment on the award, it was the duty of the plaintiff to have shown this as cause against entering the judgment, and to have spread all the facts upon the record, which might enable this court to decide whether the court below acted correctly or not.

The award is said to be unreasonable because it requires the plaintiff to get other persons to join in the conveyance to the defendant, which he may not be able to do. But surely if the plaintiff was bound to pay the bonds in suit, or to convey a good title to certain property, which title would not be valid in the opinion of the referees unless other persons joined in the conveyance, he cannot surely complain that he is ordered to pay the money, unless he executes such a deed as will pass a good title. It is his misfortune if he cannot make the title, but it is no reason why in that event he should not pay the money.

There are other causes assigned why the award is unreasonable; but as the facts to prove it unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award.

Judgment affirmed with costs.

Cited—18 How., 252; 2 Wall., 130.

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*WALLEN *v.* WILLIAMS. [*602

Absent—LIVINGSTON, TODD, *and* STORY, *J. J.*

The Circuit Court of Tennessee, as a court of equity, cannot award a writ of *hab. facias possessionem* to enforce its decree.

ERROR to the Circuit Court for the District of East Tennessee, in a suit in equity, in which Joseph Williams on the 15th of November, 1799, brought his bill of complaint against Elisha Wallen and John Williams, whereby he

stated that the defendants and others in the year 1779 entered into a copartnership in the entering of lands in the land office for the sale of lands in that part of the state of North Carolina which now lies within the District of East Tennessee; and that each party was, on demand, to pay his proportion of the money due to the state upon the entries, to the party who should advance it: and that if any party so failed to pay his proportion, he should forfeit his share of the lands entered, and should cease to be a partner. That Joseph Williams, the complainant, paid the whole of the money due to the state for the lands entered, and that John Williams, one of the defendants, not having paid any thing, sold his share of the lands to the other defendant, Wallen, who had notice that nothing had been paid by John Williams. Wallen obtained patents, upon this assignment of John Williams, for two tracts of 640 acres each, and one for 440. The latter tract of 440 acres he sold to a purchaser without notice; but he still held the other two tracts. That the complainant had demanded from Wallen payment of John Williams's proportion of the money due to the state, which Wallen refused to pay. The defendant in his answer relied in part on the statute of limitations.

The facts being proved to the satisfaction of the judge, he decreed that "the said Elisha "Wallen be devested of all the right, title, in- "terest, property and claim which he had, or "has, to the said two tracts of 640 acres, and "each of them, and that all the right, title, in- "terest, property and claim of, in and to said "two tracts of land and each of them, and "every part and parcel thereof, be vested in "the said complainant, Joseph Williams, his **603***] "heirs and assigns forever, to *have, "hold, occupy, possess and enjoy the same and "each and every part thereof, with their here- "ditaments and appurtenances, against the said "Elisha Wallen, his heirs and assigns forever." And it was further decreed that the defendant, Wallen, should pay to the complainant the sum of $593.33 1-3, the value of the tract of 440 acres as found by the jury which had been impanelled to ascertain its value; and that for the purpose of compelling payment thereof the complainant should have execution, which was accordingly issued and satisfied.

The complainant afterwards obtained a writ of *hab. facias*, grounded upon the affidavit of the marshal that the defendant refused to deliver possession to the complainant according to the decree.

By virtue of this writ the complainant was put into possession of the two tracts of 640 acres each; and the defendant, Wallen, brought his writ of error.

Jones, for the plaintiff in error,

Moved the court to direct the court below to quash the writ of *hab. facias* and to award a writ of restitution; upon the ground, as it is understood, that the court below, as a court of equity, could not award such a writ.

He cited 5 Com. Dig, Tit. Pleader; 3 B., 20, and 9 Vin. ab., 478; (8 vo. Ed.) Tit. Error, F. pl., 3.

There was no appearance for the defendant in error.

The court made the order agreeably to the motion.

FAIRFAX'S DEVISEE
v.
HUNTER'S LESSEE.

Absent—MARSHALL, *Ch. J., and* WASHINGTON, *J.*

Lord Fairfax, at the time of his death, had the absolute property, seizin and possession of the waste and unappropriated lands in the Northern Neck of Virginia.

An alien enemy may take lands in Virginia by devise, and hold the same until office found. The commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax.

THIS was a writ of error to the Court of Appeals of Virginia in an action of ejectment involving the *construction of the treat- [***604** ies between Great Britain and the United States, the judgment of the Court of Appeals being against the right claimed under those treaties.

The state of the facts, as settled by the case agreed, was as follows:

1. The title of the late Lord Fairfax to all that entire territory and tract of land, called the Northern Neck of Virginia, the nature of his estate in the same as he inherited it, and the purport of the several charters and grants from the Kings Charles II. and James II., under which his ancestor held, are agreed to be truly recited in an act of the assembly of Virginia, passed in the year 1736 (vide Rev. Code, v. 1, ch. 3, p. 5), "for the confirming and better securing the titles to lands in the Northern Neck, held under the right honorable Thomas Lord Fairfax," &c.

From the recitals of the act, it appears that the first letters patent (1 Car. 2.) granting the land in question to Ralph Lord Hopton and others, being surrendered in order to have the grant renewed with alterations, the Earl of St. Albans and others (partly survivors of, and partly purchasers under the first patentees) obtained new letters patent (2d Car., 2.) for the same land and appurtenances, and by the same description, but with additional privileges and reservations, &c.

The estate granted is described to be, "All that entire tract, territory or parcel of land, situate, &c., and bounded by, and within the heads of the rivers Tappahannock, &c., together with the rivers themselves, and all the islands, &c., and all woods, underwoods, timber, &c., mines of gold and silver, lead, tin, &c., and quarries of stone and coal, &c., to have, hold, and enjoy the said tract of land, &c., to the said patentees, their heirs and assigns forever, to their only use and behoof, and to no other use, intent or purpose whatsoever."

There is reserved to the crown, the annual rent of 6*l.* 13*s.* 4*d.* "in lieu of all services and demands whatsoever;" also one-fifth part of all gold, and one-tenth part of all silver mines.

*To the absolute title and seizin in [***605** fee, of the land and its appurtenances, and the beneficial use and enjoyment of the same, assured to the patentees, as tenants *in capite*, by the most direct and abundant terms of conveyancing, there are superadded, certain collateral powers of baronial dominion; reserving, however, to the governor, council and assembly of

Virginia, the exclusive authority in all the military concerns of the granted territory, and the power to impose taxes on the persons and property of its inhabitants for the public and common defense of the colony, as well as a general jurisdiction over the patentees, their heirs and assigns, and all other inhabitants of the said territory.

In the enumeration of privileges specifically granted to the patentees, their heirs and assigns, is, "freely and without molestation of the king, to give, grant, or by any ways or means, sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for or buy the same."

There is also a condition to avoid the grant, as to so much of the granted premises as should not be possessed, inhabited or planted by the means or procurement of the patentees, their heirs or assigns, in the space of 21 years.

The third and last of the letters patent referred to (4 Jac. 2), after reciting a sale and conveyance of the granted premises by the former patentees to Thomas Lord Culpeper, "who was thereby become sole owner and proprietor thereof in fee-simple," proceeds to confirm the same to Lord Culpeper, in fee-simple, and to release him from the said condition of having the lands inhabited or planted as aforesaid.

The said act of assembly then recites, that Thomas Lord Fairfax, heir at law of Lord Culpeper, had become "sole proprietor of the said territory, with the appurtenances, and the above recited letters patent."

By another act of assembly, passed in the year 1748 (Rev. Code, v. 1, ch. 4. p. 10), certain grants from the crown, made while the exact **606*]** boundaries of the Northern *Neck were doubtful, for lands which proved to be within those boundaries, as then recently settled and determined, were, with the express consent of Lord Fairfax, confirmed to the grantees; to be held, nevertheless of him, and all the rents, services, profits and emoluments (reserved by such grants) to be paid and performed to him.

In another act of assembly, passed May, 1779, for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands, there is the following clause, viz: (vide Chy. Rev. of 1783, ch. 13, s. 6, p. 98), "And that the proprietors of land within this commonwealth may no longer be subject to any servile, feudal or precarious tenure; and to prevent the danger to a free state from perpetual revenue; Be it enacted, That the royal mines, quit rents, and all other reservations and conditions in the patents or grants of land from the crown of England, under the former government, shall be, and are hereby declared null and void; and that all lands thereby respectively granted, shall be held in absolute and unconditional property, to all intents and purposes whatsoever, in the same manner with the lands hereafter to be granted by the commonwealth, by virtue of this act."

2d. As respects the actual exercise of his proprietary rights by Lord Fairfax.

It is agreed that he did, in the year 1748, open and conduct, at his own expense, an office within the Northern Neck, for granting and conveying what he described and called the waste and ungranted lands therein, upon certain terms, and according to certain rules by him established and published; that he did, from time to time, grant parcels of such lands in fee (the deeds being registered at his said office, in books kept for that purpose, by his own clerks and agents); that according to the uniform tenor of such grants, he did, styling himself proprietor of the Northern Neck, &c., in consideration of a certain composition to him paid, and of certain annual rents therein reserved, grant, &c.; with a clause of re-entry for non-payment of the rent, &c.; that he also demised, for lives and terms of years, *parcels of the same [***607** description of lands, also reserving annual rents; that he kept his said office open for the purposes aforesaid, from the year 1748 till his death in December, 1781; during the whole of which period, and before, he exercised the right of granting, in fee, and demising for lives and terms of years as aforesaid; and received and enjoyed the rents annually, as they accrued, as well under the grants in fee as under the leases for lives and years. It is also agreed that Lord Fairfax died seized of lands in the Northern Neck, equal to about 300,000 acres, which had been granted by him in fee to one T. B. Martin, upon the same terms and conditions, and in the same form, as the other grants in fee before described; which lands were, soon after being so granted, reconveyed to Lord Fairfax in fee.

3d. Lord Fairfax being a citizen and inhabitant of Virginia, died in the month of December, 1781; and by his last will and testament, duly made and published, devised the whole of his lands, &c., called or known by the name of the Northern Neck of Virginia, in fee to Denny Fairfax (the original defendant in ejectment) by the name and description of the Reverend Denny Martin, &c., upon condition of his taking the name and arms of Fairfax, &c., and it is admitted that he fully complied with the conditions of the devise.

4th. It is agreed that Denny Fairfax, the devisee, was a native born British subject, and never became a citizen of the United States, nor any one of them; but always resided in England; as well during the revolutionary war as from his birth about the year 1750, to his death, which happened some time between the years 1796 and 1803, as appears from the record of the proceedings in the Court of Appeals.

It is also admitted that Lord Fairfax left, at his death, a nephew named Thomas Bryan Martin, who was always a citizens of Virginia, being the younger brother of the said devisee, and the second son of a sister of the said Lord Fairfax; which sister was still living, and had always been a British subject.

5th. The land demanded by this ejectment, being *agreed to be part and parcel of [***608** the said territory and tract of land called the Northern Neck, and to be a part of that description of lands, within the Northern Neck, called and described by Lork Fairfax as "waste and ungranted;" and being also agreed never to have been escheated and seized into the hands of the commonwealth of Virginia, pursuant to certain acts of assembly concerning escheators, and never to have been the subject of any inquest of office, was contained and included in a certain patent, bearing date the 30th April, 1789, under the hand of the then governor, and the seal of the commonwealth of Virginia,

purporting that the land in question is granted by the said commonwealth unto David Hunter (the lessor of the plaintiff in ejectment) and his heirs forever, by virtue and in consideration of a land-office treasury warrant, issued the 23d January, 1788. The said lessor of the plaintiff in ejectment is, and always has been, a citizen of Virginia; and in pursuance of his said patent entered into the land in question, and was thereof possessed, prior to the institution of the said action of ejectment.

6th. The definitive treaty of peace concluded in the year 1783, between the United States of America and Great Britain, and also the several acts of the assembly of Virginia, concerning the premises, are referred to as making a part of the case agreed.

Treaties and acts of Assembly referred to.

Provisional articles of peace between Great Britain and the United States, concluded 30th November, 1782, (Art. 5 and 6.)

Definitive treaty of peace between the same powers, concluded 3d September, 1783 (art. 5 and 6).

Treaty of amity, &c., between the same powers, concluded 19th November, 1794 (art. 9.),

"An act respecting future confiscations." (Oct. 1783.)

"Whereas, it is stipulated, by the sixth article of the treaty of peace between the United States and the King of Great Britain, that there **609***] shall be no future confiscations *made; Be it enacted, That no future confiscations shall be made, any law to the contrary notwithstanding; provided, that this act shall not extend to any suit, depending in any court, which was commenced prior to the ratification of the treaty of peace."

"An act declaring who shall be deemed citizens of this commonwealth." (May, 1779, ch. 55. Repealed.)

"An act for sequestering British property," &c. (Oct., 1777, ch. 9, vid. Chy. Rev., p. 64.) All the property and estate whatsoever of British subjects is, by this act, sequestered into the hands of commissioners of sequestration, by them to be preserved, according to certain regulations, for the purpose of being restored or otherwise dealt with, according as the King of Great Britain should act towards the property of citizens of the commonwealth, in the like circumstances. The preamble declaring that inasmuch as the British sovereign was not yet known to have set the example of confiscation, "the public faith and the law and usages of nations," required the like forbearance on our part.

"An act concerning escheats and forfeitures from British subjects." (May, 1779, ch. 14, vid. Chy. Rev., p. 98). After reciting the former act, and that it had been found that the property, so sequestered, was liable to be wasted, &c., and that from the advanced price at which it would then sell, it would be most for the benefit of the former owners, in the event of its being thereafter restored, or of the public, if not so restored, that the sale should take place immediately, &c., repeals so much of the former act as was supposed to have suspended the operation of the laws of escheat and forfeiture, and then declares that all the property, real and personal within the commonwealth, belonging, at the time of passing the act, to any British subject, "shall be deemed to be vested in the commonwealth; the lands, slaves and other real estate by way of escheat, and the personal estate by forfeiture." The proceedings on inquests of office, for the purposes of escheat under this act, are prescribed. The duties of escheator are directed to be performed, in the Northern Neck, by the sheriffs of counties. Section 3 declares who shall be deemed British subjects within the meaning of the act. *"First. All persons, subjects of His [***610** Britannic Majesty, who, on the 19th April, 1775, when hostilities commenced at Lexington, between the United States of America and the other parts of the British empire, were resident or following their vocations in any part of the world, other than the said United States, and have not since either entered into public employment of the said states, or joined the same, and by overt act adhered to them." &c., &c.

An act to amend the foregoing (Oct., 1779, ch. 18, id. p. 110), directs the modes of proceeding in inquests of office, traverse of office and *monstrans de droit*, as well by British subjects as others.

"An act concerning escheators" (May, 1779, ch. 45, id. p. 106; Oct., 1785, ch. 63, p. 52, vid Rev. Code, v. 1, p. 126), directs the appointment of an escheator for every county, except the counties in the Northern Neck; his qualification, duties, &c., proceedings on inquest of office, traverse and *monstrans de droit*, &c., &c., prohibits the granting of any lands, seized into the hands of the commonwealth upon office found, till the lapse of twelve months after the return of the inquisition and verdict into the office of the general court; if no claim be made within that period, or being made shall be found and discussed for the commonwealth, the clerk of the general court is, within two months thereafter, to certify the fact to the proper escheator, who is, thereupon, to proceed to sell.

"An act to extend the operation of the foregoing act, to the counties of the Northern Neck." (1785, ch. 53, p. 37).

"An act to amend and reduce into one, the several acts for ascertaining certain taxes, establishing a permanent revenue," &c. (Oct., 1782, ch. 8, sec. 24—vide Chy. Rev. p. 176), sequesters, in the hands of persons holding lands in the Northern Neck, all quit rents then due, until the right of descent shall be more fully ascertained, and the general assembly shall make final provision thereon; and all quit rents thereafter to become due shall be paid into the public treasury, under the operation of the laws of that session; for which quit rents *the inhabitants of the Northern Neck [***611** shall be exonerated from the future claim of the proprietor.

"An act concerning surveyors," (Oct., 1782, ch. 33, sec. 3—vide id. p. 180), recites that the death of Lord Fairfax may occasion great inconvenience to those inclined to make entries for vacant lands in the Northern Neck; provides that all entries made with the surveyors of the counties in the Northern Neck, and returned to the office formerly kept by Lord Fairfax, shall be deemed as good and valid in law as those made under his direction, until some

mode shall be taken up and adopted by the general assembly, concerning the territory of the Northern Neck.

"An act for safe keeping the land-papers of the Northern Neck," (October, 1785, ch. 63, p. 36,) reciting that it was customary to keep the records, &c., of lands within the Northern Neck in the office of the late proprietor, and that it was necessary that the records on which the titles to lands depended should be all kept in one office; provides for the removal of the same into the register's office, &c.

Also, provides for issuing grants for surveys, under entries made in the life of the proprietor, and under entries made with surveyors, pursuant to the act last above recited; declaring them to be cases till then unprovided for.

Sec. 5. Subjects the unappropriated lands, within the district of the Northern Neck, to the same regulations, and to be granted in the same manner, as is by law directed in cases of other unappropriated lands belonging to the commonwealth.

Sec. 6. Forever thereafter exonerates land holders within the said district from composition and quit rents.

"An act declaring who shall be deemed citizens of this commonwealth." (May, 1779, ch. 55. Repealed.)

"An act declaring tenants of lands or slaves *in taille*, to hold the same in fee-simple." (May, 1776, ch. 26, vide Chy. Rev., p. 45.)

612*] *An act to amend the foregoing. (October, 1783, ch. 27, vide id., p. 204.) Lands or slaves, which by virtue of the former act have or shall become escheatable to the commonwealth, for defect of blood, shall descend, and be deemed to have descended, agreeable to the limitations of the deed or will creating such estates: Provided, this act shall not extend to any lands or slaves escheated and sold for the use of the commonwealth.

C. Lee and *Jones*, on the part of the plaintiff in error, contended,

1st. That Lord Fairfax was, at his death, seized of an absolute and unconditional estate of inheritance in the whole of that description of land, within the boundaries of his letters patent, designated by him as "waste and ungranted;" that is to say, in all the lands within those boundaries, except such as had been parcelled out into tenements, and granted in fee, by himself or his ancestors, or predecessors, or by his or their consent or authority; and that he was in the actual seizin and possession of the soil, with the like title to the immediate pernancy and fruition of the profits, and under the like sanctions, as ordinary proprietors in fee, under grants derived from the crown prior to the revolution.

2d. That the estate, by virtue of the will of Lord Fairfax, vested in Denny Fairfax, the devisee, and has never been divested out of him by office found and seizure, nor by any equivalent mode of confiscation whatsoever; and that the treaty of peace found him seized of the estate unaltered from the condition in which it was originally taken under the devise.

3d. That the treaty of peace prohibited the confiscation of the estate, whether by inquest of office, or by any other mode whatsoever; and so operated a release and confirmation to the British proprietor, whose title was again explicitly acknowledged and confirmed by the treaty of 1794; which completely removed every incapacity and disability that might possibly be supposed to remain in him, as a landed proprietor.

4th. That the patent, under which the defendant in error claims the land in question, was not authorized by any *pre-existing [***613** law of Virginia, but was in direct contravention of the treaty of peace, and of the statute of Virginia, enacted expressly in execution of the treaty, and strictly enjoining the observance of its stipulations with good faith: and, therefore, the said patent conveys no title to the defendant in error.

1. Upon the first point they relied upon the express words of the grant, from the crown to the original patentees, and the following cases: (2 Wash., 113, *Picket* v. *Dowdall;* Id. 120, *Johnson* v. *Buffington;* Id. 125, *Curry* v. *Burns;* 1 Wash., 34, *Birch* v. *Alexander;* and 2 Dall., 99, *M'Curdy* v. *Potts.*)

The estate, by the devise, vested in Denny Fairfax, who continued to hold the same till the treaty of peace. Although an alien enemy, he could take and hold until office found. The law is perfectly settled that an alien can take by purchase, although he cannot take by descent. In this respect there is no difference between an alien enemy and an alien friend. He took a fee-simple subject to the right of the sovereign to seize it. (Co. Lit., 2 [b.]; 5 Co., 52, *Page's* case; 9 Co., 141, [a.]; 2 Bl. Com., 293; Powell on dev., 316; 2 Vent., 270.)

It is essential to the plaintiff's title that the estate should have vested in Denny Fairfax, for if it did not, it could not escheat to the commonwealth under whom the plaintiff claims.

It is one of the principles of the common law, upon which the security of private property from the grasp of power depends, that the crown can take only by matter of record. (3 Bl. Com., 259.) Those authorities which say an alien may take, but cannot hold, clearly mean that he cannot hold against the claim of the crown asserted in a legal manner. (Co. Lit., 2, a & b.) An alien may suffer a common recovery. (Goldsb., 102; 4 Leon, 82; Bro. tit. Denizen and Alien, 17.) And it is expressly laid down that only the tenant of the freehold can suffer a common recovery. (3 Bl. Com., 356–7.) But he could not be tenant of the freehold unless the estate vested and remained in him. (1 Bac. ab., 133.) The case of an alien purchasing and being afterwards made a *denizen is very [***614** strong, for in that case, although the lands be forfeitable they descend. This could not be if the estate did not remain in the alien from the time of his purchase till his becoming a denizen. It is also laid down that if an alien and a subject purchase jointly, the estate will survive upon the death of the alien, unless office be found, consequently the estate remained in the alien until his death. It is expressly decided in *Page's* case (5 Co., 52), that until office found, nothing vests in the king. (*Nichol's* case, 2 Plowden, 481, 486; 2 Vez., 539, *Duplessis's* case; 4 Co., 58, *Sadler's* case.)

In this case no office was found, nor any equivalent act done to vest the estate in the commonwealth before the treaty of peace of 1783. The only act on the subject passed in

1782. (Ch. 33, sec. 3; Chancery revisal, 180.) This manifests no intention to confiscate. On the contrary by making the entries for lands in the Northern Neck returnable to the former office of Lord Fairfax, the legislature show a disposition not to molest his title.

The treaty of peace then found the freehold of the land in Denny Fairfax.

3. That treaty released the forfeiture and no subsequent act of the legislature could affect the title.

The 5th article engages that Congress shall earnestly recommend the restoration of confiscated estates; and the 6th article stipulates that "no further confiscation shall be made."

The term "confiscation" embraces every case of the money or estate of an individual, brought into the treasury in virtue of any forfeiture; and in this sense it is generally used in treaties. (Cowell Tit. confiscation, 1 W. Bl., 183; 3 Dall., 234; 1 Bl. Com., 299.)

Lands acquired by an alien, are, on that account, liable to forfeiture. (1 Bl. Com., 372; 2 Bl. Com., 274.) Escheat is one mode of confiscation. Confiscation law of Virginia, 1779. (2 Bl. Com., 243, 244, 252, 272, 293.)

The 5th article of the treaty illustrates the 6th. Why should Congress recommend the **615***] restoration of confiscated *estates belonging to real British subjects, if they were to be immediately taken back upon the plea of alienage? If an estate had been thus restored to a British subject under the 5th article, the 6th would have protected him in the enjoyment of it, or the 5th would have been wholly nugatory. There was no provision, in the treaty, to protect restored estates, but the prohibition of future confiscations contained in the 6th article. If in one case the term confiscation in that article meant confiscation by reason of that alienage which was the consequence of the part taken in the war, why not give it the same meaning in all cases of alienage arising from the same cause? Denny Fairfax became an alien by reason of the part he took in the war. He chose to take part with Great Britain, and thereby became an alien, whereby his land became liable to confiscation according to the laws of Virginia. Whether the confiscation was to be mediately or immediately the consequence of the part taken in the war, was immaterial. It would have been a "future confiscation by reason of the part taken by him in the war." Any subsequent act of confiscation therefore by the state of Virginia, would have been void as being contrary to the express stipulation of the treaty. (Thomas Parker's Rep., 267, 161, Co. Lit., 2 [b], Hargrave's note, 4.)

The treaty of 1794 is merely declaratory of the effect of the treaty of peace. It makes no new provision.

Harper, contra.

1. As to the nature of Lord Fairfax's title to the waste and unappropriated lands.

This title was not that of a common subject. It was a grant by the crown, of the same right to dispose of the lands which the sovereign had. It was a right to grant the lands to individuals, and to receive the services and quitrents due therefor. It was not contemplated that he himself should occupy the lands. It was a mere delegation of a part of the sovereign power, and so far as it was not executed by him, it passed with the other rights of sovereignty to the commonwealth of Virginia, at the time of the revolution.

*This was the construction put upon [***616** it by Lord Fairfax himself—for when he intended to appropriate any part of the lands to his own use, he granted it to a third person, and then took back the title from his own grantee. His deeds were not in the common form, but were made to resemble those of the crown.

The defendants in error still contend that there is a difference between an alien friend and an alien enemy, as to the right to hold lands. In the latter case an office is not necessary. The right and possession are both thrown upon the commonwealth.

3. But the principal question is, what effect had the treaty of peace upon this devise?

It is said that the provision, that no future confiscations should be made, removes the disability of alienage.

The title of the commonwealth of Virginia was complete before the treaty of peace. Nothing more was necessary than to pursue the legal proceedings to put the state into possession. The office is no part of the title. This was complete at the death of Lord Fairfax. It vested *eo instanti* in the commonwealth. If it passed to Denny Fairfax, it was to the use of the commonwealth. But if any title vested in Denny Fairfax, what kind of title was it? It could not descend from him. Upon his death the right and possession were cast upon the commonwealth. He had no beneficial interest. He was only a trustee of an estate at will. (Co. Lit., 2 [*b*], Plowd., 229.) An office is only a suit brought by the king to establish his title by proof of the facts upon which his title depends. It is not to give title, but to prove the fact of alienage. The office is the remedy, not the right. It is only the means of gaining possession. Attornment to an alien is an attornment to the use of the king. (Co. Lit., 310), [*b*.]

An alien cannot sell. (Co. Lit., 42,) [*b*.] He has nothing but a naked possession. It is said he is a good tenant to the *precipe*, and may suffer a common recovery; but it is for the use of the king.

The treaty of peace does not protect the title.

*Confiscation does not mean the re- [***617** covery of a debt, or of any thing to which the state had a right before; but it is the assumption of a new right. The creation of a right by an act of sovereign power. It is a transfer, not of property, but of the right of property, from individual to public use. But here the right existed before.

If this be not the general meaning of the word "confiscation," it is the meaning of it as used in the treaty. The contracting parties were speaking of the acts of the state governments which were intended as punishments for the part which certain persons had taken in the war. The estates to be restored were not such as had escheated by reason of alienage, but such as had been confiscated on account of the part taken in the war.

If the title was not protected by the treaty, then upon the death of Denny Fairfax it vested completely in the commonwealth. The Fairfax title was extinct. The commonwealth was

estopped by its deed from claiming it, so that the title of Hunter was unquestionable.

As to the 9th article of the treaty of 1794, Denny Fairfax could continue to hold only what he then held, and as he then held. If he held any thing, it was, at most, an estate for life, remainder to the commonwealth in fee defeasible, during his life, by office found. Consequently, at his death, the commonwealth had an estate in fee. The treaty of 1794 was intended to protect those only who became aliens by the separation of the two countries, while they held the estates, and not those who were aliens when their estates accrued. If it had intended to protect the latter class, it would have protected estates acquired by descent as well as those acquired by devise: for they are both within the same reason, yet it cannot be said that an alien, who, but for his alienage, would have inherited an estate upon a descent cast before 1794, is benefited by that treaty. It cannot be said that he then held the estate of his ancestor which his alienage had prevented from descending upon him.

March 15th, 1813. The court having taken time since last term to consider this case,

618*] *STORY, *J.*, delivered their opinion as follows, (MARSHALL, *Ch. J.* and TODD, *J.*, being absent.)

The first question is, whether Lord Fairfax was proprietor of and seized of the soil of the waste and unappropriated lands in the Northern Neck, by virtue of the royal grants (2 Charles, 2 and 4 James 2), or whether he had mere seignioral rights therein as lord paramount, disconnected from all interest in the land, except of sale or alienation.

The royal charter expressly conveys all that entire tract, territory, and parcel of land, situate, &c., together with the rivers, islands, woods, timber, &c., mines, quarries of stone and coal, &c., to the grantees and their heirs and assigns, to their only use and behoof, and to no other use, intent or purpose whatsoever.

It is difficult to conceive terms more explicit than these to vest a title and interest in the soil itself. The land is given, and the exclusive use thereof, and if the union of the title and the exclusive use do not constitute the *dominium directum et utile*, the complete and absolute dominion in property, it will not be easy to fix on any thing which shall constitute such dominion.

The ground of the objection would seem to have been, that the royal charter had declared that the grantees should hold of the king as tenants *in capite*, and that it proceeded to declare that the grantees and their heirs and assigns should have power "freely and without "molestation of the king, to give, grant, or by "any ways or means sell or alien all and singu- "lar the granted premises, and every part and "parcel thereof, to any person or persons "being willing to contract for and buy the "same," which words were to be considered as restrictive or explanatory of the preceding words of the charter, and as confining the rights granted to the mere authority to sell or alien.

But it is very clear that this clause imposes no restriction or explanation of the general terms of the grant. As the grantees held as tenants *in capite* of the king, they could not sell or alien without the royal license, and if they did, it was in ancient strictness an *ab- [***619** solute forfeiture of the land (2 Ins., 66); and after the statute 1 Edw. 3 (ch. 12), though the forfeiture did not attach, yet a reasonable fine was to be paid to the king upon the alienation. (2 Ins., 67; Staundf. Prer., 27; 2 Bl. Com., 72.) It was not until ten years after the first charter (12 Ch. 2 ch. 24), that all fines for alienations and tenures of the king *in capite* were abolished. (2 Bl. Com., 77.) So that the object of this clause was manifestly to give the royal assent to alienations without the claim of any fine therefor.

We are therefore satisfied, that by virtue of the charter and the intermediate grants, Lord Fairfax at the time of his death had the absolute property of the soil of the land in controversy, and the acts of ownership exercised by him over the whole waste and unappropriated lands, as stated in the case, vested in him a complete seizin and possession thereof. Even if there had been no acts of ownership proved, we should have been of opinion, that as there was no adverse possession, and the land was waste and unappropriated, the legal seizin must be, upon principle, considered as passing with the title.

On this point we have the satisfaction to find that our view of the title of Lord Fairfax seems incidentally confirmed by the opinion of the Court of Appeals of Virginia, in *Picket* v. *Dowdell* (2 Wash., 106), *Johnson* v. *Buffington* (2 Wash., 116), and *Curry* v. *Burns* (2 Wash., 121).

The next question is as to the nature and character of the title which Denny Fairfax took by the will of Lord Fairfax, he being, at the time of the death of Lord Fairfax, an alien enemy.

It is clear by the common law, that an alien can take lands by purchase, though not by descent; or in other words he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. (11 Hen., 4, 26; 14 Hen., 4, 20; Co. Litt., 2, b.) Nor is there any distinction, whether the purchase be by grant or by devise. In either case the estate vests in the alien (Pow. Dev., 316, &c.; Park. Rep., *144; Co. Litt., 2 b), not for his own [***620** benefit, but for the benefit of the state; or in the language of the ancient law, the alien has the capacity to take but not to hold lands, and they may be seized into the hands of the sovereign. (11 H., 4, 26; 14 H., 4, 20.) But until the lands are so seized, the alien has complete dominion over the same. He is a good tenant of the freehold in a *precipe* on a common recovery. (4 Leon, 84; Goldsb., 102; 10 Mod., 128.) And may convey the same to a purchaser. (*Sheafe* v. *O'Neile*, 1 Mass. Rep., 256.) Though Co. Litt., 52, b, seems to the contrary, yet it must probably mean that he can convey a defeasible estate only, which an office found will devest. It seems indeed to have been held, that an alien cannot maintain a real action for the recovery of lands. (Co. Lit., 129, b; Thel. Dig., ch. 6; Dyer, 2, b.) But it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign.

We do not find that in respect to these general rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. (Dyer, 2, b; *Brandon* v. *Nesbitt*, 6 T. R., 23; 3 Bos. & Pull., 113; 5 Rob., 102.) But as to capacity to purchase, no case has been cited in which it has been denied, and in *The Attorney-General* v. *Wheeden & Shales* (Park. Rep., 267), it was adjudged that a bequest to an alien enemy was good, and after a peace might be enforced. Indeed the common law in these particulars seems to coincide with the *Jus Gentium*. (Bynk. Quest. Pub. Jur., ch. 7; Vattel, b. 2, ch. 8, § 112, 114; Grot. lib. 2, ch. 6, § 16.)

It has not been attempted to place the title of Denny Fairfax upon the ground of his being an *antenatus*, born under a common allegiance before the American revolution, and this has been abandoned upon good reason; for whatever doubts may have been formerly entertained, it is now settled that a British subject born before, cannot, since the revolution, take lands by descent in the United States. (4 Cranch, 321, *Dawson's Lessee* v. *Godfrey*.)

But it has been argued, that although D. **621***] Fairfax *had capacity to take the land as devisee, yet he took to the use of the commonwealth only, and had therefore but a momentary seizin; that in fact he was but a mere trustee of the estate at the will of the commonwealth, and that by operation of law, immediately upon the death of the testator, Lord Fairfax, the title vested in the commonwealth, and left but a mere naked possession in the devisee.

If we are right in the position, that the capacity of an alien enemy does not differ in this respect from an alien friend, it will not be easy to maintain this argument. It is incontrovertibly settled upon the fullest authority, that the title acquired by an alien by purchase is not divested until office found. The principle is founded upon the ground, that as the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be divested out of him but by some notorious act, by which it may appear that the freehold is in another. (1 Bac. Abr. Alien C., p. 133.) Now an office of entitling is necessary to give this notoriety, and fix the title in the sovereign. So it was adjudged in *Page's* case (5 Co., 22), and has been uniformly recognized. (Park. Rep., 267; Park., 144; Hob., 234; Bro. Denizen, pl. 17; Co. Litt., 2, b.) And the reason of the difference, why, when an alien dies, the sovereign is seized without office found, is because otherwise the freehold would be in abeyance, as an alien can not have any inheritable blood. Nay, even after office found, the king is not adjudged in possession, unless the possession were then vacant; for if the possession were then in another, the king must enter or seize by his officer, before the possession in deed shall be adjudged in him. (14 H., 7, 21; 15 H., 7, 6, 20; Staundf. Prerog. Reg., ch. 18, p. 54; 4 Co., 58, a.) And if we were to yield to the authority of Staundford (Prer. Reg., ch. 18, p. 56), that in the case of alien enemy, the king "*ratione guerrae*," might seize without office found, yet the same learned authority assures us, "that the king must seize in those cases, ere he can have an interest in the lands, because they be penal towards the party." (4 Co., 58, b.) And until the king be in possession by office found, he cannot grant lands which are forfeited by alienage. (Staundf. Pre. Reg., ch. 18, f, 54; Stat. 18 Hen., 6, ch. 6.)

*To apply these principles to the [***622** present case, Denny Fairfax had a complete, though defeasible, title by virtue of the devise, and as the possession was either vacant or not adverse, of course the law united a seizin to his title in the lands in controversy; and this title could only be divested by an inquest of office, perfected by an entry and seizure where the possession was not vacant. And no grant by the commonwealth, according to the common law, could be valid, until the title was, by such means, fixed in the commonwealth. It is admitted that no entry or seizure was made by the commonwealth "*ratione guerrae*" during the war. It is also admitted, that no inquest of office was ever made pursuant to the acts on this subject at any time. And it would seem therefore to follow, upon common law reasoning, that the grant to the lessor of the original plaintiff, by the public patent of the 30th of April, 1789, issued improvidently and erroneously, and passed nothing. And if this be true, and there be no act of Virginia altering the common law, it is quite immaterial what is the validity of the title of the original defendant as against the commonwealth; for the plaintiff must recover by the strength of his own title, and not by the weakness of that of his adversary.

But it is contended, 1st, That the common law as to inquests of office and seizure, so far as the same respects the lands in controversy, is completely dispensed with by statutes of the commonwealth, so as to make the grant to the original plaintiff in 1789 complete and perfect. And secondly, and further, if it be not so, yet as the devisee died pending the suit, the freehold was thereby cast upon the commonwealth without an inquest, and thus arises a retroactive confirmation of the title of the original plaintiff, of which he may now avail himself. As to the first point we will not say that it was not competent for the legislature (supposing no treaty in the way), by a special act to have vested the land in the commonwealth without an inquest of office for the cause of alienage. But such an effect ought not, upon principles of public policy, to be presumed upon light grounds; that an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings. No part of the United States seems to have been more aware of its importance, or *more cautious to guard against its [***623** abolition than the commonwealth of Virginia. It prevents individuals from being harassed by numerous suits introduced by litigious grantees. It enables the owner to contest the question of alienage directly by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent of its acquisitions *pro defectu hæredis;* and above all it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature.

The common law, therefore, ought not to be

deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.

Let us now consider the several acts which have been referred to in the argument, from which we think it will abundantly appear that, during the war, the lands in controversy were never, by any public law, vested in the commonwealth. We dismiss, at once, the act of 1777 (ch. 9), and of 1779 (ch. 14), as they are restrained to estates held by British subjects at the times of their respective enactments, and do not extend to estates subsequently acquired.

The next act is that of 1782 (ch. 8, 24th sec.), after reciting that "since the death of the late proprietor of the Northern Neck, there is reason to suppose that the said proprietorship hath descended upon alien enemies," enacts, that persons holding lands in said Neck shall retain sequestered in their hands all quitrents which were then due, until the right of descent should be more fully ascertained; and that all quitrents thereafter to become due shall be paid into the public treasury, and the parties exonerated from the future claim of the proprietor. Admitting that this section, as to the quit rents, was equivalent to an inquest of office, it cannot be extended, by construction, to include the waste lands of the proprietor. Neither the words nor the intention of the legislature would authorize such a construction. But it may well be doubted if, even as to the quitrents, the provision is not to be considered as a sequestration *jure belli*, rather than a seizure for alienage; for it proceeds on the ground that the property had descended, not upon aliens, but alien enemies. So far as the treaty of peace might be deemed material in the case, this distinction would deserve consideration.

624*] *The next is the act of 1782 (ch. 33), which, after reciting that "the death of Lord Fairfax may occasion great inconvenience to those who may incline to make entries for vacant lands in the Northern Neck, proceeds (sec. 3) to enact, that all entries made with the surveyors, &c., and returned to the office formerly kept by Lord Fairfax, shall be held as good and valid as those heretofore made under his direction, "until some mode shall be taken up and "adopted by the General Assembly concern-"ing the territory of the Northern Neck." This act, so far from containing in itself any provision for vesting all the vacant lands of Lord Fairfax in the commonwealth, expressly reserves, to a future time, all decisions as to the disposal of the territory. It suffers rights and titles to be acquired exactly in the same manner, and with the same conditions, which Lord Fairfax had by permanent regulations prescribed in his office. No other acts were passed on the subject during the war.

We are now led to consider the act of 1785 (ch. 47), which has presented some difficulty, if it stand unaffected by the treaty of peace. The 4th sec., after a recital "that since the death of "the late proprietor no mode hath been adopt-"ed to enable those who had before his death "made entries within the said district accord-"ing to an act, &c. (act 1782, ch. 33), to ob-"tain titles to the same," enacts that in all cases of such entries, grants shall be issued by the commonwealth to the parties in the same manner as by law is directed in cases of other unappropriated lands. The 5th sec. then declares that the unappropriated lands within the Northern Neck should be subject to the same regulations, and be granted in the same manner, and *caveats* should be proceeded upon, tried and determined, as is by law directed in cases of other unappropriated lands belonging to the commonwealth. The 6th sec. extinguishes for the future all quitrents.

The patent of the original plaintiff issued pursuant to the 5th sec. of this act.

It has been argued, that the act of 1785 amounts to legislative appropriation of all the lands in controversy. That it must be considered as completely devesting the title of Denny Fairfax for the cause of alienage, and *vesting it in the commonwealth. After the most mature reflection, we cannot subscribe to the argument. In acts of sovereignty so highly penal, it is against the ordinary rule to enlarge, by implication and inference, the extent of the language employed. It would be to declare purposes which the legislature have not chosen to avow, and to create vested estates, when the common law would pronounce a contrary sentence, and the guardians of the public interests have not expressed an intention to abrogate that law. If the legislature have proceeded upon the supposition that the lands were already vested in the commonwealth, we do not perceive how it helps the case. If the legislature, upon a mistake of facts, proceed to grant defective titles, we know of no rule of law which requires a court to declare, in penal cases, that to be actually done which ought previously to have been done. Perhaps as to grants under the 4th sec. upon entries under the act of 1782 (ch. 33), it might not be too much to hold, that such grants conveyed no more than the title of the commonwealth, exactly in the same state as the commonwealth itself held it, viz., an inchoate right, to be reduced into possession and consummated by a suit in the nature, or with the effect, of an inquest of office. But we give no opinion on this point; because the patent of the original plaintiff manifestly issued under the succeeding section, and upon a construction which we give to this section, it issued improvidently and passed no title whatever. That construction is, that the unappropriated lands in the Northern Neck should be granted in the same manner as the other lands of the commonwealth, when the title of the commonwealth was perfected by possession. It seems to us difficult to contend, that the legislature meant to grant mere titles and rights of entry, of the commonwealth, to lands in the same manner as it did lands of which the commonweath was in actual possession and seizin. It would be selling suits and controversies through the whole country, and enacting a general statute in favor of maintenance, an offense which the common law has denounced with extraordinary severity. Consistent therefore with the manifest intention of the legislature, grants were to issue for lands in the Northern Neck, precisely in the same manner as for lands in other parts of the state, and under the same *limitation, viz., [*626 that the commonwealth should have, at the time of the grant, a complete title and seizin.

We are the more confirmed in this construction by the act concerning escheators (act 1779, ch. 45), which regulates the manner of proceed-

ing in cases of escheat, and was by a subsequent act (act 1785, ch. 53) expressly extended to the counties in the Northern Neck. This act of 1779 expressly prohibits the granting of any lands, seized into the hands of the commonwealth upon office found, till the lapse of twelve months after the return of the inquisition and verdict into the office of the General Court, and afterwards authorizes the proper escheator to proceed to sell in case no claim should be filed, within that time, and substantiated against the commonwealth. It is apparent, from this act, that it was not the intention of the legislature to dispose of lands, accruing by escheat, in the same manner as lands to which the commonwealth already possessed a perfect title. It has not been denied that the regulations of this act were designed to apply as well to titles accruing upon purchases by aliens (which are not in strictness, escheats), as upon forfeitures for other causes; and, but for the act of 1785 (ch. 47), we do not perceive but that the vacant lands held by the devisee of Lord Fairfax, in the Northern Neck, would have been completely within the act regulating proceedings upon escheats.

The real fact appears to have been, that the legislature supposed that the commonwealth were in actual seizin and possession of the vacant lands of Lord Fairfax, either upon the principle that an alien enemy could not take by devise, or the belief that the acts of 1782 (ch. 8, and ch. 33), had already vested the property in the commonwealth. In either case it was a mistake which surely ought not to be pressed to the injury of third persons.

But if the construction which we have suggested be incorrect, we think that, at all events, the title of Hunter, under the grant of 1789, cannot be considered as more extensive than the title of the commonwealth, viz., a title inchoate and imperfect; to be consummated by an actual entry under an inquest of office, or its equivalent, a suit and judgment at law by the grantee.

627*] *This view of the acts of Virginia renders it wholly unnecessary to consider a point which has been very elaborately argued at the bar, whether the treaty of peace, which declares "that no future confiscations shall be made," protects from forfeiture, under the municipal laws respecting alienage, estates held by British subjects at the time of the ratification of that treaty. For we are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax, even admitting that the treaty of peace left him wholly unprovided for.

The 9th article is in these words: "It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens."

Now, we cannot yield to the argument that Denny Fairfax had no title, but a mere naked possession or trust estate. In our judgment, by virtue of the devise to him he held a fee simple in his own right. At the time of the commencement of this suit (in 1791) he was in complete possession and seizin of the land. That possession and seizin continued up to and after the treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture by reason of alienage.

It was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself or its grantee. But it has not so done, and its own inchoate title (and of course the derivative title, if any, of its grantee) has by the operation of the treaty become ineffectual and void.

It becomes unnecessary to consider the argument as to the effect of the death of Denny Fairfax pending the *suit, because ad- [***628** mitting it to be correctly applied in general, the treaty of 1794 completely avoids it. The heirs of Denny Fairfax were made capable in law to take from him by descent, and the freehold was not, therefore, on his death, cast upon the commonwealth.

On the whole, the court are of opinion that the judgment of the Court of Appeals of Virginia ought to be reversed, and that the judgment of the District Court of Winchester be affirmed with costs, &c.

JOHNSON, *J.* After the maturest investigation of this case that circumstances would permit me to make, I am obliged to dissent from the opinion of the majority of my brethren.

The material questions are,

1st. Whether an alien can take lands as a devisee, and if he can,

2d. Whether an inquest of office was indispensably necessary to divest him of his interest for the benefit of the state?

3d. Whether the disability of the devisee was not cured by the treaty of peace, or the treaty of 1794.

With regard to the treaty of peace it is very clear to me that that does not affect the case. The words of the 4th article are, "There shall "be no future confiscations made, nor any "prosecution commenced against any person "or persons for or by reason of the part which "he or they may have taken in the present "war."

Now should we admit, as has been strongly insisted, that to escheat is to confiscate, it would still remain to show that this was "a confisca- "tion on account of the part taken by the dev- "isee in the war of the revolution." But the disability of an alien to hold real estate is the result of a general principle of the common law, and was in no wise attached to the individual on account of his conduct in the revolutionary struggle. The alien who had taken part with this country and *fought the bat- [***629** tles of the states, may have been affected by it no less than he who fought against us, and the member of any other community in the world may as well have been the object of its application as the subject of Great Britain. The object evidently was to secure the individual from legal punishment—not to cure a legal disability existing in him.

With regard to the bearing of the treaty of 1794 on the interests of the parties, the only difficulty arises from the vague signification of the words "now holding," made use of in the article which relates to this subject. But in conformity with the liberal spirit in which national contracts ought to be construed, I am satisfied to consider that treaty as extending to all cases "of a rightful possession or legal title "defeasible only on the ground of alien dis- "ability and existing at the date of that "treaty."

What then were the rights of the devisee in this case? and were they in existence at the date of this treaty?

Whoever looks into the learning on the capacity of an alien to take lands as devisee, will find it involved in some difficulties. There is no decided case, that I know of, upon the subject. And the opinions of learned men upon it, when compared, will be found to have been expressed with doubt, or scarcely reconcilable to each other. The general rule is, that an alien may take by purchase, but cannot hold. Yet so fragile or flimsy is the right he acquires, that, if tortiously dispossessed, no one contends that he can maintain an action against the evictor. To assert that he has a right, and yet admit that he has no remedy, appears to me rather paradoxical. Yet all admit that the bailiff of the king cannot enter on an alien purchaser until office found. But where a freehold is cast upon the alien by act of law, as by descent, dower, curtesy, &c., it is admitted that no inquest of office is necessary to vest the estate in the king, and he may enter immediately. Whether an alien devisee is to be considered as a purchaser according to the meaning of that term as applied to an alien, or whether his estate is to be considered as one of those which are cast on him by operation of law, is an alternative, either branch of which may be laid **630***] hold *of with some confidence. Chief Baron Gilbert asserts, without reservation, that a devise to an alien is void. (Gilbert on devises, p. 15.) But Mr. Powell maintains that he takes under it as a purchaser. (Powell on Dev., 317.) In support of Gilbert's opinion it might be urged that a devise takes effect under statute, and in that view the interest may be said to be cast on the alien by operation of law. Yet I have no hesitation in deciding in favor of the doctrine as laid down by Powell. Not on the words of Lord Hardwick, as quoted from Knight and du Plessis; for the judge there expressly declines giving an opinion; but from a reference to the principle upon which the doctrine is certainly founded.

The only unexceptionable reason that can be assigned why an alien can take by deed, though he cannot hold, is, that otherwise the proprietor would be restricted in his choice of an alienee; or in other words, in his right of alienation. And to declare such a conveyance null and void would be attended with this absurdity, that the estate would still remain in the alienor in opposition to his own will and contract. It would therefore seem that the law on this subject would be more satisfactorily expressed by asserting that an alien is a competent party to a contract, so that a conveyance, executed to him, shall divest the feoffer or donor, in order that it may escheat. The tendency of this doctrine to favor the royal prerogative of escheat, would no doubt secure to it a welcome reception, yet it is not too much to pronounce it reasonable in the abstract. This reason is as applicable to the case of a devise as of a contract, and in the technical application of the term purchaser a devisee is included. But it is contended that the grant to Lord Fairfax was a grant or cession of sovereign power, and as such was assumed by the state when it declared itself independent. Upon considering, as well the acts of the state, with regard to this property, as the acts of Lord Fairfax himself, there is reason to think that both acted under this impression. But to decide on this question, we must look into the deed of session, and upon its construction the decision of this court must depend. And here, in every part of it, we find it divested of the chief attributes of sovereignty —not a power legislative, judicial or executive given, and the words such as are adapted to convey an interest, *but no jurisdic- [***631** tion. Some few royal prerogatives, it is true, are expressly conveyed, and these unquestionably must have accrued to the state upon the assertion of independence. But the interest in the soil remained to the grantee. So far, therefore, I feel no difficulty about sustaining the claim of the devisee. But did this interest remain in him at the time of the treaty of 1794?

I am of opinion it did not. The interest acquired under the devise was a mere *scintilla juris*, and that *scintilla* was extinguished by the grant of the state vesting this tract in the plaintiff in error. I will not say what would have been the effect of a more general grant. But this grant emanated under a law expressly relating to the lands of Lord Fairfax authorizing them to be entered, surveyed and granted.

The only objection that can be set up to the validity of this grant is, that it was not preceded by an inquest of office. And the question then will be, whether it was not competent for the state to assert its rights over the alien's property, by any other means than an inquest of office. I am of opinion that it was. That the mere executive of the state could not have done it, I will readily admit; but what was there to restrict the supreme legislative power from dispensing with the inquest of office? In the case of *Smith* and *The State of Maryland*, this court sustained a specific confiscation of lands under a law of the state, where there was neither conviction nor inquest of office. And in Great Britain, in the case of treason, an inquest of office is expressly dispensed with by the statute 33 H. VIII, c. 30. So that there is nothing mystical, nor any thing of indispensable obligation, in this inquest of office. It is, in Great Britain, a salutary restraint upon the exercise of arbitrary power by the crown, and affords the subject a simple and decent mode of contesting the claim of his sovereign; but the legislative power of that country certainly may assert, and has asserted, the right of dispensing with it, and I see no reason why it was not competent for the legislature of the state of Virginia to do the same.

Several collateral questions have arisen in this case on which, as I do not differ materially from my brethren, *I will only express [***632** my opinion in the briefest manner.

I am of opinion that whenever the case made

out in the pleadings does not, in law, sanction the judgment which has been given upon it; the error sufficiently appears upon the record to bring the case within the XXV. section of the judiciary act.

I am also of opinion that whenever a case is brought up to this court under that section, the title of the parties litigant must necessarily be inquired into, and that such an inquiry must, in the nature of things, precede the consideration how far the law, treaty, and so forth, is applicable to it; otherwise an appeal to this court would be worse than nugatory.

And that in ejectment at least, if not in every possible case, the decision of this court must conform to the state of rights of the parties at the time of its own judgment: so that a treaty, although ratified subsequent to the decision of the court appealed from, becomes a part of the law of the case and must control our decision.

Cited—3 Wheat. 599; 8 Wheat. 492; 3 Pet. 258; 14 Pet. 131; 5 How. 270; 5 Wall. 268; 9 Wall. 336; 6 Otto, 289; 8 Otto, 628; 10 Otto, 484, 490; 1 Cliff. 286; 6 McLean, 5.

Approved—3 Wheat. 599.

VII CRANCH.

7 Cr. 1, 3 L. 249, HUDSON v. GUESTIER.

Rehearing.— Case cannot be reheard in the Supreme Court after the term in which it was decided, p. 1.

The following citing cases affirm and apply this rule: Roberts v. Haggart, 4 Dak. 211, 212, 29 N. W. 656, 657, and Bushnell v. Crooke M. & S. Co., 150 U. S. 83, 37 L. 1007, 14 S. Ct. 22, both holding the same as the principal case; Brooks v. Railroad Co., 102 U. S. 107, 26 L. 92, the court saying that nothing more could be done than to correct clerical errors after the term; Schooner Lizzie Weston, Blatchf. Pr. 265, F. C. 8,425, holding the court could not reopen a decree after the term; People ex rel. v. Mayor, etc., of N. Y., 25 Wend. 256, 35 Am. Dec. 672, where the court refused to grant a rehearing after a final judgment on the merits; Allen v. Wilson, 21 Fed. 883, holding the Circuit Court cannot set aside or modify a decree after the term; Gratiot v. Missouri Pac. Ry. Co., 116 Mo. 472, 21 S. W. 1100, where a motion was made to set aside an order overruling a motion for a rehearing; The Martha, Blatchf. & H. 173, F. C. 9,144, holding that equity will not, except with the consent of all the parties, grant a rehearing or modify a decree after the term; Emerson v. Davies, 1 Wood. & M. 23, F. C. 4,437, holding a rehearing in equity would not be granted on the mere certificate of counsel as to the sufficiency of reasons for it; The Major Barbour, Blatchf. Pr. 315, F. C. 8,984, holding that courts of law and of equity are governed by the same rules; Tyler v. Magwire, 17 Wall. 283, 21 L. 583, holding a final decree in equity to be as conclusive as a judgment at law; Doggett v. Emerson, 1 Wood. & M. 4, F. C. 3,961, on the point that until the decree is actually entered and until the close of the term it may be reviewed; Petty v. Merrill, 12 Blatchf. 17, F. C. 11,051, where the doctrine was applied in admiralty; The Avery, 2 Gall. 389, 390, F. C. 672, where after a captured vessel was condemned, one moved to interpose a claim of property; The Steamer New England, 3 Sumn. 503, F. C. 10,151, where the court considered but did not decide whether a libel of review would lie in admiralty; Sloman v. Wyssman, 22 Fed. Cas. 349, holding a review in libel could not be had after the term; Snow v. Edwards, 2 Low. 275, F. C. 13,145, holding that after the term the court can entertain a libel of review in admiralty; The Illinois, 1 Brown, 21, F. C. 7,003, holding admiralty could not after the term set aside a final decree because of mistake or oversight; Remnants of The Caithneshire, Abb. Adm. 164, F. C. 2,294, where the power to award costs was considered.

7 Cr. 2–22, 3 L. 249, FITZSIMMONS v. OGDEN.

Equity.— Between merely equitable claimants, each having equal equity with the other, he who has the precedency in time has the advantage in right, p. 18.

Cited and principle applied in Boone v. Chiles, 10 Pet. 210, 9 L. 400, where a claim of bona fide purchaser was set up; Byers v. Fowler, 12 Ark. 285, 54 Am. Dec. 286, where the question was as to priority between purchasers under executions; Wallace v. Bartle, 21 Iowa, 350, 89 Am. Dec. 586, where a purchaser at execution purchased an equitable title of defendant; Wailes v. Cooper, 24 Miss. 231, where the doctrine was applied in favor of a mortgagee as against the holder of an equitable title; Shelton v. Lewis, 27 Ark. 197, where the rights of wards' against bona fide purchasers was considered.

Bona fide purchaser.— One who has an equal equity with another is justified in buying in the legal estate to obtain a superiority, p. 18.

Cited and this holding affirmed in Byers v. Fowler, 12 Ark. 286, 54 Am. Dec. 287, where the rights of a bona fide purchaser from a fraudulent vendee in execution sale were considered; Boone v. Chiles 10 Pet. 211, 9 L. 400, holding that as against an innocent purchaser any adversary must be left to his remedy at law; Holmes v. Stout, 4 N. J. Eq. 494, same opinion, 10 N. J. Eq. 420–422, on the point that a grantee of a bona fide purchaser is not charged with notice though known to him.

Release regularly executed and delivered cannot be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given, p. 19.

Cited in Kingsley v. Kingsley, 20 Ill. 208, where one of the parties to a contract failed to perform; Claflin & Co. v. Dacus, 59 Fed. 1000, where the effect of a release given by a creditor to an assignee for creditors in consideration of payment in full, was considered.

7 Cr. 22–26, 3 L. 256, THE BRIG JAMES WELLS v. UNITED STATES.

Admiralty.— New evidence admitted in an admiralty case in the Supreme Court, p. 23.

Cited in the note to The Argo, 2 Wheat. 289, 4 L. 241, on the point that further proof is admissible in prize as well as in instance cases; Vanderheyden v. Reid, 1 Hopk. Ch. 469, on the point that cases in admiralty upon appeal are reheard at large; Folger v. The Robert G. Shaw, 2 Wood. & M. 540, F. C. 4,899, to the effect that it is lawful to make new allegations and proof on leave in the appellate court.

Embargo.— In a prosecution for a breach of the embargo laws, it becomes necessary for defendant to bring himself clearly within the exception for his benefit, p. 25.

7 Cr. 26-31, 3 L. 257, MARYLAND INS. CO. v. LE ROY.

Insurance.— Taking an additional cargo not sanctioned by the contract of insurance discharges insurer from liability, p. 30.

Cited in Natchez Ins. Co. v. Stanton, 2 Smedes & M. 375, 376, 41 Am. Dec. 595, where it was held that taking a tow was a deviation; Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 108, where the insurer was discharged because of improper stowage.

Insurance.— Deviation discharges underwriter whether any increase of risk resulted or not, p. 30.

Cited and doctrine applied in Moore v. Phœnix Ins. Co., 62 N. H. 243, 13 Am. St. Rep. 559, where a policy was avoided for nonoccupation of the premises; Stewart v. Tenn. M. & F. Ins. Co., 1 Humph. 250, holding that lashing a flatboat to a steamboat violated the policy; Thorndike v. Bordman, 4 Pick. 493, dissenting opinion, the court saying the discharge comes because the contract is not pursued, and not because of the increase of risk; Schroeder v. Schweizer, etc., Gesellschaft, 66 Cal. 297, 5 Pac. 480, holding that a transshipment of a cargo discharged underwriters.

Discussed and distinguished in Hughes v. Union Ins. Co., 3 Wheat. 165, 166, 4 L. 360, 361, where there was a stoppage and delay to avoid capture; Jolly v. Balt. Eq. Soc., 1 Har. & G. 303, 306, 18 Am. Dec. 291, 293, where the court further said, however, that if the principal case decided that the mere taking on board of the jackasses discharged the insurer, it would not follow it.

Insurance.— Necessity alone sanctions deviation and the deviation must be strictly commensurate with the vis major producing it, p. 30.

Cited in Turner v. Protection Ins. Co., 25 Me. 524, 43 Am. Dec. 299, holding a voyage can be departed from only to protect life and property.

Miscellaneous.— Cited in Van Deusen v. Hayward, 17 Wend. 71, but not in point.

7 Cr. 32-34, 3 L. 259, UNITED STATES v. HUDSON.

Statutes.—Acquiescence in construction of an act for many years is of weight as an element in its interpretation, p. 32.

Cited in Clark v. Mowyer, 5 Mich. 468, where rights had become vested under a tax law; Sears v. Cottrell, 5 Mich. 265, applying this doctrine in construing a tax law.

Jurisdiction.— Courts created by the general government possess no jurisdiction but what is given them by the power that creates them, p. 33.

A number of citing cases have affirmed and applied this principle as follows: Baker v. Biddle, 1 Bald. 403, F. C. 764, holding the sixteenth section of the judiciary act to be imperative; and in the same case at page 406, on the point that an enumeration of cases on which the Federal court may act is an exclusion of all others; United States v. Eckford, 6 Wall. 488, 18 L. 921, holding that the judiciary act does not authorize a suit against the United States in any Federal court; Campbell v. United States, 4 Fed. Cas. 1202, on the point that the District Court has no common-law jurisdiction; Lynch v. Clarke, 1 Sandf. Ch. 651, discussing whether there was any common law of the United States; United States v. Cruikshank, 92 U. S. 564, 23 L. 595, the court saying that appellate jurisdiction does not extend to any case not within the jurisdiction of the inferior court; McNealy v. Gregory, 13 Fla. 435, where the court said that the jurisdiction of courts was no part of the obligation of a contract; Magill v. Parsons, 4 Conn. 322, holding that an assumpsit brought by the Bank of the United States was a case arising under the laws of the United States; Cast v. Cast, 1 Utah, 118, discussing the jurisdiction of District Courts in divorce actions; Gatton v. Chicago, etc., Ry. Co., 95 Iowa, 122, 131, 135, 63 N. W. 592, 595, 596, holding that overcharges for freight on an interstate shipment prior to the interstate commerce act could not be recovered; Harrison v. Hadley, 2 Dill. 234, F. C. 6,137, where the question was as to jurisdiction in cases of contested elections; Ex parte Crane, 5 Pet. 204, 8 L. 98, dissenting opinion, holding that the Supreme Court could compel the signing of a bill of exceptions; Forward v. Adams, 7 Wend. 207, on the point that Federal courts have no genoral common-law criminal jurisdiction; In re Barry, 42 Fed. 119, 120, 121, F. C. 1,059, 136 U. S. 605, 607, 608, 34 L. 506, 507, where the right to issue the writ of habeas corpus was discussed; In re Neagle, 135 U. S. 89, 34 L. 80, 10 S. Ct. 677, dissenting opinion, where there was a petition to discharge a prisoner on habeas corpus; United States v. Coolidge, 1 Wheat. 416, 4 L. 125, where the question was whether the Circuit Court had jurisdiction over offenses at common law; Bray v. United States, 1 N. Mex. 4, holding that courts have no jurisdiction of offenses at common law without legislative sanction; Mitchell v. State, 42 Ohio St. 385, holding that there are no common-law offenses; United States v. Coolidge, 1 Gall. 495, F. C. 14,857, where the court considered the question as it respected offenses of admiralty and maritime jurisdiction; United States v. Wilson, 3 Blatchf. 438, F. C. 16,731, to the point that to give Federal courts jurisdiction over crimes there must be a designation both of the offense and the tribunal; Muller's Case, 17 Fed. Cas. 976, a proceeding against a forger and a fugitive from justice; in State v.

Buchanan, 5 Har. & J. 361, 9 Am. Dec. 570; United States v. Benson, 70 Fed. 594, 44 U. S. App. 219; United States v. Britton, 108 U. S. 206, 27 L. 700, 2 S. Ct. 535, all cases of conspiracy; In re Dana, 68 Fed. 899, where a defendant was indicted for libel; United States v. Rogers, 46 Fed. 3, where stolen property was brought within the jurisdiction; United States v. Hall, 98 U. S. 345, 25 L. 181, where a defendant was indicted for embezzlement; In re Iasigi, 79 Fed. 752, a proceeding against a consul for embezzlement; United States v. Boyer, 85 Fed. 436, where a defendant was indicted for bribery; In re Kelly, 71 Fed. 546, where one was committed for an assault in a national soldiers' home; United States v. Lewis, 13 Sawy. 533, 36 Fed. 450, holding that assault on the high seas was not within the statute conferring jurisdiction; Tennessee v. Davis, 100 U. S. 275, 25 L. 654, dissenting opinion, where a deputy collector of internal revenue was indicted for murder; United States v. Plumer, 3 Cliff. 55, F. C. 16,056, an indictment for murder on the high seas; United States v. McKenzie, 26 Fed. Cas. 1120, S. C., 30 Fed. Cas. 1162, where a murder was committed on board a United States ship of war; Jones v. United States, 137 U. S. 211, 34 L. 695, 11 S. Ct. 83, where a murder was committed in Guano Islands; United States v. Terrel, Hemp. 412, F. C. 16,452, holding there was no law of congress to punish robbery; United States v. New Bedford Bridge, 1 Wood. & M. 435, 438, 448, F. C. 15,867, an indictment against a corporation for obstructing a river; United States v. Durkee, McAll. 201, F. C. 15,009, where the defendant was indicted for larceny; In re Greene, 52 Fed. 111, where a defendant was indicted under the act against monopolies; United States v. Eaton, 144 U. S. 687, 36 L. 594, 12 S. Ct. 767, holding that a dealer in oleomargarine was not liable for failing to keep books and make a monthly return; United States v. Reese, 92 U. S. 216, 23 L. 564, an indictment against election inspectors for refusing to receive the vote of a negro; United States v. Abbott, 24 Fed. Cas. 744, where a defendant was indicted for violating the revenue laws; United States v. Mitchell, 58 Fed. 997, where a party was indicted for refusing to answer questions put by the census marshal; Commonwealth v. Peters, 12 Met. 394, the court saying that the authority of the principal case was impugned by United States v. Coolidge, 1 Gall. 495, F. C. 14,857, but approving of the principal case.

Contempt.— To fine for contempt, imprison for contumacy, enforce the obedience of order, etc., are powers which necessarily result to courts from the nature of their institution, p. 34.

In the following citing cases the principle is affirmed and applied: United States v. New Bedford Bridge, 1 Wood. & M. 440, F. C. 15,867, the court saying the power was inherent and not necessary to be conferred; In re Terry, 13 Sawy. 461, where a defendant openly resisted the authority of the court; Ex parte Terry, 128 U. S. 302, 32 L. 408, 9 S. Ct. 79, where a Circuit Court inflicted immediate

punishment for a contempt in its presence; in Ex parte Hamilton, 51 Ala. 68; State v. Matthews, 37 N. H. 453; Fischer v. Hayes, 19 Blatchf. 21, 6 Fed. 72; In re Debs, 158 U. S. 596, 39 L. 1106, 15 S. Ct. 911, all proceedings for disobedience of injunctions; Cartwright's Case, 114 Mass. 238, where a receiver disobeyed an order of court; Kregel v. Bartling, 23 Neb. 852, 37 N. W. 670, where parties violated a judgment of a court; Fishback v. State, 131 Ind. 312, 30 N. E. 1090, holding a newspaper article reflecting upon a grand jury was a contempt; People v. Wilson, 64 Ill. 226, 16 Am. Rep. 542, holding a publication in a paper at a remote place, tending to influence the administration of justice, was contempt; State v. Morrell, 16 Ark. 389, holding the court could punish libellous publications degrading its authority; Little v. State, 90 Ind. 339, 46 Am. Rep. 225, holding that to report for gain that a juror can be bribed, is contempt; Hale v. State, 55 Ohio St. 215, 60 Am. St. Rep. 694, 45 N. E. 200, holding it to be contempt to remove a witness from the county of his residence; Powell v. State, 48 Ala. 156, where a juror left the court without the permission of the court; In re Harris, 4 Utah, 9, 5 Pac. 131, where a witness was punished for refusing to answer before a grand jury; Territory v. Murray, 7 Mont. 257, 15 Pac. 148, where a wager had been made upon a decision of the court; In re Buckley, 69 Cal. 17, 10 Pac. 78, dissenting opinion, a proceeding in contempt because of an alleged agreement to influence the court; Interstate Commerce Commission v. Brimson, 154 U. S. 489, 38 L. 1061, 14 S. Ct. 1138, holding the power to punish for contempt was had by the interstate commerce commission; United States v. Jacobi, 1 Flipp. 110, F. C. 15,460, holding contempt of Federal court a crime within the meaning of the judiciary act.

Cited less specifically in Smith v. Myers, 109 Ind. 7, 58 Am. Rep. 380, 9 N. E. 697, to the point that the legislature may make and enforce orders for the production of papers; Ex parte Dalton, 44 Ohio St. 150, 58 Am. Rep. 801, 5 N. E. 138, holding that a standing legislative committee could punish for contempt; Matter of Meador, 1 Abb. (U. S.) 324, F. C. 9,375, where the court considered the powers of a supervisor of internal revenue; Ex parte Crane, 5 Pet. 210, 8 L. 100, where the question was as to the power to issue writs of mandamus; Oshoga v. State, 3 Pinn. 59, holding that a grand jury could be impanelled at an extra jury term; Supervisors of Crawford Co. v. Le Clerc, 3 Pinn. 327, holding that County Courts have no power to employ interpreters; In re Metzger, 17 Fed. Cas. 234, discussing as to when the judiciary can act without direction; In re Neagle, 14 Sawy. 269, 39 Fed. 858, where the court discussed the implied powers of the government. See also note on this subject in 12 Am. Dec. 179.

Miscellaneous.— Cited probably by inadvertance in The Free State, 1 Brown, 264, F. C. 5,090, a libel for a collision, and in Gaines v. Hale, 26 Ark. 209, as to relief in equity against a judgment at law.

7 Cr. 34–52, 3 L. 260, SHIRRAS v. CAIG & MITCHELL.

Equity.— Purchaser of equitable interest purchases at his peril and acquires property burdened with every prior equity charged upon it, p. 48.

Cited and principle applied in Shelton v. Lewis, 27 Ark. 198, 200, holding that ward's rights to property purchased with their funds may be enforced against a conveyance in trust to secure bona fide debtors; Wallace v. Bartle, 21 Iowa, 351, 89 Am. Dec. 586, where a person purchased the equity of an execution defendant in realty at a judicial sale; Ketchum v. Creagh, 53 Ala. 227, where land was sold by order of the Probate Court; Brown v. Phillips, 40 Mich. 270, holding that a purchase-money mortgage cannot attach to anything which the purchaser did not own at the time of giving it; Meade v. Thompson, Walker (Miss.), 450, holding that a purchaser under execution takes subject to a vendor's lien where the defendant in execution had only a bond for title; Shoufe v. Griffiths, 4 Wash. St. 165, 31 Am. St. Rep. 913, 30 Pac. 94, holding that such purchaser acquired the property burdened with every prior equity charged upon it; Stewart v. McLaughlin, 11 Colo. 463, 18 Pac. 621, where a holder of a certificate of purchase deposited it as security and afterwards sold the property; American Mfg. Co. v. Hopper, 64 Fed. 560, 29 U. S. App. 12, holding a purchaser from a pre-emptor was not a bona fide purchaser; Klatt v. Dummert, 70 Minn. 471, holding bona fide assignee of executory contract to buy and sell realty not protected against action by vendor to correct error in description of the land; California Redwood Co. v. Little, 79 Fed. 856, holding a purchaser of a certificate of purchase was not entitled to protection as a bona fide purchaser; McCormack v. James, 36 Fed. 18, holding that a beneficiary under a deed of trust was not estopped to assert his lien as against a subsequent purchaser by having been cognizant of the negotiations; McLean v. The Lafayette Bank, 3 McLean, 604, F. C. 8,888, where a bank took a mortgage from its debtor; McLean v. Lafayette Bank, 4 McLean, 436, F. C. 8,889, holding that where a mortgage was given on land and personalty and other liens are set up to the personalty the court will sell the realty first. See also Boone v. Chiles, 10 Pet. 212, 9 L. 400; Briscoe v. Ashby, 24 Gratt. 477, 478; Smith v. Montoya, 3 N. Mex. 11; 1 Pac. 181; Byers v. Fowler, 12 Ark. 286, 288, 54 Am. Dec. 288, 289, all citing authorities and discussing fully the subject of bona fide purchasers; and 97 Am. Dec. 434, note, where this subject was discussed.

Deeds.— Plat or map referred to in a deed, but not annexed to or recorded with the deed, affords no evidence in aid of the description, p. 48.

Cited and the holding relied upon as authority in McDonald v. Lindall, 3 Rawle, 496, holding that the lien of a mechanic does not extend beyond the description of the property in the claim

filed; Dorr v. School District No. 26, 40 Ark. 243, where the court said that such plat in connection with other proofs might be important in fixing the origin, date and limits of the possession; Ripley v. Harris, 3 Biss. 201, F C. 11,853, on the point that reference to a bond in a mortgage is sufficient without its being set out; United States v. Arredondo, 6 Pet. 739, 8 L. 565, where a grant by the King of Spain was construed, and in the same case, at page 740, on the point that words of a grant are always construed according to the intent; Coos Bank v. Brooks, 2 N. H. 149, on the point that in all conveyances every interest less than that mentioned passes.

Registration.— Negligence or fraud in omitting to place a deed on record cannot be imputed to one who has used all the dispatch which the law requires, p. 50.

Cited and applied in Wynn v. Garland, 16 Ark. 455, holding that it is not fraud in one legally entitled to pre-emption to fail to give notice of his rights to a subsequent settler; Kemper v. Campbell, 44 Ohio St. 219, 6 N. E. 570, where the question was as to the necessity of recording an absolute deed intended as a mortgage; The Derby Tp. Co. v. Parks, 10 Conn. 539, 27 Am. Dec. 702, where the court held that an application to a legislature for a right to collect tolls was not void for failure to give notice.

Deeds.— Deed misrepresenting transaction is liable to suspicion, but if upon investigation it appears to be fair, one claiming under it will not be deprived of his real rights, p. 50.

Affirmed and relied upon as authority in the following citing cases: Youngs v. Wilson, 27 N. Y. 356, holding that a mortgage to secure liabilities incurred is not void because it does not specify the amount; Wood v. Weimar, 104 U. S. 793, 26 L. 781, where a mortgage on personalty was upheld although the items making up the amount were not set forth; D'Oyly v. Capp, 99 Cal. 156, 33 Pac. 736, holding that untrue recitals or the omission to disclose the real nature of the transaction would not invalidate a mortgage; Stover v. Herrington, 7 Ala. 150, 41 Am. Dec. 88, where a mortgage stated the debt to be secured at a greater amount than was due; Davis v. Schwartz, 155 U. S. 645, 39 L. 296, 15 S. Ct. 242, where an insolvent mortgaged property much in excess of the indebtedness; Lawson v. Alabama Warehouse Co., 80 Ala. 343, holding that a false recital as to the consideration was only a badge of fraud open to explanation; Booth v. Barnum, 9 Conn. 290, 23 Am. Dec. 341, where a description of a debt as of $30, or thereabouts, was held sufficient to put one on inquiry; Goddard v. Sawyer, 9 Allen, 80, to the effect that variance between the note described and that produced is immaterial; Riggs v. Armstrong, 23 W. Va. 771, holding that a trust deed may stand for the real equitable claims of the cestui que trust if they are bona fide; Nicklin v. Betts Spring Co., 11 Or. 411, 50 Am. Rep. 481, 5 Pac. 54, holding that a bill of sale absolute became a

chattel mortgage upon proof by parol that it was made to secure a debt; Friedley v. Hamilton, 17 Serg. & R. 73, 17 Am. Dec. 642, holding that an absolute deed and defeasance constitute a mortgage; Christie v. Hale, 46 Ill. 120, on the point that a deed absolute to secure a debt is not void unless third parties sustain an injury; Tingle v. Fisher, 20 W. Va. 504, holding that to constitute an assignment of a debt in equity, no particular form is necessary; Baldwin v. Raplee, 4 Ben. 442, F. C. 801, holding that a mortgage to pay a certain sum according to the terms of a bond is not void because the bond was never executed; Pascoult v. Cochran, 34 Fed. 363, where a bargainee was omitted from a deed.

Cited also and relied upon to this point in Dickson v. McLarney, 97 Ala. 390, 12 So. 401, where a creditor assailed a conveyance by an insolvent as fraudulent; Holt v. Craemer, 34 N. J. Eq. 189, where a mortgage was executed by the mortgagor with a fraudulent intent and the mortgagee knew it; Hubbard v. Savage, 8 Conn. 220, holding that in the absence of fraud a mortgage to secure future liabilities described with reasonable certainty is valid; Collins v. Carlisle, 13 Ill. 259, holding such a mortgage to be valid although it does not show the real character of the transaction; Speer v. Skinner, 35 Ill. 292, holding it was not essential to the validity of a chattel mortgage that it should show it was intended to secure future advances; Alexandria Sav. Inst. v. Thomas, 29 Gratt. 492, holding that a mortgage to secure future advances was not void because it did not specify the amount of the indebtedness; Miller v. Lockwood, 32 N. Y. 299, holding that the sum named as a consideration of such a mortgage was of no importance; McCarty v. Chalfant, 14 W. Va. 546, 547, where there was a deed of trust to secure future advances; Tully v. Harloe, 35 Cal. 309, 95 Am. Dec. 105, where a mortgage was given to secure both a present debt and future advances; Walker v. Snediker, 1 Hoff. Ch. 146, holding that future advances will not be embraced in a mortgage by a subsequent parol agreement; Hendrix v. Gore, 8 Or. 409, holding such a mortgage to be valid as to future advances actually made in pursuance of a parol agreement entered into when it was given in the following: Doe v. McLoskey, 1 Ala. 736; Tison v. People's Sav. & L. Assn. 57 Ala. 330; Hendon v. Morris, 110 Ala. 114, 20 So. 29; Harrington v. Samples, 36 Minn. 202, 30 N. W. 672; Stevens v. Hampton, 46 Mo. 410; McKinster v. Babcock, 26 N. Y. 381; Hall v. Tay, 131 Mass. 194; Jones v. Guaranty & Indemnity Co., 101 U. S. 631, 25 L. 1036, all holding that parol evidence was admissible to show the real consideration; in Claremont v. Carlton, 2 N. H. 372, on the point as to admissibility of parol evidence to control a deed; Edwards v. Dwight, 68 Ala. 391, where the court said they would hesitate before admitting parol evidence to enlarge the amount of a mortgage or tack on another debt; Craig v. Tappin, 2 Sandf. Ch. 83, 85, where the question was as to the priority between successive mortgages; Robinson v. Williams, 22 N. Y. 385, where the question of priority between a mort-

gagee in a mortgage to secure future advances and a judgment creditor was considered. See also note as to description of indebtedness in 49 Am. St. Rep. 209.

Mortgages.— Mortgage to secure future advances will cover advances made or incurred upon its faith prior to the receipt of actual notice of the subsequent title of other claimants, p. 51.

The citations affirming and applying to this holding are also numerous: Seymour v. Darrow, 31 Vt. 134, holding that all that is required is that the extent of the mortgage should be described in general terms; Louisville Banking Co. v. Leonard, 90 Ky. 111, 13 S. W. 522, holding a mortgage must so disclose its purpose that creditors may know what was intended to be secured; Bell v. Fleming, 12 N. J. Eq. 16; Summers v. Roos, 42 Miss. 779, 2 Am. Rep. 657, both holding it was not necessary it should appear that the mortgage was to secure future advances; McGavock v. Deery, 1 Cold. 270, holding that the only question is the bona fides of the transaction; Foster v. Reynolds, 38 Mo. 557, holding the security may be taken in a sum large enough to cover the floating debt to be secured thereby; McDaniels v. Colvin, 16 Vt. 305, 42 Am. Dec. 514, where a mortgage to secure future accruing accounts as they become due was held valid; Wilson v. Russell, 13 Md. 535, 71 Am. Dec. 652, where parties had agreed to loan the grantors in a deed of trust a certain sum from time to time as might be desired; Bank of Utica v. Finch, 3 Barb. Ch. 298, 303, 49 Am. Dec. 176, holding that mortgages or judgments may be given to secure future advances or as security for balances due from time to time; Lawrence v. Tucker, 23 How. 27, 16 L. 478, where a mortgage was made to secure both an existing debt and future advances; Hendricks v. Robinson, 2 Johns. Ch. 309, holding an assignment by an insolvent to secure existing claims and future indebtedness was valid; Crane v. Deming, 7 Conn. 397, where a mortgage referring to a bond for the conditions of the advances was held valid; Hall v. Tay, 131 Mass. 193, where a mortgage was given by a husband and wife on her land to A. as security for goods to be sold to the husband; Fisher v. Otis, 3 Pinn. 91, where a mortgage for a gross sum was in reality security for advances to be made; Didier v. Patterson, 93 Va. 537, 25 S. E. 662, holding that an absolute assignment as security was a mere badge of fraud repellable by showing good faith; Brinkerhoff v. Marvin, 5 Johns. Ch. 327, holding that a judgment may be taken to secure future advances; Clapp v. Ely, 27 N. J. L. 611, where a judgment was confessed in payment of a debt and in part to secure future advances; Union Nat. Bank v. Moline, etc., Co., 7 N. Dak. 209, 73 N. W. 529, upholding prior mortgagee's lien, no actual notice having been given him of the second lien; Johnson v. Bratton, 112 Mich. 323, 70 N. W. 1022, holding parol admissible to show that a mortgage was intended to secure future advances.

Cited, affirmed and followed also in Truscott v. King, 6 N. Y. 159,

and Ely v. Parkhurst, 25 N. J. L. 192, both holding a judgment confessed to secure future advances to be valid; James v. Morey, 2 Cow. 292, 14 Am. Dec. 485, holding that in some cases a subject pledged may be considered as security for future loans; Keyes v. Bump, 59 Vt. 398, 399, 9 Atl. 601, holding that the consideration named in the mortgage does not determine the amount; Bell v. Radcliff, 32 Ark. 664, where loans above limitations in the deed were protected; Commercial Bank v. Cunningham, 24 Pick. 274, 35 Am. Dec. 324, holding new notes, whether given in renewal or not, were covered by the mortgage; Downing v. Palmateer, 1 T. B. Mon. 70, holding that advances made in continuation of those provided for will be tacked to it; Bell v. Fleming, 12 N. J. Eq. 493, holding such mortgages to be valid as against subsequent purchasers for value; United States v. Lenox, 2 Paine, 183, F. C. 15,592, holding such an assignment is valid as to all advances except such as are made after the liens of third persons have intervened; Ward v. Cooke, 17 N. J. Eq. 100, holding that if the prior mortgagee have knowledge of a second mortgage he cannot give further credit; Boswell v. Goodwin, 31 Conn. 81, 94, 81 Am. Dec. 170, holding that the mortgage was not affected by a subsequent mortgage, although the advances were made after its recording; National Bank of Chester v. Gunhouse, 17 S. C. 494, on the point that a mortgage is postponed as against a second mortgage where advances were made after knowledge; Schmidt v. Zahrndt, 148 Ind. 453, 47 N. E. 337, holding that subsequent advances are a lien as against a subsequent purchaser or incumbrancer with notice; Alexandria Sav. Inst. v. Thomas, 29 Gratt. 489, where the court said that if it was compulsory on the mortgagee to loan he would take precedence even if he had notice; Ackerman v. Hunsicker, 85 N. Y. 47, 49, 39 Am. Rep. 622, 623, holding that such a mortgage has preference over subsequent judgments; Ter-Hoven v. Kerns, 2 Pa. St. 98, where the court was of opinion that future advances would not be preferred to liens attaching before such advances are made; Tapia v. Demartini, 77 Cal. 386, 387, 11 Am. St. Rep. 290, 291, 19 Pac. 643, holding such a mortgage to be a prior lien as against a mechanic's lien; Turnbull v. Thomas, 1 Hughes, 176, F. C. 14,243, where the question was as to priority between deeds of trusts; In re Haake, 2 Sawy. 241, F. C. 5,883, where, after executing a trust deed to secure future advances, a party declared a homestead on the premises; Potter v. Holden, 31 Conn. 394, where the mortgagee in such a mortgage assigned it with the same power of disposition that mortgagee had. See also on this point 20 Am. Dec. 659, 662, note.

Distinguished in Holbrook v. Betton, 5 Fla. 107, holding that a record of a mortgage was sufficient as against a subsequent incumbrancer; Mead v. York, 6 N. Y. 451, 57 Am. Dec. 468, holding a mortgage once paid cannot by parol be kept alive and maintain priority over subsequent judgment creditors.

Miscellaneous.— Cited but not in point in Baker v. Biddle, 1 Bald. 403, F. C. 764; Coon v. Bosque, etc., Co., 8 N. Mex. 131, 42 Pac. 80, to point that breach of any mortgage covenant renders whole sum due.

7 Cr. 52–68, 3 L. 266, SCHOONER PAULINA'S CARGO v. UNITED STATES.

Embargo.— Embargo act of 1808 prohibited the transportation of any article whatever from the United States to any foreign port or place, p. 60.

Cited in The Brig Short Staple, 1 Gall. 110, F. C. 12,813, a prosecution for violation of the act.

Statutes.— In construing laws it is the duty of the court to effect the intention of the legislature, but this intention is to be searched for in the words which the legislature has employed to convey it, p. 60.

The following citing cases affirm and apply this principle: Eason v. State, 11 Ark. 495, where the question was as to whether a later act operated as a repeal pro tanto; Bourland v. Hildreth, 26 Cal. 181, holding that when the language of the Constitution is unambiguous, no construction opposed to its express words should be given; Cory v. Carter, 48 Ind. 337, 17 Am. Rep. 745, where the court said that one of the cardinal rules of construction was that the whole instrument was to be examined in construing any portion; Louisiana Lottery Cases, 20 Fed. 627, where the expression "sending" of letters and circulars concerning lotteries was construed; In re Swearinger, 5 Sawy. 53, F. C. 13,683, where the construction placed on an act by the court of the State from which the act was adopted was not followed; Lehman v. Robinson, 59 Ala. 238, holding that where the legislature employs different language in a subsequent statute, the court will presume a change of law was intended; Irwin v. Irwin, 2 Okl. 218, 37 Pac. 560, where the question was as to the power of the territorial legislature to repeal an act granting Probate Courts jurisdiction in divorce suits; In re Meteor, 17 Fed. Cas. 201, holding it dangerous to vary explicit meaning by considerations as to the intent; Penn. R. R. Co. v. Pittsburgh, 104 Pa. St. 552, the court saying that in construing an act upon the theory of supposed intention, the evidence of the intention must be found in the language of the act and not outside of it; In re Nounnan, 7 Bank. Reg. 18, where it was said that a court could not substitute in place of an expressed intention a presumed intention; State v. Sinks, 42 Ohio St. 367, citing authorities on the construction of statutes and holding a tax law unconstitutional; Bartlett v. Morris, 9 Port. 268, holding that where the language is plain there is no room left for construction and a resort to extrinsic facts is not permitted; Leonard v. Wiseman, 31 Md. 205, holding that courts have

no power to set aside a statute or evade its operation; Simington v. State, 5 Ind. 484, where a statute was held to deprive certain courts of jurisdiction over felonies; Delaplane v. Crenshaw, 15 Gratt. 481, where the evidence of a member of the legislature was excluded.

Embargo.— Seizure of a vessel under the act of April 25, 1808, is not justified because the vessel takes on a cargo, but not under the inspection of a revenue officer, p. 61.

An information against a vessel for taking on board goods without a permit was abandoned after the decision in the principal case, in The Schooner Friendship, 1 Gall. 111, F. C. 5,125.

Ownership.— It is for the legislature to declare how far the citizen shall be restrained in the exercise of the power over property which ownership gives, and for the court to apply the rule, p. 61.

Cited upon this point in United States v. Marks, 2 Abb. (U. S.) 540, F. C. 15,721, where defendants were tried and imprisoned for receiving excessive fees as pension agents; United States v. Thirty-seven Barrels of Apple Brandy, 28 Fed. Cas. 66, where the court said that although revenue statutes were not as strictly construed as penal, yet it would not adjudge a punishment unless the law expressly required it; Our House No. 2 v. State, 4 G. Greene, 175, on the point that the proposition that proceedings in rem against property used for unlawful purposes may be sanctioned by law without violating the Constitution, is conclusively settled.

Embargo.— Transshipment of cargo from one vessel to another whose business is confined to waters within the jurisdiction of United States is not a violation of act of January 9, 1808, p. 66.

7 Cr. 69–99, 3 L. 271, RUSSELL v. CLARKE.

Guaranty.— Construction of letters of guaranty must be the same in both courts of law and equity, p. 89.

Cited in Colgen v. Henley, 6 Leigh (Va.) 94, the court saying that if the words of promise are at all doubtful, the court will take into consideration the circumstances and situation of the parties at the time.

Fraud.— Remedy at law held complete in a question of fraud; moreover equity will not afford relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud, p. 91.

Cited and principle applied in Russell v. Little, 28 Ala. 163, where the court refused to entertain a bill, the sole object of which was to recover money alleged to have been paid through ignorance or mistake and fraud; Foster v. Swasey, 2 Wood. & M. 221, F. C. 4,984, holding that fraud and discovery are grounds of equitable

relief and that equity will go on and continue the proceedings; Vanbibber v. Beirne, 6 W. Va. 175, 176, where the court doubted the jurisdiction of equity in cases of fraud where a party had a plain and complete remedy at law; Woodman v. Freeman, 25 Me. 541, 555, holding that equity would relieve when a proper case was presented, but that cases which declare that equity had jurisdiction in every kind of fraud were to be viewed with caution; Bradley v. Bosley, 1 Barb. Ch. 150, holding that a bill in equity would not lie by a vendee against a vendor for false representations, for damages only; Warner v. Daniels, 1 Wood. & M. 112, F. C. 17,181, the court saying it could not be held otherwise in the United States courts under the judiciary act if the remedy at law is complete; Phalen v. Clark, 19 Conn. 434, 50 Am. Dec. 257, holding that equity has jurisdiction to relieve against every species of fraud and in many cases concurrently with a court of law; Howse v. Moody, 14 Fla. 64, holding that where a plaintiff seeks to set aside fraudulent judicial proceedings he should make all persons parties who were actors and claim a present interest.

Distinguished in Bean v. Smith, 2 Mason, 271, F. C. 1,174, holding that a bill in equity lies to set aside a fraudulent conveyance; Harding v. Wheaton, 2 Mason, 382, F. C. 6,051, holding that equity had jurisdiction of a suit by heirs-at-law to set aside a deed by their ancestor because of undue influence.

Discovery.— On a bill for discovery, if the answer of the defendant discloses nothing and the plaintiff supports his claim by evidence in his own possession, he should be dismissed from a court of equity, p. 91.

This principle is affirmed and applied in the following citing cases: Viele v. Hoag, 24 Vt. 52, holding that if a bill is brought for discovery merely in aid of proceedings at law and the discovery fails, the bill will be dismissed; Home Ins. Co. v. Stanchfield, 1 Dill. 430, 2 Abb. (U. S.) 5, F. C. 6,660, the court saying that the necessity for discovery fails when a complainant has failed to obtain the discovery he sought; Henken v. Gramann, 2 Rich. L. 367, the court saying the adduction by the plaintiff of other evidence would remove the only ground for the jurisdiction of equity; Hale v. Clarkson, 23 Gratt. 48, and Baker v. Biddle, 1 Bald. 409, 420, F. C. 764, both holding that discovery did not lie for matter of which the plaintiff had knowledge and means of proof; Bell v. Pomeroy, 4 McLean, 58, 59, F. C. 1,263, holding that in discovery to aid a prosecution at law the bill should aver the materiality of facts, and that they can only be proved by the defendant; Brown v. Swann, 10 Pet. 503, 9 L. 511, holding that a bill should show that the facts are known by the defendant and should be disclosed, and that the claimant is unable to prove them; Cecil Nat. Bank v. Thurber, 59 Fed. 914, 8 U. S. App. 496, holding that where a bill seeks relief as well as discovery, the complainant must allege his inability

to establish at law the matters of which discovery is sought; Coquillard v. Suydam, 8 Blackf. 31, where a bill did not allege that a discovery was indispensable and the matter was denied by the answer; Stacy v. Pearson, 3 Rich. Eq. 152, where the court held that a party may have discovery not only when he is destitute of other evidence, but also to aid such evidence or to render it unnecessary; Berry v. Ginaca, 6 Sawy. 395, 5 Fed. 481, holding that where a plaintiff alleges in connection with his legal cause of action some equitable matter not sustained by proof, he cannot have a decrec for the legal matter; Buzard v. Houston, 119 U. S. 354, 30 L. 454, 7 S. Ct. 253, where a bill showed ground for legal and not equitable relief and prayed for a discovery as incidental only; Leggett v. Postley, 2 Paige, 602, holding discovery would not lie merely to guard against anticipated perjury in a suit at law; Crane v. Bunnell, 10 Paige Ch. 335, where a bill was filed for relief against a fraudulent contract and for a discovery of the fraud; Va., etc., M. & M. Co. v. Hale, 93 Ala. 545, 9 So. 258, where discovery was sought from a corporation; Baker v. Biddle, 1 Bald. 417, F. C. 764, holding that a bill, if sustained, does not give power to make a final decree if relief is not incidental to the discovery. See also note on pleading in bill for discovery, 2 Am. Dec. 70.

Distinguished in Tyler v. Savage, 143 U. S. 94, 96, 36 L. 88, 89, 12 S. Ct. 345, where discovery was only one of the grounds of jurisdiction and the answers disclosed the facts; Tappan v. Evans, 11 N. H. 324, holding that it is sufficient to sustain the jurisdiction that a discovery is had of facts which are material to the case.

Equity.— If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, p. 89.

This proposition is affirmed and applied by the citing cases as follows: O'Brien v. Coulter, 2 Blackf. 423, holding that a party need not first obtain a judgment where the debtor is deceased or where the claim is to be satisfied out of a fund accessible only in equity; Postelwait v. Howes, 3 Iowa, 385, holding that the rule requiring a return of nulla bona did not apply when a creditor's bill was filed against an estate; Snodgrass v. Andrews, 30 Miss. 490, 64 Am. Dec. 173, and Hamilton v. Miss. College, 52 Miss. 68, both holding chancery to be a proper tribunal where a relief was sought against fraudulent conveyances by a decedent; Luthy v. Woods, 6 Mo. App. 69, on the point that a creditor must obtain judgment at law before proceeding in equity where there is no original ground of equity jurisdiction; Miller v. Davidson, 3 Gilm. 523, 44 Am. Dec. 718, holding that a creditor seeking to satisfy a claim out of an equitable right not liable to execution, must exhaust his remedy at law; Shufeldt v. Boehm, 96 Ill. 563, where equity refused to enjoin the sale under an execution on the ground that the judgment was fraudulently confessed; Kankakee Woolen Mill

Co. v. Kampe, 38 Mo. App. 236, holding that a creditor at large may proceed in equity to set aside an invalid preference; Early Times Dis. Co. v. Zeiger, 49 Pac. 724, upholding right of creditor to sue in equity to establish a trust in debtor's property fraudulently conveyed without first obtaining judgment at law; Kahn v. Salmon, 10 Sawy. 190, 20 Fed. 805, holding the lien of an attachment is sufficient to enable a creditor to maintain a suit in equity to set aside a fraudulent assignment; Getzler v. Saroni, 18 Ill. 518, holding that judgments on attachments are a proper foundation for equitable interposition to set aside a conveyance in fraud of creditors; Gamage v. Harris, 79 Me. 536, 11 Atl. 423, where complainant brought a bill to remove a cloud, alleging that defendant held under a fraudulent judgment, and failed to prove the fraud; Ferson v. Sanger, 2 Ware (Dav.), 261, F. C. 4,751, holding equity will not entertain suit for damages arising out of fraud when damages are the sole object of the bill; Kent v. Curtis, 4 Mo. App. 127, 128, 131, holding a petition to subject property purchased with funds converted by defendant and conveyed to his wife to be demurrable; Batchelder v. Altheimer, 10 Mo. App. 185, holding a creditor of an insolvent limited partnership may without judgment invoke equity to protect and distribute the assets; Pullman v. Stebbins, 51 Fed. 12, holding that on dissolution of a corporation creditors may sustain a bill unsupported by judgments to reach the assets; Pierpont v. Fowle, 2 Wood. & M. 29, 30, F. C. 11,152, holding that a bill for an account of sales under copyright and for an injunction gives chancery prima facie jurisdiction; Pendleton v. Perkins, 49 Mo. 568, holding that where a debtor has absconded and there was no proceeding by which his property can be reached, a creditor's bill will lie in the first instance; Merchants' Nat. Bank v. Paine, 13 R. I. 593, holding that where one had absconded in debt, leaving no legal assets which could be attached, his creditors can proceed at once in equity; Hipps v. Babin, 19 How. 278, 15 L. 635, holding that equity would not entertain a bill seeking to enforce a merely legal title to land; County of Cook v. Davis, 143 Ill. 153, 32 N. E. 177, holding that if a county treasurer fails to pay over all the fees, the remedy is complete on his bond; Baker v. Biddle, 1 Bald. 408, F. C. 764, on the point that a subpœna in equity cannot be abused as a pretext for bringing causes proper for a court of law into equity; Jones v. Newhall, 115 Mass. 249, 15 Am. Rep. 102, holding equity will decree specific performance of a contract for the sale of land when all that is to be done by the vendee is to pay money. Cited also, dissenting opinion, Ladd v. Judson, 174 Ill. 355, 66 Am. St. Rep. 271, 51 N. E. 842, majority holding a judgment at law an indispensable prerequisite to creditor's bill; and arguendo, in Stanton v. Catron, 8 N. Mex. 361, 45 Pac. 885, as one of three classes of cases where creditor may resort primarily to equity. Cited in notes, 52 Am. Rep. 673; and 66 Am. St. Rep. 288, in a valuable note on creditors' bills.

Distinguished in Pratt v. Northam, 5 Mason, 106, F. C. 11,376, holding that a bill for a recovery of assets lies, notwithstanding a remedy at law.

Guaranty.— One having no interest will be subjected to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not to receive that construction, p. 90.

Cited and applied in Tucker v. Bitting, 32 Pa. St. 430, holding that parol evidence to charge one with the debt of another must be clear, explicit and certain; Rankin v. Childs, 9 Mo. 678 (669), 680 (672), where the words "I hereby guarantee the payment of the above bill" were construed; Douglass v. Reynolds, 7 Pet. 118, 122, 8 L. 629, 630, where a letter of credit was construed and evidence of reliance upon it allowed; Bell v. Bruen, 1 How. 185, 11 L. 96, holding that commercial letters are not construed on the same principles as bonds, but ought to receive a reasonable interpretation according to the true import of the terms; Eaton v. Mayo, 118 Mass. 143, when the following letter was held not to be a guaranty: "Let M. have what goods he may want on four months, and he will pay as usual."

Distinguished, Home Sav. Bk. v. Hosie, 77 N. W. 628, holding guaranty should be fairly construed.

Guaranty.— One who contracts on the credit of another should not trust to ambiguous phrases and strained constructions, but require an explicit and plain declaration of the obligation he is about to assume, p. 92.

Affirmed and applied in Unangst v. Hibber, 26 Pa. St. 153, holding that the proof of promise must be clear and must contain a positive declaration of the obligation assumed; Smith v. Montgomery, 3 Tex. 209, holding that the liability of a guarantor or surety cannot be extended beyond the actual terms of his engagements; First Nat. Bank v. Sowles, 46 Fed. 732, where directors, during a run on a bank, posted a notice to the effect that the bank was solvent.

Distinguished in Moore v. Holt, 10 Gratt. 294, 295, where it was held that a letter of introduction with the "assurance that any contract of his will and shall be promptly paid," was a guaranty.

Guaranty.— One to whom a guaranty has been given should give immediate notice to the guarantor of the extent of his engagement, p. 94.

This principle is affirmed and applied by the following citing cases: Grice v. Ricks, 3 Dev. 65, holding that where the liability of one is upon a collateral obligation, he who takes the benefit must give the other notice; Montgomery v. Kellogg, 43 Miss. 492, 5 Am. Rep. 510, holding that it was necessary to give notice, first, of acceptance; second, of the amount of the credit; third, of the failure

to pay; Rankin v. Childs, 9 Mo. 680 (672), holding that notice should be given of acceptance and of the failure to pay; Lee v. Dick, 10 Pet. 494, 9 L. 508, where a party was held not bound because notice of acceptance had not been given; Adams v. Jones, 12 Pet. 213, 9 L. 1060, holding that if notice of acceptance was not given, no subsequent diligence can make the guarantor liable; Gardner v. Lloyd, 110 Pa. St. 288, 2 Atl. 565, holding that if a party promises that if creditors will grant time he will guarantee punctual payment, notice of acceptance must be given; Taylor v. McClung, 2 Houst. 38, and Mayfield v. Wheeler, 37 Tex. 260, both holding that a guarantor for a future credit must be given notice of acceptance; Rapelye v. Bailey, 3 Conn. 443, 8 Am. Dec. 201, where one person wrote to another that he would pay for goods furnished a third person if the last did not; Cahuzac v. Sumini, 29 Ala. 292, holding notice of acceptance to be necessary unless the parties resided in the same city and the agreement to accept was contemporaneous with the offer; Wildes v. Savage, 1 Story, 32, F. C. 17,653, holding that notice of acceptance is not necessary where the agreement to accept is contemporaneous with the guaranty; Davis v. Wells, 104 U. S. 163, 26 L. 688, holding that the rule requiring notice of acceptance applies only when such acceptance is necessary to that mutual assent without which there can be no contract; Norton v. Eastman, 4 Me. 526; Wilcox v. Draper, 12 Neb. 142, 143, 10 N. W. 580, 581, and Powers v. Bumcratz, 12 Ohio St. 277, 283, all holding that where a guaranty is absolute, no notice of acceptance is necessary; Beckman v. Hale, 17 Johns. 140, holding that a letter in which one said he would stand responsible, did not constitute an absolute guaranty and that notice was necessary; Douglass v. Reynolds, 7 Pet. 126, 8 L. 631, holding that notice was not necessary in cases of continuing guaranties; Soller v. Meugy, 1 Bailey L. 623, where a letter of credit was given, and the court held that immediate notice of acceptance was necessary; Kincheloe v. Holmes, 7 B. Mon. 9, 45 Am. Dec. 45, and Craft v. Isham, 13 Conn. 35, both holding that the guarantor was entitled to notice within a reasonable time; Farmers' Bank v. Tatnall, 7 Houst. 300, 31 Atl. 880, holding that a delay of over a year discharged the guarantor; Central Sav. Bank v. Shine, 48 Mo. 465, 8 Am. Rep. 117, holding that in an offer by letter to guaranty the payment of future advances, there should be a distinct notice of acceptance; Menard v. Scudder, 7 La. Ann. 388, 389, 56 Am. Dec. 613, 614, holding that express notice from the creditor is not indispensable if the fact is brought to the guarantor in any other way; Lachman v. Block, 47 La. Ann. 512, 17 So. 156, where the words, "I agree to become surety for ten thousand dollars," with no designation of the debt, were construed; Meyers v. Campbell, 59 N. J. L. 379, 35 Atl. 789, holding that securities belonging to a principal debtor and pledged to indemnify his surety, will inure to the benefit of his creditors. See note in 39 Am. Rep. 222, 223, where the subject of notice of acceptance of guaranties is discussed.

The language in the principal case was said to be a dictum, in Seaver v. Bradley, 6 Me. 66, holding the guarantor had seasonable notice of facts sufficient to charge him; and in Douglass v. Howland, 24 Wend. 50, holding that where one covenanted that another "shall perform the agreement" an action would lie without notice of the nonperformance.

Guaranty.— One making representation as to credit of another where the communication is honestly made and the party making it has no interest in the transaction, is not responsible for its actual verity, p. 95.

This proposition is variously affirmed and applied by the citing cases, as follows: State Bank v. Hamilton, 2 Ind. 464, holding that if representations were fraudulently made, one was liable, otherwise if made in good faith; Wynne v. Allen, 7 Baxt. 316, 32 Am. Rep. 565, holding that if the party honestly believed he stated the truth he is not liable; Marsh v. Falker, 40 N. Y. 569, holding that false representations as to the credit of another to be actionable must be known to be false or must convey the impression of actual knowledge; Einstein v. Marshall, 58 Ala. 159, 25 Am. Rep. 733, holding that if a person recommends to a wholesale merchant one who desires to purchase on credit, good faith requires his representation must be true; Hubbard v. Briggs, 31 N. Y. 529, holding it is not necessary that the defendant should be benefited by the deceit or in collusion with the party benefited; Young v. Hall, 4 Ga. 100, holding an action lies against one who gives a recommendation of character and credit to another; Addington v. Allen, 11 Wend. 402, holding that where goods were sold to A. upon the false representation of B. as to A.'s credit, an action lies against B.; Wafer v. Harvey County Bk., 46 Kan. 608. 26 Pac. 1036, holding that where the fraud consists in inducing a sale of goods to an insolvent from whom the misrepresenting party obtains them, the selier may sue the latter; Robbins v. Barton, 50 Kan. 126, 31 Pac. 686, where the representation was "I consider ——— perfectly good for a bill of goods amounting to ———;" Merchants' Nat. Bk. v. Sells, 3 Mo. App. 94, where a party identified another at a bank and he was not the party he was represented to be; Nevada Bk. v. Portland Nat. Bk., 59 Fed. 344, holding a national bank to be liable for fraudulent representations through its cashier to another bank as to the financial responsibility of a customer; Merchants' Nat. Bk. v. Armstrong, 65 Fed. 940, holding that to make one liable for deceit the false representations must have been made directly to the party injured; Ferson v. Sanger, 1 Wood. & M. 146, F. C. 4,752, holding that there must be knowledge to charge one criminaliter for the fraud of an agent. Cited, generally, in discussing the question of fraud, in Green v. Bryant, 2 Ga. 70; Campbell v. Kinlock, 9 Rich. L. 310, and Meyers v. Merillion, 118 Cal. 356, 50 Pac. 663. And see valuable notes, in 5 Am. Dec. 212, and 25 Am. Dec. 448, 450.

Fraud.— If an act immoral and designedly injurious to another, were not cognizable and punishable by our laws, our system of jurisprudence would be defective, p. 94.

Cited in Bean v. Herrick, 12 Me. 265, 28 Am. Dec. 177, holding that if a party makes a false affirmation, although he has no interest he is liable; Bristol Mfg. Co. v. Gridley, 28 Conn. 211, holding that an assessor was liable where he altered an assessment list so that the property of the plaintiff was rated higher than it was before the alteration.

Evidence.— Answer responsive to the bill is evidence, p. 94.

Cited and affirmed in Dilly v. Barnard, 8 Gill & J. 188, holding an answer to be evidence even where the equity of the complainant's bill is grounded upon the allegation of fraud; Jewett v. Cunard, 3 Wood. & M. 294, F. C. 7,310, where the question was whether an answer voluntarily sworn to was evidence; Tufts v. Tufts, 3 Wood. & M. 467, F. C. 14,233, citing cases on the point without deciding the question; Martin v. Martin, 13 Mo. 64, where an executor sued a son to recover a slave given to the son by the father, the plaintiff charging that the slave was loaned not given.

Guaranty.— One indorsing bills on faith of guaranty cannot resort to a trust fund for the indemnity of the guarantor, both the principal and guarantor being insolvent, p. 97.

Cited and relied upon as authority, in Keene Five Cents Sav. Bk. v. Herrick, 62 N. H. 176, holding that a payee of a note is entitled to have a mortgage given by the maker to his surety assigned to him; In re Baldwin, 19 N. B. R. 52, 2 Fed. Cas. 509, holding that after the insolvency of either the principal or surety the property is to be applied upon the debt for which the surety is bound; Belcher v. Hartford Bk., 15 Conn. 383, holding it was the debt that was to be protected, and however it may be modified or into whose hands it may come, the fund accompanies it; New London Bk. v. Lee, 11 Conn. 119, 27 Am. Dec. 716, holding that the security for a debt in whose hands soever it may be is held for the payment of such debt.

Trusts.— One taking assignment with notice of a trust takes it clothed with the trust, p. 97.

Cited in Breedlove v. Stump, 3 Yerg. 270, holding that to constitute an abandonment of a trust fund there must be a clear and decisive act; Wood v. Dummer, 3 Mason, 313, F. C. 17,944, holding that capital stock is a trust fund for the payment of the bank notes, and may be followed in the hands of stockholders.

Trusts.— One for whose benefit a trust is created, who is to be the ultimate receiver of the money, may maintain a suit in equity to have it paid directly to himself, p. 97.

Cited and principle affirmed and applied in Rodney v. Shankland, 1 Del. Ch. 47, 12 Am. Dec. 75, holding that a person for whose benefit a trust is created may enforce it, although he is not a party to it; Trecothick v. Austin, 4 Mason, 36, 41, F. C. 14,164, holding a cestui que trust may enforce his rights directly in equity not only against the trustee, but against all others; Homer v. The Savings Bk., 7 Conn. 484, holding that where security is given for the better protection of a debt chancery will make it effectual to others who are entitled to the debt; King v. Harman, 6 La. 620, 621, 26 Am. Dec. 488, 489, holding that a bond creditor in chancery has the benefit of all counter-bonds or collateral securities given by the principal to the surety; Breedlove v. Stump, 3 Yerg. 263, holding that indorsers of negotiable paper were entitled to the benefit of collateral security given to the indorser; Ray v. Proffet, 15 Lea, 523, holding that indemnity or collateral security given by a debtor to his surety, inures to the benefit of the creditors; National Bk. v. Ridenour, 46 Kan. 713, 27 Pac. 152, where a chattel mortgage was executed by a firm to one of the members thereof to secure a note executed by the members of the firm to a bank; Sedam v. Williams, 4 McLean, 54, F. C. 12,609, holding that if a debtor of a judgment debtor agree to pay the judgment creditor he may be decreed to make the payment; Duke of Cumberland v. Codrington, 3 Johns. Ch. 261, 8 Am. Dec. 501, holding that if one takes a conveyance subject to a mortgage covenanting to indemnify the grantor, and having paid off part dies, the land was primarily to be resorted to for the residue.

Distinguished in McConnell v. Dickson, 43 Ill. 108, holding that where a security pays a debt he has no right in equity in the first instance.

Parties.— The incapacity imposed on the Circuit Courts to proceed against any person residing within the United States, but not within the district, justifies the courts in dispensing with parties merely formal, p. 98.

Cited and principle applied in Abbot v. The American Hard Rubber Co., 4 Blatchf. 492, F. C. 9, holding that where a person is beyond the reach of process, the court will dismiss only when his presence is indispensable; Heriot v. Davis, 2 Wood. & M. 233, F. C. 6,404, holding that a case will proceed against the persons appearing and notified without prejudice to the others where their interests can be severed; Ribon v. Chicago, etc., R. R. Co., 16 Wall. 451, 21 L. 369, holding that where a decree can be made as to those present without affecting those absent the court will proceed; Carneal v. Banks, 10 Wheat. 188, note, 6 L. 299, note, on the point that parties having been improperly made defendants cannot affect the jurisdiction as between parties properly before the court; Wood v. Davis, 18 How. 469, 15 L. 461, where the real parties in interest were those who resided out of the State; Harrison v. Urann, 1 Story,

66, F. C. 6,146, holding that the question of jurisdiction of United States courts as to parties can only apply as between the very parties who by a false allegation are brought within their jurisdiction. Cited in collection of authorities on the point that Circuit Court subpoena served outside the court's territorial jurisdiction, is a nullity, United States v. Amer. Lumber Co., 80 Fed. 311.

Parties.— Where essential parties are not before the court, the court will not make a decree, p. 98.

The following citations affirm and apply this rule: Hamilton v. Savannah, etc., Ry. Co., 49 Fed. 418, holding that, notwithstanding the act of congress of 1838 and rule 47 of the equity practice, no decree can be made involving the rights of an omitted party; California v. Southern Pac. Co., 157 U. S. 249, 39 L. 691, 15 S. Ct. 599, holding that in an original cause in the Supreme Court, the court would not proceed in the absence of parties whose rights would be in effect determined, though not technically bound; Porter v. Clements, 3 Ark. 382, holding it must appear that the ends of justice would be defeated and that the rights of the absent persons would not be affected before the court will proceed; Florida v. Georgia, 17 How. 508, 15 L. 200, holding that the United States should have an opportunity to be heard in a controversy between States to establish a boundary; Christian v. Atlantic, etc., R. R. Co., 133 U. S. 241, 33 L. 592, 10 S. Ct. 262, holding a State is an indispensable party to any proceeding in equity to subject its property to the payment of its obligations; Tobin v. Walkinshaw, McAll. 29, F. C. 14,068, holding that where the bill prayed for cancellation of conveyances in which absent parties were interested, the court had no jurisdiction; Mahr v. Norwich Union Fire Ins. Co., 127 N. Y. 461, 28 N. E. 393, holding that in an action by an equitable assignee of a policy to restrain its payment, one to whom the insured had assigned it absolutely should be made a party; Eyster v. Gaff, 2 Colo. 241, dissenting opinion, holding the assignee in bankruptcy must be a party in a suit by a mortgagee; Shields v. Barrow, 17 How. 139, 140, 15 L. 160, holding a compromise executed by six persons could not be rescinded in an action against two only; Gray v. Larrimore, 4 Sawy. 650, 2 Abb. (U. S.) 556, F. C. 5,721, holding that all partners or their representatives are indispensable parties to a bill to dissolve a partnership and for an accounting; Griffin v. Lovell, 42 Miss. 404, holding that on a bill filed by an executor to foreclose a mortgage, the heirs need not be made parties; West v. Smith, 8 How. 410, 12 L. 1134, holding that on a bill by a legatee to compel an executor to sell realty to pay legacies it was not necessary to make a special devisee, residing out of the State, a party; West v. Randall, 2 Mason, 196, 198, F. C. 17,424, 8 Wheat. 457, note, 5 L. 660, note, the court being of opinion that heirs could not sue for a distributive share without making the other heirs or next of kin parties; Reese v. Bradford, 13 Ala. 844, holding that if the absent

parties are not mere passive parties to the decree, equity will not proceed without them.

Parties.— Instead of dismissing a bill brought to a hearing without proper parties, the court may give leave to make new parties, p. 99.

Cited and followed in Hightower v. Mustian, 8 Ga. 511, holding that generally a bill will not be dismissed for want of proper parties but may be dismissed; Picquet v. Swan, 5 Mason, 571, F. C. 11,135, on the point that dismissal is the common course where persons who are necessary parties refuse to appear and the court cannot reach them by its process; Beasley v. Shively, 20 Or. 510, 26 Pac. 847, where it appeared from the record that the real merits could not be determined without essentially affecting persons not parties and the court dismissed the complaint; Lucas v. Bank of Darien, 2 Stew. 326, holding that if the case were with the appellant a dismissal generally would not be proper; Sloan v. Sloan, 21 Fla. 598, where a defect of necessary parties which existed prior to the decree appealed from was discovered on appeal; Fisher v. Rutherford, 1 Bald. 194, F. C. 4,823, on the point that parties may be added after the reversal of a final decree and the cause is remanded to the Circuit Court; Poole v. Nixon, 9 Pet. Appx. 775, 19 F. C. 996, 9 L. 307, where there was a bill of review and the court said that such bills would lie only in favor of a party or a privy to the original suit; Alston v. Rowles, 13 Fla. 114, where an appeal prosecuted by the "defendants now living," omitting individual names and by a legal representative of one who was a party, was dismissed; Baker v. Biddle, 1 Bald. 416, F. C. 764, holding that objection to the jurisdiction for want of proper parties may be made at the hearing or on appeal.

Equity, being rightfully in possession of a cause, will proceed to determine the whole matter in controversy, p. 89.

Cited and applied in Stow v. Barzeman, 29 Ala. 403, where this principle was applied on a bill filed by a vendee for an abatement of the price on account of misrepresentations; Howards v. Selden, 4 Hughes, 310, 5 Fed. 474, where a Federal court having jurisdiction over the parties before it granted the prayer of a petition though both the petitioner and respondent were residents of the same State; McLaren v. Steapp, 1 Ga. 378, and Pryor v. Adams, 1 Call, 392, both holding that where it was necessary to establish an account, equity would grant a discovery and then grant the appropriate relief consequent upon it; Lancy v. Randlett, 80 Me. 175, 6 Am. St. Rep. 171, 13 Atl. 687, holding that equity could grant relief, even though the discovery showed the proper relief to be an award of damages; Magic Ruffle Co. v. Elm City Co., 14 Blatchf. 112, F. C. 8,950, where the court having granted discovery, proceeded to give the proper relief in damages; Woodman v. Freeman, 25 Me. 545, holding that

relief can be given as a consequent upon discovery only upon a bill averring the facts of which discovery is desired, that they rest in the knowledge of defendant alone and are material; Dowell v. Mitchell, 105 U. S. 432, 26 L. 1143, on the point that where jurisdiction is taken in equity of a legal cause of action because of some equitable relief which cannot be granted, equity should dismiss the bill; Real Estate Sav. Inst. v. Collonious, 63 Mo. 295, where a suit was brought to set aside a partition sale for fraud; Boland v. Ross, 120 Mo. 216, 25 S. W. 526, holding that a mortgagee by answering and setting up his mortgage as a prior lien waives the objection that the cross-bill is not germane; Kent v. Curtis, 4 Mo. App. 124, the court saying that where the principal matter of controversy is a cause of action at law it should be settled at law wherever possible; Magic Ruffle Co. v. Elm City Co., 13 Blatchf. 153, F. C. 8,949, holding that a bill upon a license under a patent, although no royalties were payable and the patent had expired, is not open to the objection that there is a remedy at law where an account and discovery are necessary.

Miscellaneous.— Cited upon the point as to the jurisdiction of Federal courts in Pond v. Vt. Valley R. R. Co., 12 Blatchf. 291, F. C. 11,265; Howard v. Cannon, 11 Rich. Eq. 26, 75 Am. Dec. 739; Romaine v. Union Ins. Co., 28 Fed. 639.

7 Cr. 99, 3 L. 281, SCHOONER CATHERINE v. UNITED STATES.

Appeals.—Appeal will be dismissed where the appellant fails to furnish the court with a statement of the points of the case, p. 99.

Cited in Southern Exp. Co. v. Van Meter, 17 Fla. 796, holding that a discussion of certain errors in a brief is an abandonment of others.

7 Cr. 99, 3 L. 281, BINGHAM v. MORRIS.

Appeals.— Motion to dismiss appeal for failure to file transcript in time will be denied where the transcript was filed before the motion was made, p. 99.

Cited and applied in Kimball Lumber Co. v. Ruge, 26 Fla. 61, 7 So. 374, and Lake v. Hancock, 29 Fla. 337, 11 So. 97, in both cases a motion being made to dismiss because the appellant had not filed his transcript on the first day of the term; Armijo v. Abeytia, 5 N. Mex. 538, 25 Pac. 778, where a transcript was not filed within ten days before the first day of the term as prescribed by statute; West Chicago St. Ry. Co. v. Ellsworth, 77 Fed. 665, 46 U. S. App. 603, where the rule was applied in a motion to dismiss a cause in the Circuit Court of Appeals; Altenberg v. Grant, 83 Fed. 981, 54 U. S. App. 315, holding that a writ of error will not be dismissed by the Circuit Court of Appeals because return was not made until one day

after it was returnable; Sparrow v. Strong, 3 Wall. 103, 18 L. 49, where a record was filed and a cause docketed before a motion to dismiss was made; Walker v. Tiffin Mining Co., 2 Colo. 92, holding that a demurrer subsequent to the expiration of the rule was in time if filed before any steps were taken.

7 Cr. 100–107, 3 L. 282, SLOOP ACTIVE v. UNITED STATES.

Embargo.— Departure from a port without a clearance is necessary to justify a seizure under the embargo act of 1808, and a vessel leaving a wharf without a clearance under suspicious circumstances is not liable to forfeiture where she was seized in port, p. 106.

Cited in United States v. The George Darby, 25 Fed. Cas. 1285, holding that a vessel has not departed on her voyage until she is outside the limits of the harbor; United States v. One Hundred and Twenty-nine Packages, 27 Fed. Cas. 288, holding a shipment of goods in violation of the statutes is an overt act, and such goods are "proceeding to" the interdicted port.

Embargo.— Cargo not belonging to the owner, master or mariners is exempt from forfeiture where the vessel departs without a clearance, the goods being liable to no duty, p. 107.

Embargo.— Licensed vessel employed in a trade other than that for which she was licensed is subject to forfeiture, pp. 106, 107.

Cited and rule applied in United States v. The Paryntha Davis, 3 Ware, 162, F. C. 16,004, holding that a vessel with a cod-fishing license may take mackerel for bait, but if she engages in this fishery she is liable; The Nymph, 1 Ware, 262, F. C. 10,389, and The Schooner Nymph, 1 Sumn. 518, F. C. 10,388, both holding the word "trade" is equivalent to employment or business and that cod fishing was a trade; The Boat Eliza, 2 Gall. 10, F. C. 4,346, holding that if a vessel, licensed for the fisheries, be engaged in an illegal traffic, she is liable; The Ocean Bride, 1 Hask. 339, 340, F. C. 10,404, holding that a vessel licensed for the fisheries, which brings merchandise, is liable; The Willie G., 1 Hask. 260, F. C. 17,762, holding that a vessel sailing under a fishing license may touch at a foreign port and procure supplies; Schooner Two Friends, 1 Gall. 121, F. C. 14,289, holding that a vessel licensed for the fisheries taking on board goods for an illicit voyage is subject to forfeiture; Schooner Three Brothers, 1 Gall. 144, F. C. 14,009, holding that a purchase and taking on board of fish was a trading.

Distinguished in The Boat Swallow, 1 Ware, 24, F. C. 13,666, holding that the taking of a few cattle as a neighborly act is not engaging in trade; United States v. The Reindeer, 27 Fed. Cas. 764, 766, holding that a vessel licensed to catch cod will not be forfeited for catching mackerel.

7 Cr. 107, 108, 3 L. 284, THE CLARISSA CLAIBORNE HAWTHORN v. UNITED STATES.

Admiralty.— Commission to take depositions to be used in the Supreme Court will be granted in an admiralty case, p. 107.

Cited in Vanderheyden v. Reid, Hopk. Ch. 469, on the point that a cause on appeal in admiralty is reheard; Souter v. Baymore, 7 Pa. St. 418, 47 Am. Dec. 519, where the court said that an information filed in the inferior may be amended in the superior tribunal; Nickels v. Griffin, 1 Wash. Tr. 396, dissenting opinion, where there was a motion to strike from the files certain depositions filed by appellant; in the note to The Argo, 2 Wheat. 289, 4 L. 241, holding that the provision in the judiciary act as to taking depositions de bene esse did not apply to cases pending in the Supreme Court.

7 Cr. 108–112, 3 L. 284, UNITED STATES v. GOODWIN.

Appeals.—Where a cause was removed from the District Court to the Circuit Court by writ of error, the Supreme Court cannot review the judgment of the Circuit Court upon a writ of error or otherwise, p. 109.

The following citations affirm and apply this principle: The Pueblo Case, 4 Sawy. 580, F. C. 12,316, holding that the appellate jurisdiction of the Supreme Court existed only in those cases in which it was expressly granted; Baker v. Biddle, 1 Bald. 403, 406, F. C. 764, saying that Federal courts are of limited jurisdiction, which must be exercised in the mode pointed out; in the note to United States v. Tenbrock, 2 Wheat. 259, 4 L. 234, where a writ of error from the Circuit Court in an action removed there from a District Court by writ of error was dismissed; United States v. Gordon, 7 Cr. 288, 3 L. 347, holding the same as the principal case; Sarchet v. United States, 12 Pet. 144, 9 L. 1033, where the defendant in an action on a bond for duties appealed to the Circuit Court; Merrill v. Petty, 16 Wall. 342, 21 L. 499, holding power to re-examine decrees of Circuit Courts removed there by appeal from the District Court was conferred by the twenty-second section of the judiciary act; Holmes v. Jennison, 14 Pet. 621, 10 L. 623, holding that a writ of error does not lie from the Supreme Court to a State court to revise proceedings on habeas corpus; United States v. Circuit Judges, 3 Wall. 679, 18 L. 114, dissenting opinion, holding that a decree of the Circuit Court in a proceeding to settle private land claim was subject to appeal; United States v. Nourse, 6 Pet. 495–497, 8 L. 476, 477, holding that there is no provision to authorize an appeal from the judgment or decree of the District Court to the Circuit Court; United States v. Wonson, 1 Gall. 6, 7, F. C. 16,750, holding that no appeal lies from the District to the Circuit Court except in civil cases in admiralty and maritime jurisdiction and that a writ of error is the proper process in common-law actions; Ex parte

Crane, 5 Pet. 204, 8 L. 98, dissenting opinion, holding the Supreme Court can compel the circuit judge to sign a bill of exceptions.

Appeals.— An appeal is a civil-law process and removes a cause entirely, subjecting the law and fact to a review and retrial; a writ of error is a common-law process and removes for re-examination nothing but the law, p. 111.

This holding affirmed and relied upon in Dower v. Richards, 151 U. S. 663, 38 L. 307, 14 S. Ct. 454, where the court held that the Supreme Court cannot, upon a writ of error to the highest court of a State, review its judgment upon a question of fact; Ex parte Crane, 5 Pet. 205, 8 L. 98, dissenting opinion, where the same principle was laid down; Christianson v. Farmers' Warehouse Assn., 5 N. Dak. 445, 67 N. W. 302, where an act providing that cases on appeal shall be tried anew was construed; Bishop v. State, 43 Tex. 400, where the court considered the effect of errors not excepted to; Day v. Holland, 15 Or. 470, 15 Pac. 859, dissenting opinion, holding that an appeal from a decree did not break it up, that until annulled or reversed it was binding; Carter v. Buchanan, 2 Ga. 339, holding a writ of error will not lie for errors committed upon the trial of a cause before the petit jury, where an appeal is pending; Crane v. Reeder, 28 Mich. 535, 15 Am. Rep. 230, on the meaning of the words "trial" and "hearing."

7 Cr. 112, 3 L. 286, WHELAN v. UNITED STATES.

Admiralty.— Seizure, for breach of Federal law, of vessel on waters navigable from the sea for vessels of ten or more tons burden, is an admiralty cause, triable without a jury, p. 112.

Cited in The Meteor, 17 Fed. Cas. 180, applying the rule to a libel of forfeiture against a vessel upon such waters; The Wave, Blatchf. & H. 240, F. C. 17,297, on the point that violations of the revenue laws in the waters of bays, harbors, etc., are in their nature cases of admiralty jurisdiction; United States v. Arms and Ammunition, 24 Fed. Cas. 863, holding that jurisdiction in admiralty includes cases of seizure and forfeiture on tide waters without as well as within the United States.

Distinguished in Waring v. Clarke, 5 How. 486, 12 L. 247, dissenting opinion, the case holding that in cases of torts or collisions on the high seas or within the ebb and flow of the tide, admiralty has jurisdiction, although it was infra corpus comitatus.

7 Cr. 113–115, 3 L. 286, UNITED STATES v. BRIG ELIZA.

Embargo.—Vessel proceeding to a foreign port in violation of the embargo act is liable to seizure on her return, p. 115.

Cited in The Brig Short Staple, 1 Gall. 110, F. C. 12,813, holding that a registered vessel is within the prohibition of the third section of the act of the 9th of January, 1808, chapter 8; Smith v. United

States, 1 Gall. 267, F. C. 13,122, holding that in debt for the penalty under the embargo act, it need not be averred that the vessel and cargo have not been and could not be seized; Betz v. Maier, 12 Tex. Civ. App. 220, 33 S. W. 711, construing the words "trade or profession."

Distinguished in United States v. Woolsey, 28 Fed. Cas. 769, holding that the declaration need not aver the arrival of the vessel at a foreign port; Ingersoll v. Jackson, 14 Mass. 110, where the claimant was a bona fide purchaser and purchased the vessel before it was seized.

7 Cr. 115, 116, 3 L. 287, UNITED STATES v. CROSBY.

Conflict of laws.— The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated, p. 116.

Subsequent citing cases have affirmed and variously applied this doctrine. Brine v. Insurance Co., 96 U. S. 635, 24 L. 861, and Houghton v. Page, 2 N. H. 46, on the point that deeds or devises are governed by the law of the place where they are to be executed; Vaughan v. Phebe, Mart. & Y. 24, 17 Am. Dec. 779, holding the decisions of a State as to lands within it would not be questioned by any other tribunals; Zug, In re, 30 Fed. Cas. 948, 16 N. B. R. 280, and Mo., etc., T. Co. v. Krumseig, 77 Fed. 40, 40 U. S. App. 620, the court saying in both cases that as to questions touching the tenure of realty, the Federal courts are governed by the laws and decisions of the local tribunals; Doyle v. Maguire, 38 Iowa, 412, the court saying that this rule applies not only to the form and manner of the conveyances, but to the rights of the parties and their capacity to contract; Chappell v. Jardine, 51 Conn. 66, holding that a mortgage of land at the time within the State of New York, but which on an adjustment became part of Vermont, is governed by the laws of New York; Schley v. Pullman Car Co., 120 U. S. 580, 30 L. 791, 7 S. Ct. 732, where the question was as to whether a married woman joined with her husband in a conveyance within the meaning of the statute; Thompson v. Kyle, 39 Fla. 594, 63 Am. St. Rep. 196, 23 So. 16, where a married woman executed a mortgage on land in another State, although by the law of her domicile she could not execute a mortgage; Hoadley v. Stephens, 4 Neb. 435, holding that a deed in another State was not admissible without evidence that it was executed according to its laws; Taylor v. Benham, 5 How. 273, 12 L. 149, on the point that the necessity for recording sales depends entirely upon the local laws; Burbank v. Conrad, 96 U. S. 298, 24 L. 726, dissenting opinion, where the court considered the effect of a conveyance without registration; Klinck v. Price, 4 W. Va. 9, 6 Am. Rep. 269, holding that a contract for a loan secured by conveyance executed in New York is governed by the laws of that State; Allen v. Allen,

95 Cal. 199, 30 Pac. 215, holding the right to redeem was governed by the laws of the State where the land was situated; Bentley v. Whittemore, 18 N. J. Eq. 373, holding a preferential assignment, valid where made, to be void as to lands situated in New Jersey; Sneed v. Ewing, 5 J. J. Marsh. 465, 22 Am. Dec. 47; Kerr v. Moon, 9 Wheat. 570, 6 L. 163, and Calloway v. Doe, 1 Blackf. 372, all holding a will must conform to the laws of the State where the realty was situated; Eyre v. Storer, 37 N. H. 121, holding that in respect to wills, the law of the place governed as to the capacity to devise and the forms necessary; Irving v. McLean, 4 Blackf. 53, and Schultz v. Pulver, 11 Wend. 363, on the point that personalty is disposed of and distributed according to the law of the domicile.

Cited and principle followed also in Ross v. Ross, 129 Mass. 245, 37 Am. Rep. 322, holding that capacity of succession or inheritance was determined by the law of the domicile; De Vaugh v. Hutchinson, 165 U. S. 570, 41 L. 829, 17 S. Ct. 462, where a will devising real estate in the District of Columbia was construed; McCormick v. Sullivant, 10 Wheat. 202, 6 L. 303, holding that the probate of a will of lands in one State does not affect the title of real property in another; Crusoe v. Butler, 36 Miss. 167, holding that a will could not pass title to land situated in another State unless admitted to probate there; Hutchinson v. State Bank, 12 Met. 424, where the court said that, where it was necessary to make title to real estate through an executor, it must be by letters from some probate court in that State; Wills v. Cowper, 2 Ohio, 128, where the court said that a sale of realty, by an administrator without the State authorizing it, is inoperative; Heydock's Appeal, 7 N. H. 502, holding that an executor was liable for the proceeds of the sale of land in another State as personalty; Magill v. Brown, 16 Fed. Cas. 447, where the question was as to the validity of a charitable bequest; Seaman v. Cook, 14 Ill. 506, where the court examined the statutes of New York to determine whether a trust existed; Commercial Bank v. Jackson, 7 S. Dak. 140, 63 N. W. 550, where a deed and declaration of trust were executed in Indiana, where the transaction was void, and subsequently a new deed was executed in Illinois, where it was valid; Corrie's Case, 2 Bland Ch. 499, citing authorities and discussing the validity of marriages; Allen v. Allen, 95 Cal. 196, 30 Pac. 214, on the point that laws of a State existing at the time a contract is made must be read as a part of the contract. Cited generally in Langdon v. Sherwood, 124 U. S. 82, 31 L. 346, 8 S. Ct. 431, construing an act giving a judgment for the conveyance of land the same effect as a conveyance; United States v. Ames, 1 Wood. & M. 80, F. C. 14,441, considering the rights and remedies of the United States owning lands; Tarpey v. Desert Salt Co., 5 Utah, 212, 14 Pac. 340, discussing the effect of want of attestation to a deed. See also 3 Wheat. 220, note, 3 L. 375, note.

Miscellaneous.— Cited erroneously in United States v. Mackenzie, 26 Fed. Cas. 1120.

7 Cr. 116–147, 3 L. 287, SCHOONER EXCHANGE v. McFADDON.

Jurisdiction.—Jurisdiction of a nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself, p. 136.

Cited to this point in People v. Tyler, 7 Mich. 234, where a defendant was indicted for a murder on an American vessel, in foreign waters; People v. McLeod, 25 Wend. 284, 1 Hill, 417, 37 Am. Dec. 347, holding that a British subject was liable to be proceeded against criminally in the State of New York; The Chinese Exclusion Case, 130 U. S. 604, 32 L. 1075, 9 S. Ct. 629, holding that the act of October 1, 1888, excluding Chinese laborers, was constitutional; In re Debs, 158 U. S. 579, 39 L. 1101, 15 S. Ct. 904, on the point that the United States government had jurisdiction over every foot of soil within its territory.

Jurisdiction.—National ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction, p. 145.

The following citing cases affirm and variously apply this doctrine: United States v. Wong Kim Ark, 169 U. S. 683, 684, 685, 686, 687, 42 L. 903, 904, 18 S. Ct. 470, 471, on the point as to the extent of the jurisdiction of a nation and the exemptions from it; The Santissima Trinidad, 1 Brock. 497, F. C. 2,568, holding that this exemption is granted only on condition that the sovereignty shall be respected; Walley v. Schooner Liberty, 12 La. 101, 32 Am. Dec. 115, holding that, while Texas and Mexico were at war, Texas was to be regarded as a sovereign and her armed vessels entitled to our hospitality; The Pizarro v. Matthias, 19 Fed. Cas. 787, 789, holding that a foreign ship of war is not liable to arrest on process for a wrongful collision; L'Invincible, 1 Wheat. 252, 4 L. 84, holding that the courts cannot redress torts on the high seas by a cruiser of a foreign and friendly power; Lee v. Kaufman, 3 Hughes, 102, F. C. 8,191, holding that courts may take cognizance of actions affecting the personal property of a sovereign power under certain circumstances; Wildenhus' Case, 120 U. S. 11, 30 L. 567, 7 S. Ct. 387, and People v. Tyler, 7 Mich. 209, 74 Am. Dec. 706, on the point that a private ship entering the port of a foreign country is subject to its laws; United States v. Diekelman, 92 U. S. 525, 23 L. 745, holding that a vessel visiting blockaded ports assents to the conditions of the blockade; Brown v. Duchesne, 2 Curt. 372, F. C. 2,004, holding that patent laws were not intended to apply to a vessel of a foreign friendly nation; Clarke v. New Jersey S. N. Co., 1 Story, 542, F. C. 2,859, holding that in all proceedings in rem, when admiralty had jurisdiction over the thing ,it was unimportant to whom it belonged; United States v. Wilder, 3 Sumn. 315, 316, F. C. 16,694; Briggs v. Light Boats, 11 Allen, 184; Long v. Tampico, 16 Fed. 494, 496, all proceedings to enforce claims against the

government; Stanley v. Schwalby, 162 U. S. 270, 40 L. 965, 16 S. Ct. 761, holding no officer was authorized to waive the exemption of the United States; United States v. Lee, 106 U. S. 235, 249, 251, 27 L. 187, 192, 1 S. Ct. 273, 280, 285, 286, dissenting opinion, discussing the liability of officers of the United States; Stanley v. Schwalby, 147 U. S. 513, 37 L. 261, 13 S. Ct. 420, an intervention by way of suggestion by the United States attorney; Middlebrooks v. Springfield F. Ins. Co., 14 Conn. 308, discussing the liability of the stockholders of a foreign corporation; The Willamette Valley, 62 Fed. 305, holding a steamship of an insolvent corporation in the possession of a receiver was not exempt from judicial process.

Distinguished in The Santissima Trinidad, 7 Wheat. 352, 5 L. 471, holding that the exemption of foreign public ships does not extend to their prize ships, or goods captured in violation of our neutrality; United States v. Lee, 106 U. S. 209, 27 L. 178, 1 S. Ct. 251, where the doctrine that the United States cannot be sued was examined and reaffirmed.

International law.— Ministers and other representatives of foreign powers are entitled to immunity from the general local law, p. 138.

Jurisdiction.— A sovereign granting a free passage through his dominions to a foreign army waives all jurisdiction over the troops during their passage, p. 140.

Cited in Dow v. Johnson, 100 U. S. 165, 25 L. 635, holding that an officer during the Rebellion was not liable for injuries from his military acts; Coleman v. Tennessee, 97 U. S. 515, 516, note, 24 L. 1122, holding the same.

Miscellaneous.— Cited in South Carolina v. Wesley, 155 U. S. 544, 39 L. 254, 15 S. Ct. 231, on the point that the Circuit Court ought not to arrest proceedings on a mere suggestion of the attorney-general.

7 Cr. 147–152, 3 L. 297, FREELAND v. HERON.

Account.— When one merchant sends an account current to another in a different country, who keeps it two years without objections, it is a stated account and his silence and acquiescence cast the onus probandi on him, p. 151.

Affirmed upon this point and applied in Langdon v. Roane, 6 Ala. 527, 41 Am. Dec. 62, holding that the party receiving an account must examine it, and if he remains silent it becomes an account stated; Bainbridge v. Wilcocks, 1 Bald. 540, F. C. 755, and Baker v. Biddle, 1 Bald. 418, F. C. 764, both holding that if an account is retained an unreasonable time without objection it becomes a stated account; Swayze v. Swayze, 37 N. J. Eq. 188, where the matters were equally within the knowledge of both and the settlement was allowed to stand for five years; Baxter v. Waite, 2 Wash.

Tr. 238, 6 Pac. 431, where the court considered as to whether an account stated was created by estoppel and reviewed instructions upon the question; Lockwood v. Slevin, 26 Ind. 135, on the point that there is an acquiescence in an account if no objection is made after several opportunities; Chapman v. Lee, 47 Ala. 156, where the court considered the relevancy of evidence to prove an account stated; Anding v. Levy, 57 Miss. 63, 34 Am. Rep. 437, where the court said the rule as to stated accounts applied only in controversies between merchants; Shepard v. Bank of State of Missouri, 15 Mo. 151, holding that there is no reason why the same doctrine should not apply to other persons; Lockwood v. Thorne, 11 N. Y. 174, 62 Am. Dec. 83, holding an account stated need not be signed; Watson v. Lyle, 4 Leigh (Va.), 249, where the question was as to whether an account was barred; Roberts v. Totten, 13 Ark. 616, on the point that settled accounts may be impeached for fraud or mistake; Marye v. Strouse, 6 Sawy. 212, 5 Fed. 491, where the court said that an account stated could not be opened because of an item of interest not recoverable; Towns v. Birchett, 12 Leigh (Va.), 193, on the point that retaining an account did not conclude one from surcharging and falsifying it; St. Louis v. Alexander, 23 Mo. 526, holding that, in a bill to open a settled account, it is not sufficient to allege generally that it is erroneous; Porter v. Price, 80 Fed. 660, 49 U. S. App. 304, refusing to re-open an account stated for alleged error in compounding interest thereon; Allen-West Com. Co. v. Patillo, 90 Fed. 631, holding an account stated, unobjected to for two years, cast upon the defendant the burden of showing certain commissions charged to be error. See also valuable note in 62 Am. Dec. 88.

Interest.— It is error for a commissioner, in stating an account, to adopt a mode of calculating interest contrary to the agreement of the parties, p. 151.

7 Cr. 152–156, 3 L. 299, WELCH v. MANDEVILLE.

Dismissal.— Motion to reinstate a case dismissed is an application to the discretion of the court, and its refusal is not ground for error, p. 155.

Cited and principle applied in Trice v. Smith, 6 Yerg. 320, and Marsh v. Graham, 6 Iowa, 78, both holding that a writ of error will not lie on refusal to reinstate after a voluntary nonsuit; Ringgold's Case, 1 Bland Ch. 9, on the point that there can be no writ of error for refusal to reinstate after a nonsuit or dismissal; Andrews v. Central Nat. Bk., 77 Md. 27, 25 Atl. 917, where there was a dismissal by the legal plaintiff and a motion by the equitable plaintiff to reinstate; Hazleton, etc., Co. v. Citizens' St. Ry. Co., 72 Fed. 328, holding that, after a direction for a decree, a stranger will not be given leave to file a supplemental bill; Welch v. County Court, 29 W. Va. 68, holding the doctrine that discretionary

matters will not be reviewed must be limited to matters purely of discretion, or such as cannot do injury; Stephenson v. Mansony, 4 Ala. 320, holding an order, striking a cause from the docket, was not revisable; State v. Hunt, 4 La. Ann. 439, an appeal from an order overruling an application for a new trial; in the note to Carlisle v. Wilkinson, 12 Ind. 96, where a motion was made to set aside a default; State v. Brette, 6 La. Ann. 660, holding the court will not re-examine a decision upon a question of fact.

Distinguished in Gilliland v. Rappleyea, 15 N. J. L. 143, where the court said that error might be assigned on such intermediate proceedings not apparent of record as show the final judgment to be erroneous.

7 Cr. 156–159, 3 L. 300, MARSTELLER v. McLEAN.

Pleading.— Replication should of itself contain a full and complete answer to the bar, and a joint plea which is bad affects with its consequences all the parties joining in it, p. 158.

Cited in Kerr v. Force, 3 Cr. C. C. 33, F. C. 7,730, upon the qualities of a replication; Taylor v. Benham, 5 How. 263, 12 L. 145, holding that any special excuse for not suing within the statutory time should be set up in the original bill or by amendment to it; Ferrall v. Bradford, 2 Fla. 519, 50 Am. Dec. 300; Marsh v. Smith, 18 N. H. 369, and Poulk v. Slocum, 3 Blackf. 429, on the point that where several defendants join in a plea, if it is bad as to one it is bad as to all.

Parties.— All the parties in a suit must be competent to sue, otherwise the action cannot be supported, p. 159.

Cited in Pringle v. Gaw, 5 Serg. & R. 536, holding that, if a widow join with the heirs in ejectment, the heirs cannot recover alone.

Distinguished in Lytle v. State, 17 Ark. 652, 659, holding that the disability of one of several coplaintiffs operated neither to the advantage nor disadvantage of the others.

Statute of limitations.— When once the statute of limitations runs against one of two parties entitled to a joint action, it operates as a bar to such action, notwithstanding the disability of the first party, p. 159.

The citing cases show that this principle has been variously affirmed and applied: Dickey v. Armstrong, 1 A. K. Marsh. 41, holding that in a joint estate, if the right of entry is tolled as to some, all are barred; Hardeman v. Sims, 3 Ala. 751, holding it was a settled rule that where a joint right of action accrued it must exist in all at the time the action is brought; Keeton v. Keeton, 20 Mo. 544, holding that one party who is saved can obtain no relief upon a bill jointly with others who are barred; Allen v.

Farrington, 2 Sneed, 534, holding that an action, barred as to one partner, is barred as to a nonresident partner; Chase v. Henry, 166 Mass. 582, 44 N. E. 989, 55 Am. St. Rep. 426, note, dissenting opinion, the court presuming it would make no difference that one of the parties lived out of the State; Turner v. Debell, 2 A. K. Marsh. 384, holding that, if one executor was barred from suing, the other was barred; Jordan v. McKenzie, 30 Miss. 35, where the principle was applied, in an action by distributees, to set aside an unauthorized sale; Shannon v. Dunn, 8 Blackf. 183, holding that it is no answer to the plea of the statute to a writ of error that within five years after one of the plaintiffs arrived at age it was prosecuted; State v. Wilson, 3 Harr. 356, holding a husband of a legatee may appeal and the right is barred in three years after marriage, although the wife was an infant; Layton v. State, 4 Harr. 20, where a legatee married and was under coverture when she attained full age and a suit was brought by husband and wife within three years afterwards; Peters v. Jones, 35 Iowa, 519, and Henry v. Stewart, 2 Hill's L. 333, both holding that the minority of one party will not save those who are of full age; Griffith v. Huston, 7 J. J. Marsh. 390, holding that the disability of one parcener did not waive the right of entry of others; Barrow v. Navee, 2 Yerg. 227, 228, holding that upon a joint demise by tenants in common, if one is barred it is not a bar to all, contra in personal actions where all are compelled to join; Ridon v. Frion, 3 Murph. (N. C.) 578, the court saying that the parties who are competent ought to take care of the interests of all; Doe v. Kennon, 1 Ga. 380, on the point that where the statute has begun to run its operation is not arrested even where there is a legal impossibility to assert the right; Gross v. Disney, 95 Tenn. 596, 32 S. W. 633, considering what one relying upon a disability must allege; Buel v. St. Louis Transfer Co., 45 Mo. 564, discussing the relation of an amendment to a pleading. See also valuable notes in 36 Am. Dec. 77, and 49 Am. St. Rep. 712.

Distinguished in Doe ex dem. v. Barksdale, 2 Brock. 445, F. C. 8,317, saying the principal case rested not upon the rights of the parties, but the form of the pleadiug; Shipp v. Miller, 2 Wheat. 324, 4 L. 251, where the court drew a distinction between the saving clause in the statute of limitations and that under a statute requiring entries of land to be surveyed by a certain time; University of Vermont v. Reynolds, 3 Vt. 557, 23 Am. Dec. 241, where an ejectment was brought under a charter from the State making a grant of land; Moore v. Armstrong, 10 Ohio, 14, 36 Am. Dec. 64, the court saying that in the principal case the interest was joint, while in the case under consideration the interest was several and distinct; Weare v. Burge, 10 Ired. 171, holding that where only one of several tenants in common of a negro sued in tort, the statute could not operate upon him, though it might as against all of his

cotenants; said to be neutralized by Doe ex dem. v. Barksdale, in Jordan v. Thornton, 7 Ga. 524, 526, holding that where one of two or more cotenants was barred, those within the exception may recover; denied in Hill v. Wilson, 4 Rich. L. 528, 55 Am. Dec. 700, holding that the successive minorities of cotenants will protect the interests of adults; Wilkins v. Philips, 3 Ohio, 50, 17 Am. Dec. 579, holding that where one party to a writ of error is within the saving clause the case was saved as to all; Sturges v. Longworth, 1 Ohio St. 562, holding that where the interests of two defendants are joint, the disability of one inures to the benefit of the other; Shute v. Wade, 5 Yerg. 10, and Masters v. Dunn, 30 Miss. 269, 270, 272, both holding that, if all be under a disability to sue, the statute will not commence running until the disability of all be removed.

7 Cr. 159–164, 3 L. 301, WELCH v. LINDO.

Bills and notes.— Possession of a note by one who had assigned it to another is not evidence that it was the propery of the possessor, p. 163.

Cited and principle applied in Hunt v. Stewart, 7 Ala. 527, holding an action by an indorser cannot be supported; Greenhough v. Keyworth, 30 Fed. Cas. 1087, holding that where a note was indorsed for collection the indorser may sue; McCormick v. Eckland, 11 Ind. 294, on the point that, if the note is in the hands of an indorser, the presumption is that the assignment never was completed; Mitchell v. Fuller, 15 Pa. St. 270, 53 Am. Dec. 595, holding a note specially indorsed cannot be recovered on by anyone but the special indorsee; Davis v. Christy, 8 Mo. 571, holding that the erasure of the assignment on a bond did not reinvest title in the assignor; Robson v. Early, 1 Mart. (N. S.) 374, holding that possession is not evidence of property in a note which, on inspection, appears to be another's.

Distinguished in Wood v. Berthoud, 4 J. J. Marsh. 320, dissenting opinion, an action by an intermediate assignor; Bell v. Morehead, 3 A. K. Marsh. 161, holding that an assignor of a note negotiated in bank, acquiring possession, is prima facie the owner; said to be overruled in principle by Dugan v. United States, 3 Wheat. 172, 4 L. 362, in Norris v. Badger, 6 Cow. 455, holding that an intermediate indorser may sue a previous indorser; Kells v. Northwestern Live Stock Ins. Co., 64 Minn. 393, 58 Am. St. Rep. 544, 67 N. W. 216, where the court said that the weight of authority is that possession by the payee of a note specially indorsed is prima facie evidence of ownership; in the note to 1 Am. Dec. 275, where other cases on this subject are cited; Hanna v. Pegg, 1 Blackf. 185, approving the doctrine of Dugan v. United States, 3 Wheat. 172, 4 L. 362, and holding an assignee regaining possession is prima facie owner.

Bills and notes.— Under indorsement of a note without recourse, it cannot be inferred that the nominal value of the note was actually paid, p. 163.

Cited in Watson v. Chesire, 18 Iowa, 205, 209, 87 Am. Dec. 384, 387, holding that it will not protect the assignor from liability for fraud in the assignment; Cowles v. Harts, 3 Conn. 522, where the payees of a bill indorsed it, "Pay G. C., or order, without recourse to us." See note to 87 Am. Dec. 390, where cases on the subject of indorsement without recourse are collated.

Bills and notes.— In an action against an indorser of a note, a count is defective which does not state that the indorsement was on a valuable considcration, and that the plaintiff had actually received the money, p. 164.

Pleading.— Substantial defects in pleading are not cured by verdict, p. 164.

Miscellaneous.— Cited erroneously in Bates v. Kimball, 2 D. Chip. 89.

7 Cr. 164–167, 3 L. 303, STATE OF NEW JERSEY v. WILSON.

Appeals.—Writ of error may be directed to a judgment of a State court from the Supreme Court of the United States, p. 165.

Cited in Wurts v. Hoagland, 105 U. S. 702, 26 L. 1110, the court saying that this was the course adopted in the principal case, and discussing the time of service of a writ of error.

Taxation.— Contract by State, exempting property from taxation, is valid and binding and cannot be abrogated by a subsequent act repealing the statute granting the exemption, p. 167.

This case, as is evident from the large number of citations, is leading authority upon the question of tax exemption. The following citations affirm and apply its doctrine: Northern Pac. R. R. Co. v. Carland, 5 Mont. 187, 3 Pac. 155, holding that congress could exempt railroads from taxation; Jefferson Branch Bank v. Skelly, 1 Black, 446, 17 L. 178, holding that a State may contract not to exercise the taxing power; Matheny v. Golden, Treasurer, 5 Ohio St. 366, where an act leasing land to a university and providing it should be exempt was held valid; Erie Ry. Co. v. Pennsylvania, 21 Wall. 498, 22 L. 598, the court saying the language must be clear and unmistakable; Bradley v. McAtee, 7 Bush (Ky.), 673, 3 Am. Rep. 313, holding the taxing power is never presumed to be relinquished and that the State is never bound unless there is some duty imposed; State v. County Court of Crittenden Co., 19 Ark. 367, 372, 374, holding that lands exempted from taxation for a certain time cannot be subject to taxation; in Gonzales v. Sullivan, 16 Fla. 812; First Division of St. Paul, etc., Ry. Co. v. Parcher, 14 Minn. 326; State v. Georgia R. R., etc., Co., 54 Ga. 426, and Hewitt v. New York, etc.,

R. R. Co., 12 Blatchf. 459, 460, F. C. 6,443, all holding an act exempting the property of a railroad to be a contract; Osborne v. Humphrey, 7 Conn. 342, holding that an act exempting land given to pious uses was a contract; Grand Lodge F. & A. M. v. New Orleans, 166 U. S. 146, 41 L. 952, 17 S. Ct. 524, holding an act exempting a hall occupied by masons "so long as they occupied" it, was not a contract; Franklin St. Society v. Manchester, 60 N. H. 350, on the point that an agreement exempting property from taxation on a consideration paid is a contract; Tucker v. Ferguson, 22 Wall. 573, 22 L. 815, holding that an act exempting a railroad was not a contract unless there was a consideration; Home of the Friendless v. Rouse, 8 Wall. 438, 19 L. 498, on the point that an exemption is presumed to be on a sufficient consideration; Washington Univ. v. Rowse, 42 Mo. 318, holding that an act exempting property without any consideration might be repealed; Tomlinson v. Jessup, 15 Wall. 458, 21 L. 206, holding that where a charter was amended so as to exempt its property, a subsequent statute making all property subject, was valid; Landon v. Litchfield, 11 Conn. 262, holding that the repeal of an act exempting church property violated the obligation of a contract; State Bank v. Knoop, 16 How. 385, 401, 14 L. 984, 990, where an act fixed the tax a bank should pay and an act increasing this amount was held void; Iron City Bank v. City of Pittsburg, 37 Pa. 344, holding that if the legislature prescribes a rate of taxation a subsequent tax law is void; State v. Commissioners of Taxation, 37 N. J. L. 251, holding that a corporation with a charter providing a special mode of taxation may consent to another mode without impairing its exemption; Knoxville, etc., R. R. Co. v. Hicks, 9 Baxt. 445, holding that an exemption granted a railroad passed to the purchaser; State ex rel. Gaines v. Whitworth, 8 Lea, 604, where the court said the exemption will not extend to a grantee unless the intention is evinced beyond reasonable doubt; Brainard v. Colchester, 31 Conn. 410, holding that an act that land leased or conveyed by a society should be taxed, was valid; Appeal Tax Court v. Patterson, 50 Md. 372, holding that the contract of exemption is limited to the State granting it; Salt Co. v. East Saginaw, 13 Wall. 376, 20 L. 613, holding that a law offering a bounty for salt manufactured and exempting the property from taxation was a mere gratuity; East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. 293, where an act exempting corporations engaged in the manufacture of salt was amended by limiting the exemption; State v. Branin, 23 N. J. L. 492, 500, holding that the exemption of a corporation extends to the stockholders; Brewster v. Hough, 10 N. H. 145, holding that a resolution exempting the property of Dartmouth College was terminated by the adoption of the Constitution and the laws passed under it; Coney v. Owen, 6 Watts, 438, holding that a sale for taxes of unseated donation land during the life of the soldier was void; Given v. Wright, 117 U. S. 649, 653, 29 L. 1022, 1024, 6 S. Ct.

908, 910, where lands held to be exempt in the principal case were assessed; State v. Wright, 41 N. J. L. 481, holding that by the voluntary payment for many years the right of exemption was waived.

Elsewhere it has been affirmed and relied upon for this holding, as follows: Bonaparte v. Camden & Amboy R. R. Co., 1 Bald. 220, F. C. 1,617, on the point that rights vested by contract cannot be impaired; Winter v. Jones, 10 Ga. 196, 54 Am. Dec. 382, holding that an objection that a law impairs the obligation of a contract does not depend upon the extent of the change; Scobey v. Gibson, 17 Ind. 578, dissenting opinion, holding that the act providing for the redemption of realty was void as to prior contracts; Temple v. Hays, Morris, 12, holding that a statute declaring that fraud may be set up against a note does not apply to a note assigned before; Martindale v. Moore, 3 Blackf. 279, holding that a statute that no mispleading or lack of pleading should render any executor personally liable did not apply to a judgment rendered previously; Corbin v. Board of County Commissioners, 1 McCrary, 527, 3 Fed. 362, holding a statute for the return of money paid by purchasers at invalid tax sales to be a contract when acted on; Danolds v. State, 89 N. Y. 45, 46, 42 Am. Rep. 280, and Poindexter v. Greenhow, 114 U. S. 286, 29 L. 191, 5 S. Ct. 912, on the point that a State cannot violate the obligation of its own contracts; Hawkins v. Filkins, 24 Ark. 319, holding that a State convention could not violate the obligation of contracts; Howard v. Jones, 50 Ala. 69, on the point that the laws in force at the making of a contract enter into and become part of it; McElvain v. Mudd, 44 Ala. 76, on the point that a State cannot assail a contract by a repeal of the law on which it stands; Bruce v. Schuyler, 4 Gil. 278, 46 Am. Dec. 460, holding that the rights of a purchaser under a revenue law to a deed cannot be taken away by a repeal of the statute; People ex rel. McLane v. Bond, 10 Cal. 572, holding that an act funding a debt could not be substantially changed; Antoni v. Greenhow, 107 U. S. 802, 27 L. 481, dissenting opinion; Lynn v. Polk, 8 Lea, 305, and Antoni v. Wright, 22 Gratt. 841, 852, 858, 872, all holding that an act providing that coupons shall be receivable in payment of taxes could not be affected; In re Ayers, 123 U. S. 515, 31 L. 233, 8 S. Ct. 188, dissenting opinion, holding that the act of Virginia of 1877, concerning suits to collect taxes from persons who had tendered coupons, did not violate the contract; Mayre v. Parsons, 114 U. S. 336, 29 L. 209, 5 L. 966, dissenting opinion, holding that the contract right of a coupon-holder under the Virginia act of March 30, 1871, can be exercised only by a taxpayer; English v. Oliver, 28 Ark. 334, holding that the tax laws in force when bonds were issued are still in force for the purposes of paying the bonds, although repealed; Louisiana v. Jumel, 107 U. S. 750, 27 L. 462, where the court considered the effect of a constitutional amendment upon the rights of bondholders; Von

Hoffman v. City of Quincy, 4 Wall. 550, 554, 18 L. 408, 410, holding that a statute repealing the power of taxation so as to affect municipal bonds is void; County Commissioners v. King, 13 Fla. 474, holding that where a county issues bonds, the legislature cannot limit the amount of taxes to be levied; State v. Young, 29 Minn. 538, 9 N. W. 747, holding, where a State had issued bonds, an amendment providing that no tax should be levied until submitted to the people was void; Commissioners' Court of Limestone Co. v. Rather, 48 Ala. 447, holding that bonds issued by a county under an act created obligations, the payment of which would be enforced by mandamus; Robertson v. Commissioners of State Land Office, 44 Mich. 278, 6 N. W. 661, on the point that a State selling lands is in the same position as any other proprietor; Houston, etc., R. R. Co. v. Kuechler, 36 Tex. 434, on the point that a legislative grant is a contract; Proprietors, etc. v. Haskell, 7 Me. 477, on the point that a grant is a contract and rights under it cannot be divested; Davis v. Gray, 16 Wall. 232, 21 L. 457, on the point that a railroad land grant was a contract; City of Brownsville v. Basse, 36 Tex. 501, on the point that an act in the nature of a public grant cannot be repealed; Thorpe v. Rutland & B. R. R. Co., 27 Vt. 146, 62 Am. Dec. 629, holding that a grant to be irrevocable must be based on a consideration; Floyd v. Blanding, 54 Cal. 46, holding that an act providing for the disposition of lands of a State, known as the Waterlot act, was not a contract; People v. Platt, 17 Johns. 215, 8 Am. Dec. 389, holding that under a patent to land bordering on Lake Champlain and on a river without any reservation, the patentee has exclusive rights; Micou v. Tallassee Bridge Co., 47 Ala. 656, holding that an act incorporating a company with authority to erect a toll bridge was a contract; Gray v. Davis, 1 Woods, 423, 424, F. C. 5,715, holding an act incorporating a railroad and making a grant to it on certain conditions to be a contract; Montgomery v. Kasson, 16 Cal. 194, holding that an act for the construction of canals and the reclaiming of lands was a contract and the repealing act was void; Glover v. Powell, 10 N. J. Eq. 229, holding an act granting, on sufficient consideration, the right to maintain a dam was a contract; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 69, holding the grant of an exclusive right to maintain a bridge was a franchise; Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 48, holding that a grant to construct locks was exclusive; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 665, 673, 29 L. 522, 524, 6 S. Ct. 260, 264, holding that a legislative grant of an exclusive right to furnish gas could not be impaired; East Hartford v. Hartford Bridge Co., 17 Conn. 93, holding an act giving an exclusive right to transport passengers to be constitutional; Charles River Bridge v. Warren Bridge, 7 Pick. 446, holding a grant of a ferry privilege a contract; Langdon v. Mayor, etc., of New York, 93 N. Y. 157, holding a grant of a right of wharfage carries a right of way to the wharf, and that

the easement could not be impaired; Trustees, etc. v. Rider, 13 Conn. 96, holding an act giving to a church a percentage of funds received was not a contract; Boyd v. State, 46 Ala. 334, holding that where an act granted an association the right to carry on a lottery, the rights under it could not be defeated; Doe ex dem. Gaines v. Buford, 1 Dana, 488, holding an act forfeiting lands unless certain improvements are made was void; Pierce v. Kitzmiller, 19 W. Va. 573, on the point that legislatures are not inhibited divesting vested rights unless the rights are vested by contract; Bailey v. Philadelphia, etc., R. R. Co., 4 Harr. 401, 44 Am. Dec. 603, holding that where an act gave a right to a close bridge, a subsequent act giving an action for obstruction to navigation was void; Commonwealth v. Pennsylvania Canal Co., 66 Pa. St. 50, 5 Am. Rep. 341, holding an act requiring a canal company to change its dams at its own cost to be void; McLaren v. Pennington, 1 Paige Ch. 108; Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. R. Co., 4 Gill & J. 128, and Young v. Harrison, 6 Ga. 154, all holding that a charter is a contract and cannot be altered; State v. Noyes, 47 Me. 206, holding that such charter was to be construed upon the same principles which are applied to contracts; West River Bridge Co. v. Dix, 6 How. 542, 12 L. 549, holding that a charter to a bridge corporation was a contract but subject to the right of eminent domain; State v. Matthews, 3 Jones (N. C.), 464, dissenting opinion, and Pearsall v. Great Northern Ry. Co., 161 U. S. 662, 40 L. 843, 16 S. Ct. 709, discussing the inviolability of a charter; Le Clercq v. Town of Gallipolis, 7 Ohio, 221, 28 Am. Dec. 643, on the point that franchises held by a corporation cannot be revoked unless for forfeiture; Michigan State Bank v. Hastings, 1 Doug. 234, 41 Am. Dec. 551, holding that the repeal of a charter which contained no reservation of a right of repeal, was void; Young v. Harrison, 6 Ga. 155, on the point that a charter granted without consideration and before its execution may be repealed; Planters' Bank v. Sharp, 6 How. 332, 12 L. 460, where, after a bank had been chartered, a statute forbade banks to transfer any note or bill; Clark v. Mitchell, 64 Mo. 582, holding that in times of peace congress cannot confiscate debts; Armington v. Town of Barnet, 15 Vt. 751, 40 Am. Dec. 708, holding an act authorizing the taking of a franchise of a turnpike corporation for public use to be valid.

Cited arguendo in Saginaw G. L. Co. v. Saginaw, 28 Fed. 532, discussing the jurisdiction of Federal courts; United States v. Arredondo, 6 Pet. 738, 8 L. 565, construing the treaty with Spain in 1819, relative to land in Florida, and the act of congress to adjust claims; Farris v. Vannier, 6 Dak. 213, 42 N. W. 41, dissenting opinion, holding that an act taxing personalty in any unorganized county in the nearest organized county is invalid; McCullough v. Virginia, 172 U. S. 119, in an incidental reference to cases where the Supreme Court had reviewed State court decisions. See also valuable note, 72 Am. Dec. 683.

Distinguished in McCallie v. Mayor, etc., of Chattanooga, 3 Head, 320, holding an act for the extension of the town limits was not a contract; Debolt v. Ohio Life Ass. Co., 1 Ohio St. 589, holding that a pledge to a bank to surrender the right of taxation would not be binding; Armstrong v. Athens Co., 16 Pet. 289, 10 L. 968, where an act taxing certain lands held under conveyances from Ohio University was held valid; Town of New Hampshire v. Sheffield, 30 Conn. 174; Armstrong v. Treasurer of Athens Co., 10 Ohio, 246, and Commissioners, etc. v. Brackenridge, 12 Kan. 119, all holding an exemption from taxation did not extend to a purchaser; Greenhow v. Vashon, 81 Va. 345, holding that under an act providing that coupons are receivable for taxes, such coupons could not be used for school taxes; Landon v. Litchfield, 11 Conn. 268, 270, 272, dissenting opinion, where an act exempting church property was repealed; Hanna v. Commissioners of Allen Co., 8 Blackf. 356, holding an act exempting lands sold by the State until payment, did not prevent their being taxed afterwards; Toledo Bank v. Bond, 1 Ohio St. 670, and Dartmouth College v. Woodward, 1 N. H. 132, both holding that a charter of a corporation is not a contract; Matter of Meador, 1 Abb. (U. S.) 327, F. C. 9,375, discussing the distinction between the power of taxation and of eminent domain; Morgan v. Louisiana, 93 U. S. 223, 23 L. 862, holding that immunity from taxation is not itself a franchise of a railroad corporation; Providence Bank v. Billings, 4 Pet. 563, 7 L. 956, where a legislature granted a charter to a bank and an act subsequently imposing a tax on banks was held constitutional; State v. Morgan, 28 La. Ann. 487, dissenting opinion, 493, holding that a right of exemption was not transferable; Herrick v. Randolph, 13 Vt. 531, holding that an act taxing buildings on public lands was valid; Dale v. The Governor, 3 Stew. 396, 418, 423, holding that an act conferring a military title and settling an annuity created no contract; limited in East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. 282, 2 Am. Rep. 91, where the court said the principal case may well be referred to an exercise of the treaty-making power; Rhode Island v. Massachusetts, 12 Pet. 744, 9 L. 1268, a bill by one State against another to quiet title to boundaries; denied in Mott v. Pennsylvania R. R. Co., 30 Pa. St. 29, 72 Am. Dec. 675, holding that a legislature cannot grant exemption from taxation forever; Webster v. Reid, Morris, 478, doubting the power to exempt from taxation, the court saying the principal case went to the verge of judicial power.

Miscellaneous.— Cited erroneously in Noyes v. Stauff, 5 Or. 458.

7 Cr. 168–171, 3 L. 304, KING v. RIDDLE.

Payment.— If plaintiff was not bound to pay money, and if it was paid without the request of the defendant, the plaintiff is not entitled to recover, p. 171.

Cited in Cudahy Packing Co. v. Sioux Nat. Bk., 75 Fed. 479, 40

U. S. App. 142, dissenting opinion, on the point that one cannot constitute himself a creditor of another by paying his debts voluntarily or at the request of his debtor or of a stranger.

Statute of limitations.— Recital in deed admitting a debt to be due is sufficient to take a case out of the statute of limitations, p. 171.

Cited in Shepherd v. Thompson, 122 U. S. 235, 30 L. 1157, 7 S. Ct. 1231, holding that a mere acknowledgment of the debt, though in writing, did not revive a debt; Center v. The P. & M. Bank, 22 Ala. 759, holding a recital in a mortgage to be sufficient to put one on inquiry.

Bankruptcy.— Certificate of discharge from imprisonment, under the act of congress for the relief of insolvent debtors in the District of Columbia is no bar to an action, p. 171.

7 Cr. 171–176, 3 L. 305, DAVY v. FAW.

Arbitration.— Omission of arbitrators to act upon a matter submitted is not ground for setting aside an award where a party is not injured by the omission, p. 174.

Cited, affirmed and applied in Daniels v. Willis, 7 Minn. 378, holding courts of law are less liberal than courts of equity in setting aside awards; Whittemore v. Whittemore, 2 N. H. 27, holding an award of demands, actually laid before the arbitrators, was binding, although the agreement was to submit all demands; Fluharty v. Beatty, 22 W. Va. 707, citing authorities and holding that presumptions are not to be raised against awards; Green v. Ford, 17 Ark. 593, on the point that awards of only a parcel of the things submitted will be disregarded, if injurious; Page v. Foster, 7 N. H. 395, holding that one objecting to the hearing of a certain demand cannot afterwards claim it was within the submission. Cited, generally, in Merritt v. Thompson, 27 N. Y. 232, where the acts of the arbitrators, though not authorized, were merely clerical.

Arbitration.— Award will not be set aside, because of conduct which is indiscreet, but not seriously indicative that an unjust award has been made, p. 175.

Cited to this point in Silver v. Connecticut River Lumber Co., 40 Fed. 194, holding that jealousy of one arbitrator of another, resulting in a slight warping of his judgment, will not vitiate an award; Ormsby v. Bakewell, 7 Ohio, 114, holding that arbitrators after the hearing may meet for consultation without notice; Brush v. Fisher, 70 Mich. 473, 14 Am. St. Rep. 513, 38 N. W. 448, holding that the commission of an error of law or fact would not vitiate an award, unless so gross as to be proof of fraud; Underhill v. Van Cortlandt, 2 Johns. Ch. 368, holding that if there was no corruption or partiality an award was binding, however unjust it might ap-

pear; Carey v. Wilcox, 6 N. H. 179, where the court stated the grounds upon which an award could be impeached; Furber v. Chamberlain, 29 N. H. 417, on the point that an award fairly made in pursuance of submission is conclusive, even upon questions touching real estate.

Arbitration.— Award need not be by deed where the dispute is not as to the title, but only as to the price of land, p. 176.

Cited in Tracy v. Herrick, 25 N. H. 400, where an objection was made, because one award only was signed while the submission provided that it should be tripartite.

7 Cr. 176–194, 3 L. 307, HUGHES v. MOORE.

Discontinuance.— Plaintiff may discontinue a count in his declaration after taking issue on some of the pleas and demurring to others, p. 190.

Cited and applied in Leavitt v. Cowles, 2 McLean, 493, F. C. 8,171, where the plaintiff in an action on a note asked leave to discontinue the first and second counts; Kimball v. Bellows, 13 N. H. 68, where it was said that such discontinuance was no admission of the truth of a plea; Keeler v. Bartine, 12 Wend. 113, considering the effect of a nolle prosequi as to one count.

Pleading.— Oyer of a written contract alleged in the first count of a declaration does not spread the contract on the record so as to make it a part of the pleas to the other counts, p. 190.

Principle applied in Messer v. Smythe, 58 N. H. 313, where the operation and effect of profert and oyer were considered; Estill v. Jenkins, 4 Dana (Ky.), 77, holding that where a declaration contained several counts, a plea not restricted to any particular count must be taken as an answer to the whole declaration; Larry v. Herrick, 58 N. H. 41, on the point that inconsistent counts are not evidence.

Patents.— Tortious act in obtaining patent does not deprive the owner of a plat and survey of his equitable title, p. 191.

Cited in Alston v. Rawles, 13 Fla. 142, on the point that where one takes title in the name of another to defraud creditors, a trust results; Rooker v. Rooker, 75 Ind. 574, where an action was brought to enforce a parol trust against a purchaser at a sheriff's sale; Oliver v. Dougherty, 3 G. Greene, 373, and Botsford v. Burr, 2 Johns. Ch. 409, on the point that advances of money after a purchase cannot raise a resulting trust without overturning the statute of frauds.

Statute of frauds.— There is no distinction between a sale of land to which one has only an equitable title and a sale of land to which he has a legal title; they are equally within the statute of frauds, p. 101.

Principle affirmed and applied in Smith v. Burnham, 3 Sumn. 461, F. C. 13,019, holding a parol agreement to become partners in the purchase and sale of lands was within the statute; Chenowith v. Lewis, 9 Or. 152, holding a verbal agreement for the sale of an interest in land was void; Dougherty v. Catlett, 129 Ill. 438, 21 N. E. 934, holding the same as the principal case; West v. Randall, 2 Mason, 203, F. C. 17,424; Tynan v. Warren, 53 N. J. Eq. 320, and Darling v. Butler, 45 Fed. 335, all holding that one could not acquire an equitable interest in land to parol; Brown v. Dysinger, 1 Rawle, 418, dissenting opinion, holding it to be an established rule of chancery never to decree against the statute upon parol proof which was contradictory. See note to 17 Am. Dec. 58.

Distinguished in Grumley v. Webb, 48 Mo. 570, dissenting opinion, p. 594, where a party was in possession and the purchase money was paid under a parol contract of purchase.

Statute of frauds.— Contract to compensate plaintiff for the loss of land the title to which he has been deprived of by the defendant taking the title in his own name, is within the statute of frauds, p. 192.

7 Cr. 194–202, 3 L. 313, BARTON v. PETIT.

Judgments.— If two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain judgment against one alone, but must wait until the others have been served with process or have been proceeded against so far as the law authorizes for the purpose of forcing an appearance, p. 201.

Cited and principle applied in Gibbons v. Surber, 4 Blackf. 155, where an action of debt was brought by the assignee of a joint and several bond; Helm v. Van Vleet, 1 Blackf. 344, 12 Am. Dec. 249, where a declaration was filed against two and judgment by default was taken against one; Brooks v. McIntyre, 4 Mich. 319, where there was a joint action and one defendant was served and non est inventus was returned as to the other; Doggett v. Jordan, 3 Fla. 217, 218, holding that the return by an officer "not in the county" does not warrant an abatement or discontinuance as to one or more several joint defendants; Pegram v. United States, 1 Brock. 263, F. C. 10,906, where there was an action on a joint and several bond against several defendants, some of whom were non-residents and there was a return of "no inhabitants" as to them; Hanley v. Dewes, 1 Mo. 21, dissenting opinion, where a suit was against five, only one was served, and judgment by default was taken against all; Goodhue v. Palmer, 13 Ind. 458, on the point that all the parties to a joint action must be brought into court before judgment is taken against any. Cited, generally, in Sneed v. Wiester, 2 A. K. Marsh. 282, discussing when non est inventus can be returned.

Denied in Loney v. Bailey, 43 Md. 19, holding that if two or more

are sued in a joint action the plaintiff may proceed against one or more, though the others may not be served; Early v. Clarkson, 7 Leigh (Va.), 85, the court saying that probably the Supreme Court was not apprised of the decision of the Supreme Court of Virgina, and the long-continued practice there; Beagley v. Sims, 81 Va. 646, holding rule changed by Virginia code.

Discontinuance.— Plaintiff ought not to be permitted to abate or discontinue his action as against one defendant after stating a joint cause of action, unless authorized to do so by the return of the process against that defendant, p. 202.

7 Cr. 202–206, 3 L. 315, WILSON v. KOONTZ.

Statute of limitations.— Removal of a defendant from one county to another does not stop the running of the statute of limitations, unless the plaintiff has been actually defeated or obstructed in the bringing of his action by the removal of the defendant, p. 205.

Cited in Nelson v. Beveridge, 21 Mo. 25, construing the section suspending the right of action, where one prevented its commencement; Brown v. Butler, 87 Va. 625, 13 S. E. 72, where the defendant removed from the State; McDonald v. Underhill, 10 Bush (Ky.), 590, where one residing in Alabama and owing debts in New York absconded and took up his residence in New York under an assumed name; Comstock v. Rayford, 1 S. & M. 440, 441, 40 Am. Dec. 104, 105, on the point that a nonresident may proceed against a nonresident debtor provided there is also a resident debtor.

Distinguished in Ten Eyck v. Wing, 1 Mich. 55, where the question was as to the sufficiency of an acknowledgment to take a case out of the statute.

Statute of limitations.— Objection that plea of the statute of limitations to a bill in equity in the nature of an attachment is not good, unless the defendant answer and also deny the debt, should be taken at the time of offering the plea and before issue, p. 205.

Attachment.— Bill in equity in the nature of an attachment in chancery against a surviving partner as principal and others as garnishees is really a case at law, p. 206.

Cited in Kelso v. Blackburn, 3 Leigh, 315, dissenting opinion, on the point that though a proceeding under an attachment is in equity, the question between debtor and creditor is generally a legal demand; Gilbert v. Lynch, 17 Blatchf. 406, 1 Fed. 115, on the point that a bill to appropriate a dividend of an insolvent estate to a debt is in effect an action at law; Templeman v. Fauntleroy, 3 Rand. 440, where a foreign attachment was sued out against an absent debtor and a resident garnishee; explained in Moore v. Holt, 10 Gratt. 292, holding there to be no doubt that purely equitable rights might be secured and enforced, through the medium of a foreign attachment.

7 Cr. 206–208, 3 L. 317, RIDDLE v. MOSS.

Witnesses.— Principal obligor is not competent as a witness in an action against the surety on the bond, p. 207.

This holding is affirmed and applied by citing cases as follows: Hunter v. Gatewood, 5 T. B. Mon. 269, holding the same as the principal case; Caldwell v. McVicar, 12 Ark. 751, where the court said this was so, even though he was not a party; United States v. Leffler, 11 Pet. 95, 9 L. 645, where the United States instituted a joint action on a joiut and several bond executed by a collector of taxes and his sureties; Kelly v. Lank, 7 B. Mon. 226, holding the principal in a delivery bond not to be a competent witness to sustain the plea of non est factum for the surety; Cannon v. Jones, 4 Hawks, 370, where a surety filed a bill to be relieved from a judgment because of laches; Henderson v. Lewis, 9 Serg. & R. 383, 11 Am. Dec. 734, holding that one of two joint obligors not summoned is not a witness for the other who is summoned; Governor of Virginia v. Evans, 1 Cr. C. C. 582, F. C. 16,969, holding a principal obligor to be competent for the sureties upon a collateral issue; Owings v. Low, 7 Harr. & J. 130, where a witness was held incompetent because interested in defeating the suit; Bennett v. Dowling, 22 Tex. 662, holding that the liability of a witness to one of the parties for costs makes him interested; Finnell v. Cox, 3 Met. (Ky.) 248, holding that a payee and indorser of a bill was not a competent witness for the accommodation acceptor; Bank of Montgomery Co. v. Walker, 9 Serg. & R. 237, 11 Am. Dec. 713, holding the indorser of a note to be incompetent in a suit against the maker; Chur v. Keckeley, 1 Bailey L. 481, holding that the maker of a note is not a competent witness for the indorser; Gayle v. Bishop, 14 Ala. 556, holding the principal in a note to be competent against a surety with whom he has deposited indemnity; Haig v. Newton, 1 Mills (S. C.), 426, holding a drawer to be incompeteut in an action against the indorser. Cited generally in Caldwell v. McVicar, 12 Ark. 754, on the point of release of interest.

Distinguished in Gass v. Stinson, 2 Sumn. 459, F. C. 5,260, holding that a principal was competent where the surety had been discharged from all liability.

7 Cr. 208–218, 3 L. 317, SHEEHY v. MANDEVILLE.

Variance.— In all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration, p. 217.

Cited and doctrine applied in Munn v. Haynes, 46 Mich. 144, 9 N. W. 137, holding a declaration setting out a joint obligation will not be sustained, unless a joint debt is proved; Reed v. Cox, 5 Blackf. 314, and Greenough v. Keyworth, 30 Fed. Cas. 1087, where there was a variance in the time of payment of a note sued on;

Stone v. Lawrence, 4 Cr. C. C. 11, F. C. 13,484, holding that a note payable "at St. Louis, in the territory of Missouri," is not admissible upon a count not so describing the note; Osborne v. Fulton, 1 Blackf. 234, holding that, where no day of payment is set forth, it is a fatal variance if the note produced was not payable for four months; Connolly v. Cottle, Breese, 365, where the note declared on was payable to A. C., and the one produced was payable to the creditors of S. B. S.; McRae v. McLean, 3 Port. 172, holding an averment of a promise by "Duncan McL.," is supported by evidence of a promise by "D. McL.;" Frank v. Morrison, 58 Md. 441, where a variance was held immaterial in an action on a contract to purchase stock on installments; Burton v. State, 6 Blackf. 341, where the doctrine was applied to a scire facias on a recognizance; Pearsall v. Phelps, 3 Ala. 526, where there was a variance between the pleading of a foreign judgment and the exemplification produced; Cabell v. Hardwick, 1 Call (Va.), 354, note, holding that in debt on an administration bond, if the declaration does not show that the plaintiffs sue as justices of the court, it is a fatal variance; Kellogg v. Denslow, 14 Conn. 429, 431, holding the variance to be fatal, where the allegation was of a sale of a condenser and the evidence was of a sale of sundry articles, including a condenser; Border Min. Co. v. Barry, 17 Md. 431, holding there was no substantial variance where the declaration was for freight at a certain rate and the proof was freight at a certain rate or current rates; Franklin Ins. Co. v. Smith, 82 Ill. 132, where the rule was applied in an action on an insurance policy; Long v. Overton, 7 Mo. 568, holding the omission of the words "of October" in an action on a bond to be a fatal variance.

Variance.— Note payable sixty days after date will not support a declaration on a note not stating when it was payable, p. 217.

Bills and notes.— Note having no day of payment is payable immediately, p. 217.

Cited in Eaton v. Truesdail, 40 Mich. 6, where this principle was applied to a mortgage deed; White v. Tarbell, 27 Vt. 574, holding an allegation that the plaintiff was the "bona fide owner and bearer of" the note, without stating the time of payment, was sufficient; in the note to 6 Am. Dec. 189, discussing the subject of the right to interest.

Writ of inquiry.— Production of note in executing a writ of inquiry in assumpsit on the note is necessary, p. 218.

7 Cr. 218–241, 3 L. 321, CONWAY v. ALEXANDER.

Conditional sales.— Individuals may make contracts for the purchase and sale of lands defeasible by the payment of money at a future day, p. 237.

The following cases rely upon this holding of the principal case: Cornell v. Hall, 22 Mich. 383, holding the only safe criterion between a conditional sale and a mortgage is in the intent; Alstin v. Cundiff, 52 Tex. 462, holding that, in determining, reference must be had to whether the relation of debtor and creditor exists; Price v. Karnes, 59 Ill. 278, and Hicks v. Norris, 5 Gill & J. 86, both holding the inquiry must be whether the contract is security; Hinckley v. Wheelwright, 29 Md. 348; Holton v. Meighen, 15 Minn. 76; Turner v. Kerr, 44 Mo. 433, and Sears v. Dixon, 33 Cal. 333, all holding that an absolute deed is a mortgage, if intended as security; Henley v. Hotaling, 41 Cal. 27; Gassert v. Bogk, 7 Mont. 600, 19 Pac. 285, and Mitchell v. Wellman, 80 Ala. 20, all holding that to change a deed into a mortgage the evidence must be clear; in Bridges v. Linder, 60 Iowa, 192; Voss v. Eller, 109 Ind. 264, 10 N. E. 76, and Alleghany R. R. Co. v. Casey, 79 Pa. St. 97, all holding a conveyance in satisfaction of a debt with an agreement to reconvey not to be a mortgage; Barnes v. Holcomb, 12 Smedes & M. 314, on the point that an absolute deed on account of a pre-existing debt with an agreement to reconvey is a mortgage; Devore v. Woodruff, 1 N. Dak. 148, 45 N. W. 702, holding a separate agreement to reconvey did not conclusively show a mortgage; Keithley v. Wood, 151 Ill. 574, 42 Am. St. Rep. 268, 38 N. E. 151, holding that, in the case of a warranty deed with an agreement to reconvey, the character of the deed depends upon the intent; Smith v. Crosby, 47 Wis. 166, 2 N. W. 108, where a warranty deed with an agreement for reconveyance was regarded as an absolute conveyance; Flagg v. Mann, 14 Pick. 480, holding conditional sales to be valid; Johnson v. Clark, 5 Ark. 342, on the point that parties can make conditional sales to become absolute on certain contingencies; Hollingsworth v. Handcock, 7 Fla. 346, holding conditional sales will be supported when clearly the purpose of the parties; Lucketts v. Townsend, 3 Tex. 129, 49 Am. Dec. 725, discussing the distinction between conditional sales, mortgages and pawns; Fowler v. Stoneum, 11 Tex. 508, 62 Am. Dec. 502, on the point that a conditional sale passes title in the first instance with the right of repurchase; Lowry v. McGhee, 8 Yerg. 248, on the point that in a conditional sale the condition must be strictly performed. See also valuable note on this point in 17 Am. Dec. 300, 305, and Chapman v. Turner, 1 Call (Va.), 294, note.

Conditional sales.— Leaning of courts is against conditional sales, and in doubtful cases they have generally been decided to be mortgages, p. 237.

This doctrine affirmed and applied in Walker v. Farmers' Bk., 8 Houst. 261, 10 Atl. 97, same opinion in 6 Del. Ch. 91, on the point that the policy of the law is to prohibit the conversion of a mortgage into a sale; Dougherty v. McColgan, 6 Gill & J. 281, holding

that, in doubtful cases, the leaning of the courts was in favor of the mortgage; Stephens v. Allen, 11 Or. 190, 3 Pac. 169; Reed v. Reed, 75 Me. 271, and Hughes v. Sheaff, 19 Iowa, 343, all holding that the character of the conveyance is determined by the intention; Hoffman v. Ryan, 21 W. Va. 429; Vangilder v. Hoffman, 22 W. Va. 16, and Ruffier v. Womack, 30 Tex. 340, all holding the true issue to be, does the relation of debtor and creditor exist; Baugher v. Merryman, 32 Md. 192, holding a conveyance, whatever its form, taken as security, was a mortgage; Davis v. Stonestreet, 4 Ind. 105, holding equity was disposed to construe every deed taken as security to be a mortgage; Plummer v. Shirley, 16 Ind. 382, holding that, where personalty is given as security, it is a chattel mortgage; Bacon v. Brown, 19 Conn. 34, and Stoever v. Stoever, 9 Serg. & R. 447, both holding a deed, with a condition that it is to be void if a certain sum is paid by a certain day, is a mortgage; Brown v. Dewey, 1 Sandf. Ch. 64, holding an absolute conveyance by a mortgagor to a mortgagee, with an agreement to reconvey, to be a mortgage; Matthews v. Sheehan, 69 N. Y. 591, holding an absolute assignment of a life insurance policy may be shown to be a mortgage by parol. See also note to 50 Am. Dec. 196.

Mortgages.— Want of covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance, p. 237.

Cited and relied upon as authority in Gassert v. Bogk, 7 Mont. 598, 19 Pac. 284, and Scott v. Britton, 2 Yerg. 223, 224, both holding that where there is an absolute conveyance and no obligation to pay appears, prima facie the transaction is a sale; Moss v. Green, 10 Leigh, 272, and Brown v. Dewey, 1 Sandf. Ch. 71, holding that want of such agreement is not conclusive against a contract being a mortgage; Matthews v. Sheehan, 69 N. Y. 593, holding that an absolute assignment of a policy with an absolute promise by the assignor to pay the premiums was not essential to constitute it a mortgage; Holmes v. Fresh, 9 Mo. (210) 211, holding that all the parties must have intended the transaction to be a mortgage to change an absolute deed into a mortgage; Robinson v. Farrelly, 16 Ala. 478, and Rogan v. Walker, 1 Wis. 570, both holding that whatever its form, if security, it is a mortgage; Horn v. Keteltas, 46 N. Y. 611, holding that an absolute conveyance can be shown to be a mortgage by parol; Low v. Henry, 9 Cal. 549, discussing the admissibility of parol evidence to show a deed to be a mortgage; Hickman v. Cantrell, 9 Yerg. 182, 30 Am. Dec. 397, where a bill of sale with a covenant to reconvey on payment was held not to be a mortgage.

Distinguished in Floyd v. Harrison, 2 Rob. (Va.) 181, where one had covenanted to repay with interest.

Mortgages.— It is a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor, p. 237.

Cited in Hicks v. Hicks, 5 Gill & J. 83, holding that to constitute a mortgage the remedies must in all respects be material; Calhoun v. Lumpkin, 60 Tex. 189, and Desloge v. Ranger, 7 Mo. 330, both holding that whether a transaction is a sale or a mortgage depends upon the intent; Slutz v. Desenberg, 28 Ohio St. 377; Hubby v. Harris, 68 Tex. 95, 3 S. W. 559, and Robinson v. Cropsey, 2 Edw. Ch. 144, all holding that the criterion is whether the relation of debtor and creditor exists; Demond v. Crary, 9 Fed. 752, where a deed absolute in consideration of a debt paid for the grantor was held not to be a mortgage.

Denied in Kerr v. Kilmore, 6 Watts, 410, holding a deed of conveyance with a separate defeasance to be a mortgage.

Mortgages.— Court will examine extrinsic circumstances for the purpose of determining whether a contract is to be construed as a deed or a mortgage, p. 238.

This holding has been extensively affirmed by subsequent citing cases, as follows: Snavely v. Pickle, 29 Gratt. 31, holding that whether a deed absolute is a mortgage depends upon circumstances with the leaning in favor of the mortgage; Spence v. Steadman, 49 Ga. 138, holding that the test was whether the relation of debtor and creditor existed; in Cleveland v. La Crosse, etc., Co., 5 Fed. Cas. 1035; Scott v. Cunningham, 13 Ark. 127; Campbell v. Dearborn, 109 Mass. 145, 12 Am. Rep. 682; Schriber v. Le Claire, 66 Wis. 599, 29 N. W. 892; Page v. Foster, 7 N. H. 394, and Hicks v. Norris, 5 Gill & J. 86, all holding that the transaction depends upon whether the contract is security for the repayment of money; Rockwell v. Humphrey, 57 Wis. 416, 15 N. W. 396, on the point that, if there is nothing to show an intent to transfer as security, the transaction is usually held to be a conditional sale; Nease v. Capehart, 8 W. Va. 125, holding that, where the object of a conveyance is to secure the payment of money, the right to redeem exists; McNamara v. Culver, 22 Kan. 669, 670, and Flagg v. Mann, 2 Sumn. 534, F. C. 4,847, both holding the test to be the existence of a debt; Byrne v. Marshall, 44 Ala. 357, on the point that two instruments relating to the same transaction will be considered in construing a contract; Vangilder v. Hoffman, 22 W. Va. 21, where the court reviewed circumstances which would indicate the transaction to be a mortgage; Flagg v. Mann, 14 Pick. 478, on the point that whether there was any agreement to reconvey is material in determining; Hays v. Carr, 83 Ind. 283, where a grantee agreed to pay a debt of the grantor, and upon repayment to reconvey; Davis v. Demming, 12 W. Va. 281, holding that a conveyance for the payment of a debt with a condition for reconveyance on repayment was a mortgage;

Murphy v. Barsfield, 27 Ala. 639, where there was a sale of slaves with words of conveyance and a stipulation for redemption; Livingston v. Story, 11 Pet. 405, 9 L. 768, dissenting opinion, where a contract of loan with an absolute conveyance was construed; Hinckley v. Hinckley, 79 Me. 323, 9 Atl. 898, where a son conveyed property to his mother and received an agreement to reconvey when an indebtedness was paid; Kroesen v. Seevers, 5 Leigh, 441, and Haynie v. Robertson, 58 Ala. 40, both holding that an absolute sale with a condition for resale was not a mortgage; Amory v. Lawrence, 3 Cliff. 530, F. C. 336, where there was a conveyance to one who was to pay a debt of the grantor and account for the balance; Rogers v. Beach, 115 Ind. 416, 17 N. E. 611, on the point that an agreement to give grantor the increased price, if the vendee should sell, does not make a contract a mortgage; Hollingsworth v. Handcock, 7 Fla. 350, where a party failed to assert his claim for a great length of time without any explanation; Jewett v. Cunard, 3 Wood. & M. 295, F. C. 7,310, on the point that an absolute deed may be changed to a mortgage by subsequent special agreement; in Hubby v. Harris, 68 Tex. 94, 3 S. W. 558; Alexander v. Rodriguez, 1 Fed. Cas. 377, and Klein v. McNamara, 54 Miss. 101, on the point that parol evidence is admissible to show the real nature of the transaction; in Hudson v. Isbell, 5 Stew. & P. 80; Huoncker v. Merkey, 102 Pa. St. 467; Lewis v. Wells, 85 Fed. 899, and Babcock v. Wyman, 19 How. 299, 15 L. 648, all holding that an absolute conveyance can be shown to be a mortgage by parol; Wyman v. Babcock, 2 Curt. 398, F. C. 18,113, holding a deed may be shown to be a mortgage by the oral testimony of two witnesses against the denial of the answer; Roberts v. McMahan, 4 G. Greene, 35, holding that ordinarily oral evidence was not admissible to contradict a writing; Hatfield v. Montgomery, 2 Port. 69, where the question as to the admissibility of the testimony of a fraudulent grantor in favor of his grantee was discussed; Russell v. Southard, 12 How. 147, 13 L. 930, holding extraneous evidence was admissible to inform the court of every material fact.

Distinguished on the point as to what transaction was a mortgage in Coles v. Perry, 7 Tex. 130, 150, where an instrument was held to be an executory contract of sale and not a mortgage.

Mortgages.— If the instrument was really a security for money advanced and to be repaid, it is a mortgage, and the intention of the parties would make no difference, p. 238.

Cited in Hinckley v. Wheelwright, 29 Md. 360, on the point that absolute conveyances taken as security are mortgages; Johnson v. Clark, 5 Ark. 338, on the point that a contract is a mortgage, no matter what its form of intended security for a debt; Cake v. Shull, 45 N. J. Eq. 212, 16 Atl. 435, on the point that, if no security is intended, a transaction is a sale, although there is a provision

for reconveyance; in the note to 4 Am. St. Rep. 699, discussing the subject of equitable mortgages; Musgat v. Pumpelly, 46 Wis. 666, 1 N. W. 416, on the point that a court is justified in presuming the relation of debtor and creditor, where the contract is to secure an indebtedness; Alexander v. Rodriguez, 1 Fed. Cas. 381, holding a conveyance in satisfaction of a precedent debt, so that there is no personal remedy left to the creditor, is not a mortgage.

Mortgages.— Existence of a debt is a circumstance of much importance in determining whether a transaction is an absolute sale or a mortgage, p. 239.

Cited and this holding affirmed and applied in De Bruhl v. Maas, 54 Tex. 472, holding that in doubtful cases the contract will be construed to be a mortgage; Bentley v. Phelps, 2 Wood. & M. 443–446, F. C. 1,331, on the point that the relationship of debtor and creditor and the amount of the consideration are material; Douglass v. Moody, 80 Ala. 69, on the point that the absence of independent evidence of debt is a circumstance to show a conditional sale; McKinstry v. Conly, 12 Ala. 681, holding very clear evidence is necessary to create a mortgage where evidences of debt are given up; West v. Hendrix, 28 Ala. 234, holding a conveyance in consideration of a pre-existing debt was not a mortgage; Cully v. Bloomingdale, 68 Ga. 759, where a deed signed by a husband and wife, provided that if a certain sum were paid by a certain day, it should be void; Baxter v. Willey, 9 Vt. 280, 31 Am. Dec. 625; Hoopes v. Bailey, 28 Miss. 339, and Reed v. Bond, 96 Mich. 140, 55 N. W. 621, all holding that a conveyance in payment of a debt with a privilege of repurchase was not a mortgage; Winters v. Swift, 2 Idaho, 66, 69, 3 Pac. 19, 21; Glover v. Payne, 19 Wend. 521, and Galt v. Jackson, 9 Ga. 156, all holding a conveyance with an agreement for reconveyance did not show a mortgage; Sewall v. Henry, 9 Ala. 33, where a sale of a negro with a stipulation to resell if applied for in a certain time, was held not to be a mortgage; Mobile Bldg. & Loan Assn. v. Robertson, 65 Ala. 388, holding that if a contract is intended as a security it is a mortgage no matter what its form; Porter v. Clements, 3 Ark. 384, holding parol evidence was admissible to show a deed to be a mortgage; Pace v. Bartles, 47 N. J. Eq. 176, 20 Atl. 359, where the court reviewed a transaction and held it to be a conditional sale; Almy v. Wilbur, 2 Wood. & M. 384, F. C. 256, where a promise to buy machinery and let another use it for cloth at such other's factory was held not a mortgage.

Distinguished in Plato v. Roe, 14 Wis. 457, where the vendor had expressly applied for a loan.

Mortgages.— Inadequacy of consideration on a sale of property, by one much pressed for money, is a material circumstance in determining whether a contract is absolute sale or a mortgage, p. 241.

Cited in Flagg v. Mann, 2 Sumn. 537, F. C. 4,847, the court saying the true question to be determined was whether a debt still existed; Russell v. Southard, 12 How. 148, 151, 13 L. 931, 932, citing authorities and holding a transaction, the consideration being grossly inadequate, to be a mortgage; in Holmes v. Fresh, 9 Mo. 210, 211; Lane v. Dickerson, 10 Yerg. 374, and West v. Hendrix, 28 Ala. 235, all holding that mere inadequacy was not sufficient to convert a sale into a mortgage; Wilson v. Patrick, 34 Iowa, 370, and Husheon v. Husheon, 71 Cal. 412, 12 Pac. 412, both holding that transactions in land intended only as a security for the performance of another act are mortgages; De Laigle v. Denham, 65 Ga. 491, where there was an absolute conveyance with an agreement for repurchase.

Miscellaneous.— Cited erroneously in State ex rel. Klein v. Pilsbury, 29 La. Ann. 790, a mandamus case; and in Bank of Mt. Pleasant v. Sprigg, 1 McLean, 182, F. C. 891, a question in estoppel.

7 Cr. 242–270, 3 L. 242, DUNLOP v. MUNROE.

Postmaster.— Is not liable for the negligence and carelessness of his assistants, p. 269.

This ruling is affirmed and applied by the following citations: Hutchins v. Brackett, 22 N. H. 255, 53 Am. Dec. 250, holding mail contractors not to be liable for negligence of carriers employed; Keenan v. Southworth, 110 Mass. 475, 14 Am. Rep. 614, holding a postmaster not liable for the loss of a letter by an assistant; Coleman v. Frazier, 4 Rich. L. 150, 53 Am. Dec. 729, holding a postmaster to be liable for his servant's negligence or default; Bishop v. Williamson, 11 Me. 502, 505, holding a postmaster liable for the acts of one he leaves in charge of the office, not sworn; Schroyer v. Lynch, 8 Watts, 457, holding a postmaster liable for want of attention to official duties by his subordinates, but not for their secret delinquencies; United States v. Kochersperger, 26 Fed. Cas. 806, on the point that postmasters are not in any respect carriers of mail; Raisler v. Oliver, 97 Ala. 714, 38 Am. St. Rep. 214, 12 So. 240, holding a postmaster to be liable for the negligence of a clerk employed independently of lawful authority; Sawyer v. Corse, 17 Gratt. 240, 94 Am. Dec. 448, holding a public officer not to be liable for the acts of his official subordinates; United States v. Thomas, 15 Wall. 344, 21 L. 91, and Robertson v. Sichel, 127 U. S. 516, 32 L. 206, 8 S. Ct. 1291, both laying down the rule as to the liability of a collector of public money; United States v. Collier, 3 Blatchf. 349, F. C. 14,833, where an action was brought against a collector for a balance alleged to be due; Supervisors of Albany v. Dore, 25 Wend. 442, holding a public officer not to be liable for money stolen from his office; Richmond v. Long, 17 Gratt. 378, 94 Am. Dec. 463, holding cities not to be liable for the misconduct of agents; Movins v. Lee, 24 Blatchf. 301, 30 Fed. 305, where an action was brought against the directors of a national bank. See on this point 42 Am. Dec. 209, note.

Distinguished in Commissioner of Jefferson Co. v. Lineberger, 3 Mont. 242, 35 Am. Rep. 465, holding a county treasurer to be liable for trust money stolen from the safe; United States v. Zabriskie, 87 Fed. 717, holding a melter and refiner to be liable for embezzlement by his assistant.

Postmasters.— If it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case, p. 269.

Cited in Macumber v. White River Log, etc., Co., 52 Mich. 197, 17 N. W. 806, on the point that under a count for malfeasance one cannot recover for nonfeasance.

Mails.— Entry on post bill is not conclusive evidence of the transmission of a letter, p. 270.

Evidence.—Witness cannot be permitted to testify whether printed general instructions from the postmaster-general to a deputy postmaster superseded instructions before given, p. 270.

Bills of exceptions.— Each bill of exceptions must be considered as presenting a distinct, substantive case, p. 270.

Rule affirmed and applied in Carmichael v. Browder, 4 How. (Miss.) 433, holding that a mere statement by the clerk that certain papers were read, or a reference to papers will not constitute them a part of the record; Southwestern Va. Imp. Co. v. Frari, 58 Fed. 172, 8 U. S. App. 444, and Jones v. Buckell, 104 U. S. 556, 26 L. 841, both holding that the appellate court would not consider instructions unless the bill of exceptions contained the evidence; Doe ex dem. Commys v. Latimer, 2 Fla. 89, where the court said that if the bill was defective in any material point, it could not be supplied by intendment; New York, etc., R. R. Co. v. Madison, 123 U. S. 526, 31 L. 260, 8 S. Ct. 247, holding that rulings on questions of law will not be considered unless it appears from the bill that the facts make them material; United States v. Three Hundred and Thirty-seven Cases of Wine, 1 Woods, 50, F. C. 16,506, holding a cause would not be reversed for error in an abstract cause which the bill does not show was pertinent.

Appeals.— It is on the evidence stated in the bill of exceptions alone that the court is to decide; it cannot go beyond the bill and collect other facts, p. 270.

Rule affirmed and applied in United States v. Wingate, 44 Fed. 131, on the point that the court will not look outside of the bill to determine the correctness of an instruction; Barfield v. Impson, 1 Smedes & M. 330, holding a bill of exceptions to be the only medium of communication between the lower and higher courts; Lewis v. Baca, 5 N. Mex. 294, 21 Pac. 343, holding that extrinsic evidence of matters occurring at the trial was not admissible to aid in con-

struing a bill of exceptions; Insurance Co. v. Folsom, 18 Wall. 249, 21 L. 833, on the point that facts are not re-examinable in the Supreme Court; United States v. King, 7 How. 865, 12 L. 948, dissenting opinion, holding that writs of error bring up questions of law only and that facts remain unexaminable; United States v. Jarvis, 3 Wood. & M. 225, F. C. 15,469, holding that a bill must show a party objected to the rulings; Hornbuckle v. Stafford, 111 U. S. 393, 28 L. 469, 4 S. Ct. 517, on the point that on an exception to evidence the bill should show what the excluded testimony was.

7 Cr. 271–273, 3 L. 339, WOOD v. DAVIS.

Judgment.— Verdict and judgment that a mother was born free is not conclusive evidence of the freedom of her children, in a suit between other parties, p. 271.

Cited and relied upon in Bloodgood v. Grasey, 31 Ala. 591, holding that a judgment in a suit for freedom in favor of petitioner's mother does not estop one claiming under the defendant therein; Nowak v. Knight, 44 Minn. 243, 46 N. W. 349, on the point that the estoppel of a judgment must be mutual; Chamberlain v. Carlisle, 26 N. H. 552, holding the former judgment must be strictly between the same parties and upon the same matter; Greely v. Smith, 1 Wood. & M. 182, F. C. 5,749, where, to an action of trover, the defendant pleaded a replevin for the same property; Dent v. Ashley, Hemp. 55, F. C. 3,809a, holding that where an administration is granted in two States, there is no privity between the administrators; Chamberlain v. Pierson, 87 Fed. 424, holding a judgment in a criminal case was not admissible in a civil; Burlen v. Shannon, 3 Gray, 390, holding a decree dismissing a libel for divorce for extreme cruelty is not conclusive of a wife having unjustifiably left the house; Warner v. Brinton, 29 Fed. Cas. 235, upon the point as to the admissibility of the minutes of the proceedings before the register to show the foundation of the decree of the register.

7 Cr. 273–276, 3 L. 340, MORGAN v. REINTZELL.

Bills and notes.— Payment of a note by an indorser is sufficient consideration to support a promise by the maker to pay the amount of the note and costs of protest, p. 275.

Cited in Doughty v. Hildt, 1 McLean, 336, F. C. 4,027, holding the payee is entitled to recover the costs of protest against an indorser; Morse v. Bellows, 7 N. H. 569, 28 Am. Dec. 380, on the point that where a demand is made of the maker, the note itself should be produced.

Distinguished in Roach v. Hullings, 16 Pet. 326, 10 L. 981, where a court refused an instruction as to payment by note and the surrender and cancellation of the note.

7 Cr. 276, 3 L. 341, WISE v. COLUMBIAN TURNPIKE CO.

Appeals.—Writ of error to the Circuit Court of the District of Columbia will be dismissed if the sum awarded was less than $100, although a greater sum was claimed, p. 276.

Affirmed and applied in the citing case of Kline v. Wood, 9 Serg. & R. 301, where the judgment was for less than the necessary amount, although the plaintiff claimed more; Batchelder v. Richardson, 75 Va. 837, holding that on a money demand, if the difference between the amount decreed and the amount asserted is not sufficient to give the court jurisdiction, the appeal will be dismissed; Kanouse v. Martin, 15 How. 208, 14 L. 664, where the court said the words "matter in dispute" referred to the claim presented on the record; Walker v. United States, 4 Wall. 164, 18 L. 319, on the point that the amount in controversy is fixed by the judgment; Reynolds v. Sneed, 1 Ark. 200, on the point that the judgment is the amount in dispute on an appeal by a defendant; Gordon v. Ogden, 3 Pet. 35, 7 L. 593, upon the point that the test of jurisdiction depends upon the amount in dispute as the case stands upon the writ of error; Merrill v. Petty, 16 Wall. 344, 21 L. 500, where an appeal in a libel in personam for a collision was dismissed because the judgment was for less than $2,000.

Discussed and said to be imperfectly reported in Hilton v. Dickinson, 108 U. S. 170, 172, 27 L. 689, 690, 2 S. Ct. 427, 428, holding that the sum demanded governs until it appears it was not the sum in dispute.

7 Cr. 276–277, 3 L. 341, CALDWELL v. JACKSON.

Fees.— Each party is liable to the clerk for his fees for services performed for such party, p. 277.

Cited in In re Stover, 1 Curt. 204, 205, F. C. 13,507, holding that the rule as to liability was not changed by a decree dismissing a libel "without costs to either party;" In re Stover, 1 Curt. 98, 99, F. C. 13,506, holding fees paid by a claimant did not have to be refunded by the United States; Anonymous, 2 Gall. 101, F. C. 445, holding an attachment would issue to enforce payment of fees against an indorser on a writ; Frese v. Biedenfeld, 14 Blatchf. 402, F. C. 5,111, where an attachment was refused to a plaintiff to compel a defendant to pay the fees; In re Atlantic Mut. L. Ins. Co., 9 Bened. 338, F. C. 629, where the court said it was unable to find any theory upon which such practice could be sustained in New York.

Costs.— Copy of record is not part of the costs which are to be taxed against the other party as costs of suit, p. 277.

Cited in Price v. Garland, 5 N. Mex. 101; S. C., 4 N. Mex. 366, 20 Pac. 183, holding the expense of the record or of appellant's brief

or the stenographer's fee are not costs; Goodyear v. Sawyer, 17 Fed. 5, where the court said that the fees of an attorney under certain circumstances were taxable as costs.

7 Cr. 277, 278, 3 L. 342, BLACKWELL v. PATTEN.

Appeals.—Writ of error will not be dismissed because a term intervenes between the teste and the return day, p. 278.

Cited in State v. Kennedy, 18 N. J. L. 26, holding a writ of certiorari to be void if not executed before its return day; cited generally in United States v. Jarvis, 3 Wood. & M. 224, F. C. 15,469, upon the point as to allowance of amendments on writs of error and in the proceedings they are brought to reverse.

7 Cr. 278, 279, 3 L. 342, WALLEN v. WILLIAMS.

Executions.— Court will not quash an execution on a writ of error to the original decree which did not award the writ, p. 279.

Cited in the Slaughter House Cases, 10 Wall. 292, 19 L. 920, holding that neither appeals nor writs of error become a supersedeas by virtue merely of process issued by the Supreme Court; Adams v. Law, 16 How. 148, 14 L. 882, holding that if the bond is not filed in time, a motion for supersedeas is not sustained; French v. Shoemaker, 12 Wall. 100, 20 L. 271, holding that on an appeal from a decree in a suit for an injunction the Supreme Court may issue a supersedeas; Telegraph Co. v. Eyser, 19 Wall. 430, 22 L. 45, dissenting opinion, on the point that writs of error or appeals do not operate as a stay unless the act of congress is complied with within the ten days; Union Mut. Life Ins. Co. v. Windett, 36 Fed. 839, on the point that after an appeal the court has power to execute the decree; Chicago, R. I. & P. R. R. Co. v. Grinnell, 53 Iowa, 56, on the point that judgments are not superseded by appeal and may be enforced by the proper process.

Distinguished in Ferguson v. Dent, 29 Fed. 3, discussing the effect of a decree on the appointment of a receiver.

Miscellaneous.— Cited erroneously in Worthy v. Lyon, 18 Ala. 787.

7 Cr. 279–281, 3 L. 342, McKIM v. VOORHIES.

Judgment.— State court has no jurisdiction to enjoin a judgment of the Circuit Court of the United States, p. 281.

Many subsequent cases have cited this decision upon the foregoing proposition, affirming and applying it as follows: Sumner v. Marcy, 3 Wood. & M. 119, F. C. 13,609, and Dorr v. Rohr, 82 Va. 370, 3 Am. St. Rep. 114, both holding that a State court could not enjoin a decree of a Federal court; Schuyler v. Pelissier, 3 Edw. Ch. 193, where a State court refused to enjoin an action brought in the United States Circuit Court; Edwards v. Nicholson, 13 La.

586, on the point that a District Court of the United States first taking jurisdiction has exclusive jurisdiction of all proceedings arising therein; Central Nat. Bk. v. Hazard, 49 Fed. 295, holding that a Federal court ordering the sale of a railroad has complete jurisdiction so as to exclude all interference; Mabry v. Herndon, 8 Ala. 861, holding a State court can inquire into a Federal discharge in Bankruptcy; Ex parte Holman, 28 Iowa, 105, 4 Am. Rep. 168, holding that a person in custody, under an order of the Circuit Court, cannot be discharged in a State court; United States v. Council of Keokuk, 6 Wall. 517, 18 L. 934, and Riggs v. Johnson Co., 6 Wall. 194, 18 L. 776, both holding an injunction by a State court to be inoperative against a mandamus by a Federal court to compel the levy of a tax; Duncan v. Darst, 1 How. 306, 11 L. 141, holding that a person in custody, under authority of a Circuit Court, could not be discharged from imprisonment by a State officer; Mead v. Merritt, 2 Paige, 404, holding that chancery will not restrain a suit previously commenced in a sister State or a Federal court; Kendall v. Winsor, 6 R. I. 462, holding this rule to be specially applicable in a suit for damages for the infringement of a patent; Ex parte Hill, 38 Ala. 438, and Ex parte Hill, 38 Ala. 462, both holding a State court could not on habeas corpus discharge an enrolled conscript from the custody of a Confederate State officer; Stozier v. Howes, 30 Ga. 579, and Chapin v. James, 11 R. I. 89, 23 Am. Rep. 415, both holding a State court could not enjoin executions from the Circuit Court; Providence, etc., S. S. Co. v. Hill Mfg. Co., 109 U. S. 607, 27 L. 1048, 3 S. Ct. 620, dissenting opinion, holding that proceedings in the District Court to limit the liability of a shipowner supersedes all other proceeding; Kittredge v. Emerson, 15 N. H. 269, holding that Federal judges are restrained by general laws from staying proceedings in any State court; Boyd v. Hawkins, 2 Dev. Eq. 337, and Amory v. Amory, 3 Biss. 271, F. C. 334, on the point that Federal courts will not disturb judgments in State courts; Reinach v. Atlantic, etc., R. R. Co., 58 Fed. 44, holding a Federal court could not enjoin a receiver under a State court from issuing receiver's certificates; The Celestine, 1 Biss. 12, F. C. 2,541, holding a creditor could not in the Circuit Court obtain any control over property seized under State laws; Fisher v. Lord, 9 Fed. Cas. 135, where the proceedings did not operate upon the State court, but the respondent was enjoined in personam; Cropper v. Coburn, 2 Curt. 469, F. C. 3,416, holding that an unauthorized attachment may be enjoined in the Federal courts; Moran v. Sturges, 154 U. S. 267, 38 L. 985, 14 S. Ct. 1022, holding that a District Court could interfere where the State court had no jurisdiction; City of Opelika v. Daniel, 59 Ala. 216, where a suit was brought in the Federal courts on city bonds previously declared void by a State court; Brown v. Wallace, 4 Gill & J. 496: S. C., 2 Bland Ch. 603, holding that the proceedings of a trustee, under a court of chancery, cannot be investigated in a bill filed on the equity side of the

County Court; Perry Mfg. Co. v. Brown, 2 Wood. & M. 469, F. C. 11,015, citing cases and discussing the relative jurisdiction of State and Federal courts; Freeman v. Timanus, 12 Fla. 410, holding equity will not entertain a bill to enjoin proceedings, where there is a good defense at law. And see note to 54 Am. St. Rep. 261, elaborately discussing the subject of relief in equity against judgments.

7 Cr. 281–284, 3 L. 343, BEATTY v. STATE OF MARYLAND.

Executors.— Settlement of a final account by the Orphans' Court is not conclusive in an action by the creditors on an administration bond, p. 284.

Cited in Nicholls v. Hodge, 2 Cr. C. C. 583, F. C. 10,231, holding that creditors may contest the settlement of an executor's account and appeal; Lupton v. Janney, 5 Cr. C. C. 477, F. C. 8,607, where the court was of opinion that the settlement was conclusive against distributees and residuary legatees, but not against creditors; Bank of Troy v. Topping, 13 Wend. 563, holding that creditors are not parties to proceedings until they have received their dividends; Cameron v. Gibson, Walk. (Miss.) 503, holding that an account was not conclusive between the parties where there was no evidence that it had been passed upon; Pulliam v. Pulliam, 10 Fed. 29, F. C. 11,463a, where a bill was brought by a widow against an executor for a general settlement of account.

7 Cr. 285, 286, 3 L. 344, UNITED STATES v. TYLER.

Appeals.— The judges of the lower court being opposed in opinion upon a question under the embargo act, it was certified to the Supreme Court for its direction in the premises, p. 285.

Cited in United States v. Sanges, 144 U. S. 321, 36 L. 449, 12 S. Ct. 613, upon the point as to the manner of bringing up criminal cases upon a certificate of division of opinion; Forsyth v. United States, 9 How. 572, 15 L. 263, where the power of the Supreme Court to revise judgments in criminal cases was considered.

Embargo.— Valuation by the jury is not necessary in a prosecution, under the embargo act, for loading goods on carriages with an intent to transport them to Canada, p. 285.

Cited in Mason v. People, 2 Colo. 374, holding that in an indictment for larceny the jury need not specially find the value.

Miscellaneous.— Cited in United States v. Mann, 1 Gall. 181, 186, F. C. 15,718, holding that an offense punishable under the embargo act of January 9, 1809, was not saved from repeal by the saving clause of the second section of the act of June 28, 1809, chapter 9; United States v. New Bedford Bridge, 1 Wood. & M. 453, F. C. 15,867, on the point that whatever the law declares a crime must be prosecuted by indictment, unless a remedy by information is specially given.

7 Cr. 287, 288, 3 L. 347, UNITED STATES v. GORDON.

Bonds.— It is a good defense to an action on an embargo bond that it was more than double the value of the vessel and cargo, and the obligors were constrained to execute it by refusal of the collector to permit the vessel to clear, p. 288.

Cited in Jackson v. Simonton, 4 Cr. C. C. 261, F. C. 7,147, holding that no officer can take a bond in his official capacity which he is not specially authorized to take; Whitsell v. Womack, 8 Ala. 476, where a bond was given to release a vessel under process; Hawes v. Marchant, 1 Curt. 139, F. C. 6,240, holding that a statutory bond for the liberties of the prison, executed under duress, is void; United States v. Mynderse, 27 Fed. Cas. 57, holding that a bond which is extorted by a public official, containing conditions different from those prescribed, is void; United States v. Jones, 77 Fed. 720, holding that no recovery could be had on a bond given by an assistant melter and refiner of a mint for a prior defalcation.

Distinguished in McWhorter v. McGehee, 1 Stewart, 555, where the question was as to the validity of a sheriff's bond.

Appeals.— Writ of error will not lie to the Supreme Court of the United States from a judgment in a cause carried to the Circuit Court by writ of error from the District Court, p. 288.

Cited in Sarchet v. United States, 12 Pet. 144, 9 L. 1033, holding that cases at law can only be brought from the Circuit Court by a writ of error and cannot be brought by appeal; Ex parte Crane, 5 Pet. 204, 8 L. 98, on the point that an enumeration of the cases in which the Supreme Court has appellate jurisdiction is an exclusion of all others; Baker v. Biddle, 1 Bald. 403, F. C. 764, on the point that the jurisdiction of the Circuit Court must be exercised within the limits prescribed by the organic law.

7 Cr. 288–290, 3 L. 347, BARTON v. PETIT.

Judgments.— Judgment on a forthcoming bond must be reversed if the judgment upon which it was issued is reversed, p. 289.

Cited and principle applied in Fowler v. Gibson, 4 Ark. 428, where the court could see from the record that the bond was for property levied upon under an execution on the judgment; Mills v. Conner, 1 Blackf. 10, note, holding that if the original judgment be reversed, scire facias to revive cannot be supported; Buckingham v. Bailey, 4 Smedes & M. 547, where a judgment upon which a forthcoming bond purported to be founded was void for want of jurisdiction; Gaspar v. State, 11 Ind. 548, where a suit was brought upon a forfeited recognizance taken in a prosecution under the liquor act of 1853; White v. Crump, 19 W. Va. 593, and State v. Blair, 29 W. Va. 476, both holding that a supersedeas to the original judgment will supersede a judgment on the delivery bond; Hoy v.

Couch, 5 How. (Miss.) 194, where the court said it was not necessary to enter a formal motion to quash the latter.

Certiorari.— On a writ of error to a judgment on a forthcoming bond, where the original judgment was reversed, the court directed a certiorari to the clerk to certify the execution so as to show the connection between the two judgments, p. 290.

Cited in American Construction Co. v. Jacksonville, etc., Ry. Co., 148 U. S. 380, 37 L. 490, 13 S. Ct. 762, on the point that certiorari is an auxiliary process only to supply imperfections in a case already before the court.

7 Cr. 290-299, 3 L. 348, MIMA QUEEN v. HEPBURN.

Evidence.— Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge, p. 295.

This holding is affirmed, cited and applied as follows: Glover v. Millings, 2 Stew. & P. 43, holding there was no exception to this rule where one applied for freedom; Davis v. Wood, 1 Wheat. 8, 4 L. 23, holding that evidence of general reputation was not admissible to prove freedom; Brown v. Crandall, 11 Conn. 94, 95, holding general reputation to be inadmissible to prove partnership; Sexton v. Hollis, 26 S. C. 235, 237, 1 S. E. 896, 897, and Taliaferro v. Pryor, 12 Gratt. 282, both holding that evidence was inadmissible to show reputation of ownership; People v. Fulton F. I. Co., 25 Wend. 220, where on a question of escheat, the declarations of deceased members and reputation existing in a family were admitted; Casey v. Inloes, 1 Gill, 492, 39 Am. Dec. 669, holding facts of great antiquity and resting in parol may be proved by hearsay; People v. Mayne, 118 Cal. 519, 62 Am. St. Rep. 257, 50 Pac. 655, holding an entry in a family bible to be incompetent where the person making it was alive; Bradford v. Haggerthy, 11 Ala. 701, holding a declaration by a person as to his place of residence to be hearsay; Ellicott v. Pearl, 1 McLean, 209, F. C. 4,386, where evidence to prove what a deceased person had said in relation to a certain boundary was not admitted; Barker v. Pope, 91 N. C. 169, where the court ruled out a question as to whether the witness had ever heard of a grantor's incompetence; Hammond v. Noble, 57 Vt. 203, where there was introduced hearsay evidence to prove the incompetency of a juror; Brown v. Foster, 41 S. C. 122, 19 S. E. 301, holding that evidence of general knowledge of the fact that a partnership was dissolved was incompetent; United States v. Mulholland, 50 Fed. 419, holding evidence of an admission of a theft by a person since deceased was inadmissible; Moore v. Greene, 2 Curt. 209, F. C. 9,763, on the point as to the admissibility of evidence of tradition to prove death; Scott v. Ratcliffe, 5 Pet. 86, 8 L. 55, holding that hearsay evidence of death was admissible; Hopt v. Utah, 110 U. S. 581, 28 L. 266, 4 S. Ct. 206, holding that

testimony of a surgeon making a post-mortem examination, that a third person had identified the body was inadmissible; Wells v. Compton, 3 Rob. 193, holding plats made by a parish surveyor were admissible after his decease; Insurance Co. v. Mosely, 8 Wall. 409, 19 L. 441, dissenting opinion, where the question was as to the admissibility of declarations as part of res gestæ; National Masonic Acc. Assn. v. Shryock, 73 Fed. 778, 36 U. S. App. 658, holding that declarations of a person two hours after an injury were inadmissible; Silva v. Pickard, 10 Utah, 88, 37 Pac. 89, where a cause was reversed because of the admission of self-serving declarations; Farner v. Turner, 1 Iowa, 59, where the court referred to admit a book of original entries of a firm to prove title in a third person; Oelrichs v. Ford, 21 Md. 514, holding correspondence between a principal and agent to be competent to prove a contract; Ewing v. Keith, 16 Utah, 322, 52 Pac. 7, rejecting parol statements of a party in his own favor, to prove a deed and mortgage. See also 91 Am. Dec. 529, note, discussing proof of death.

Evidence.— Rule rejecting hearsay evidence applies to suits to establish freedom, p. 295.

Cited in Walkup v. Pratt, 5 Harr. & J. 56, holding such evidence not admissible to prove pedigree; State v. Marshall, 137 Mo. 478, 479, 36 S. W. 620, dissenting opinion, on the point that evidence admissible in a pedigree case is not admissible in a suit for freedom; Gregory v. Baugh, 4 Rand. 615, 620, holding evidence of reputation that an ancestor of the plaintiff was entitled to her freedom was incompetent; Johnson v. Tompkins, 1 Bald. 577, F. C. 7,416, on the point that on the question of freedom the same rules of evidence as in other contests govern; United States v. Morris, 1 Curt. 45, 48, F. C. 15,815, on the point that evidence that a person was bought and also as a slave was admissible; Marguerite v. Chouteau, 2 Mo. 77, holding that Indians taken in war prior to 1769 by the French and sold as slaves, and their descendants, are slaves; Hamilton v. Wabash, etc., Ry. Co., 21 Mo. App. 157, holding that oral declarations of pedigree were admissible if the declarant was dead.

Evidence.— Rule that hearsay evidence is not admissible to prove a specific fact will not be departed from because the eye-witnesses tc that fact are dead, p. 296.

Cited in Stegall v. Stegall, 2 Brock. 263, F. C. 13,351, where the court considered the effect of general reports in a neighborhood as to illegitimacy; Gregory v. Baugh, 2 Leigh, 679, 695, holding that in a suit for freedom hearsay was inadmissible to prove pedigree; Taylor v. Glenn, 29 S. C. 297, 13 Am. St. Rep. 727, 7 S. E. 485; Alexander v. Gossett, 29 S. C. 423, 7 S. E. 816, and Ellicott v. Pearl, 10 Pet. 437, 438, 9 L. 486, all holding that hearsay as to boundary was inadmissible; Clement v. Packer, 125 U. S. 321, 31

L. 726, 8 S. Ct. 912, where the question was as to whether boundary could be proved by hearsay; McEwen v. Portland, 1 Or. 304, 306, holding it to be error to admit evidence of reputation to support title.

Jurors.— It is too late to object to the competency of a juror after he is sworn, p. 297.

This holding is affirmed and applied as follows: State v. Stephens, 11 S. C. 320, holding that objections to the panel or to jurors must be made before the jury were sworn; Costly v. State, 19 Ga. 628, applying the rule to a challenge for nonresidence; Tide Water Canal Co. v. Archer, 9 Gill & J. 499, holding that an objection that a juror is related comes too late upon the inquisition; Page v. Danvers, 7 Met. 328, where the court refused to set aside a verdict because some of the jurors were irregularly selected; Croy v. State, 32 Ind. 389, where a juror though a resident was not a householder; Turner v. Hahn, 1 Colo. 28, and Kohl v. Lehlback, 160 U. S. 301, 40 L. 435, note, 16 S. Ct. 307, note, where a juror was an alien; Presbury v. Commonwealth, 9 Dana (Ky.), 204, where the alienage was not known until after the verdict; People v. Wintermute, 1 Dak. 76, 46 N. W. 699, where the court considered as to when an objection should be made to a grand juror; Johns v. Hodges, 60 Md. 222, 45 Am. Rep. 724, where a juror was not of proper age; Wentworth v. Farnington, 51 N. H. 136, holding that objections to highway commissioners must be made before they have entered on their duties; Livingston v. Heerman, 9 Mart. (O. S.) 701, where the court did not decide the question, but left it open.

Jurors.— Juror is incompetent in a suit for freedom who avows his detestation of slavery to be such that in a doubtful case, or if the testimony were equal, he would find for the plaintiff, p. 297.

Principle applied in Choteau v. Pierre, 9 Mo. 7, holding that in a suit for freedom it was a good cause of challenge if a juror should feel bound in conscience to find for the plaintiff; Smith v. Eames, 3 Scam. 77, 36 Am. Dec. 516, holding that a juror with decided opinions was subject to challenge for cause; Connors v. United States, 158 U. S. 413, 39 L. 1035, 15 S. Ct. 953, where the court refused to allow a juror to be asked if his political or party predilections would bias his judgment; Milan v. State, 24 Ark. 354, holding that one who would convict a negro on less evidence than he would a white man was incompetent; Stoots v. State, 108 Ind. 417, 9 N. E. 381, on the point that a person prejudiced against a business so that he would doubt the testimony of one engaged in it is incompetent; People v. Bodine, 1 Den. 309, where the effect of a fixed opinion as to guilt was considered. See also note to 9 Am. St. Rep. 746, discussing the subject of the rejection of jurors for bias.

7 Cr. 299–307, 3 L. 351, BANK OF COLUMBIA v. PATTERSON.

Contracts.— Indebitatus assumpsit will lie to recover the stipulated price due on a special contract not under seal, where the contract has been fully executed, p. 303.

The citing cases have very extensively affirmed and followed this holding: Arnett v. Evans, Walk. (Miss.) 473, and Brackett v. Hammond, 2 Cr. C. C. 56, F. C. 1,916, both holding that although a special contract existed, the plaintiff may recover on the common counts; Mansur v. Botts, 80 Mo. 655, holding assumpsit would lie on a special contract where nothing remained to be done but pay money; Corbett v. Lucas, 4 McCord, 328, where the court said the consideration is a distinct substantive cause of action independently in some sort of the contract; Lyell v. Superv. of Lapeer Co., 6 McLean, 450, F. C. 8,618, where the plaintiff brought assumpsit and declared specially upon a county order; Goshorn v. Stewart, 15 W. Va. 662, holding assumpsit would lie for the use and occupation where the agreement was not by deed; Williams v. Sherman, 7 Wend. 110, holding that in an action for use and occupation plaintiff may avail himself of an agreement not under seal; Thomas v. Dickinson, 12 N. Y. 370, where the court said that in a contract of exchange executed by the plaintiff, he could recover any balance under the common counts; Dukes v. Leowie, 13 Ala. 459, holding assumpsit would lie on an executed parol contract; Welsh v. Welsh, 5 Ohio, 432, on point that where contract has been put an end to by defendant plaintiff may recover on the common counts; Wheeler v. Curtis, 11 Wend. 665, holding that under a contract of charter-party assumpsit would lie for the freight; Eggleston v. Buck, 24 Ill. 264, and Hancock v. Ross, 18 Ga. 365, where assumpsit was brought on a special contract for the sale of goods; Holbrook v. Armstrong, 10 Me. 39, where assumpsit was brought for the price of cows delivered to defendant to be returned in a certain time or paid for; Mitchell v. Gile, 12 N. H. 391, where one agreed to deliver goods to another, the other to deliver to the plaintiff goods of a similar nature on demand; Peltier v. Sewall, 12 Wend. 388, where a vendor sold goods agreeing to retain one-half interest, and the vendee sued in assumpsit for one-half the loss; Pool v. Tuttle, 11 Me. 472, 26 Am. Dec. 555, holding that if a purchaser of goods gives another's note and it is not paid, assumpsit lies; N. O., etc., R. R. Co. v. Pressley, 45 Miss. 71, holding that where there is a special agreement to pay for goods in any other way than money, it must be specially declared on; Holden Steam Mill Co. v. Westervelt, 67 Me. 450, holding in an action for goods furnished under an express contract, plaintiff cannot abandon such contract and recover on an implied one; Lanier v. Chappell, 2 Fla. 630, holding that assumpsit would lie for the hire of slaves although a note had been given; Walker v. Brown, 28 Ill. 385, 81 Am. Dec. 290, where work was done under a special contract; Newman v. McGregor, 5 Ohio, 352,

24 Am. Dec. 295, and Feeter v. Heath, 11 Wend. 484, both holding that under a special contract to do work one may recover in assumpsit; Throop v. Sherwood, 4 Gilm. 98, where assumpsit was brought for work and labor done, and on an account stated; Londregon v. Crowley, 12 Conn. 562, where there was a special contract for personal services, and the plaintiff had declared on a special contract and failed in his proof because of variance; Cranmer v. Graham, 1 Blackf. 408, note, where there was a special contract to pay one a certain amount a month for twelve months for work done; Girohan v. Dailey, 4 Ala. 340, where a party contracted to serve another for a year, and it was held the entire service was a condition precedent to recovery.

Cited, and relied upon to this point also in Emslie v. City of Leavenworth, 20 Kan. 569, an assumpsit against a city for work done on a bride contract; Chesapeake, etc., Canal Co. v. Knapp, 9 Pet. 566, 9 L. 231, where assumpsit was brought to recover money due for the construction of locks; Cook v. Linn, 19 N. J. L. 20, holding that one who at another's request discharges a sum of money due may recover in assumpsit; Ridgely v. Crandall, 4 Md. 441, assumpsit on a contract to pay the difference in value on a partition; Ford v. Rockwell, 2 Colo. 377, where an action was brought for board and tuition furnished to appellant's nephew at the appellant's request; Bertrand v. Byrd, 5 Ark. 657, holding that if the special contract remains open and unperformed, or is for anything else than the payment of money, assumpsit will not lie; Beck v. Pearse, 1 Bailey L. 156, holding that assumpsit would not lie under a building contract to be paid for in installments; State v. Harmon, 15 W. Va. 124, holding that assumpsit would not lie on a bond; Garred v. Macey, 10 Mo. 165, on the point that assumpsit will not lie on special contract under seal which has been fully executed; Kerstetter v. Raymond, 10 Ind. 203, where the court said that if the defendant in assumpsit would avail himself of the special contract he must plead it; Weart v. Hoagland, 22 N. J. L. 519, holding a special contract was admissible in assumpsit to fix the price stipulated.

Contracts.— Where there is a special contract for building a house and some alterations or additions are made, the special contract is considered as subsisting so far as it can be traced, p. 303.

Merger.— Sealed instrument does not extinguish simple contract where it merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation, p. 303.

Cited in Langdon v. Paul, 20 Vt. 221, holding that a sealed instrument certifying that the maker had executed certain notes and waiving the statute of limitations did not supersede the remedy on the notes; Baker v. Baker, 28 N. J. L. 18, 75 Am. Dec. 247, holding that the taking of higher security extinguishes those of inferior degrees; Beede v. Fraser, 66 Vt. 119, 44 Am. St. Rep. 828, 28 Atl.

882, on the effect of a higher security merging a lower; Wallace v. Fairman, 4 Watts, 379, holding a note under seal with a warrant to confess judgment did not extinguish the original debt.

Assumpsit.— Special agreements are admissible under general counts in indebitatus assumpsit, p. 304.

Cited in Keyser v. District No. 8, 35 N. H. 483, holding that one selling a building may recover the amount in assumpsit; Stout v. Gallagher, 2 A. K. Marsh. 160, where under such a count a special agreement for work was held admissible; Schwartzel v. Karnes, 2 Kan. App. 785, 44 Pac. 42, holding assumpsit would lie on a special contract for services where the plaintiff had fully performed.

Merger.— Mere recital of a prior in a later agreement, after it has been executed, does not extinguish the former, p. 304.

Corporations may by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts within the scope of his authority would be binding upon the corporation, p. 305.

The following cases cite, approve and variously apply this principle: Green v. State, 8 Ohio, 314, where the appointment of a superintendent was by parol; Everett v. United States, 6 Port. 182, 30 Am. Dec. 588, and State v. Allis, 18 Ark. 280, both holding that a corporation may appoint an agent whose acts within his powers would be valid without a seal; Fitch v. Lewiston Steam Mill Co., 80 Me. 38, 12 Atl. 734, holding that this was the rule whatever the purpose of the agency; Garvey v. Colcock, 1 Nott & McC. 233, holding that while a corporation cannot act directly except under seal, it may appoint by vote an agent whose acts will be binding; Davis v. Memphis, etc., Ry. Co., 22 Fed. 886, on the point that a president may employ attorneys without any contract under seal; Osborn v. United States Bank, 9 Wheat. 829, 6 L. 226, holding that it was unnecessary for an attorney to produce authority under seal; The Banks v. Poitiaux, 3 Rand. 143, 147, 15 Am. Dec. 708, 711, holding a corporate seal was not essential to an agreement to convey real estate; Female Orphan Asylum v. Johnson, 43 Me. 184, holding that a corporation empowered to make contracts in writing is not thereby authorized to confer that power on their officers; Savings Bank v. Davis, 8 Conn. 207, 210, on the point that a corporation cannot convey or mortgage except by its corporate seal; Union Bank v. Ridgely, 1 Harr. & G. 421, holding that acts of corporations may now be evidenced by writing without seal; Hamilton v. Lycoming Ins. Co., 5 Pa. St. 344, holding that corporations may contract by parol within the sphere of their proper functions; Crawford v. Longstreet, 43 N. J. L. 329, holding a lease for years need not be under seal; Commercial Bank v. Newport M. Co., 1 B. Mon. 14, 35 Am. Dec. 172, and Butts v. Cuthbertson, 6 Ga. 171, both holding that a note given by an agent within his powers bound the corporations;

Garrison v. Combs, 7 J. J. Marsh. 85, 22 Am. Dec. 121, holding a seal was not necessary to pass interest in a note; Eastman v. Coos Bank, 1 N. H. 26, holding an express vote is not necessary to authorize the cashier to deliver notes for collection; Gottfried v. Miller, 104 U. S. 527, 26 L. 853, holding a corporation may assign letters patent without a seal; in The Cape Sable Co.'s Case, 3 Bland Ch. 610; Poultney v. Wells, 1 Aik. 184, and Baptist Church v. Mulford, 8 N. J. L. 185, all holding that assumpsit lies against a corporation; Saxton v. Texas, etc., R. R. Co., 4 N. Mex. 385 (203), 16 Pac. 854; Damon v. Granby, 2 Pick. 353, and State v. Allis, 18 Ark. 278, on the point that the seal of an agent is not the seal of the corporation; Union Bank v. Jacobs, 6 Humph. 519, holding that a corporation created to construct a road may borrow money, although the charter directs that funds shall be raised by subscription; Dennis v. Maynard, 15 Ill. 478, holding that a warrant issued by tax commissioners without a seal was valid.

Denied in Frankfort Bank v. Anderson, 3 A. K. Marsh. 3, holding that a corporation can only bind itself by a seal, and that a banking corporation is no exception.

Corporations.— All parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises binding on the corporation, p. 306.

The citations show the following cases where this holding is affirmed and applied: Moss v. Averell, 10 N. Y. 454, and Kelly v. Board of Public Works, 75 Va. 271, on the point that a corporation may bind itself in any way that a natural person may bind himself; Badger v. Bank of Cumberland, 26 Me. 435, holding that authority need not be proved by record or writing; Southern Hotel Co. v. Newman, 30 Mo. 121, on the point that promises may be implied from its acts and the acts of its agents; Union Bank v. Ridgely, 1 Harr. & G. 413, holding a corporation may be bound by the acts of its agents not reduced to writing; Garrison v. Combs, 7 J. J. Marsh. 88, 22 Am. Dec. 124, holding an agent within his authority may bind by any agreement which if made in his own right would bind him; In re Troy Woollen Co., 8 N. B. R. 414, 24 Fed. Cas. 246, on the point that a party dealing with an agent acting for the benefit of his principal, may sue the principal; Mott v. Hicks, 1 Cow. 532, 537, 13 Am. Dec. 552, 556, holding a corporation to be liable in assumpsit for the simple contracts of its agents within their authority; Cram v. Bangor House Proprietary, 12 Me. 357, holding assumpsit would lie where the directors acting within their authority contracted under their own seals; Stamford Bank v. Benedict, 15 Conn. 445, holding a verbal direction from the directors to a cashier is sufficient authority; Davenport v. Peoria M. & F. I. Co., 17 Iowa, 283, holding that acts of a corporation evidenced by a vote are as binding as the most solemn acts under seal; Preston v. Missouri

& Penn. Lead Co., 51 Mo. 45, holding the officers may confer authority on an agent to draw and execute bills of exchange for the company; Bank of the United States v. Dandridge, 12 Wheat. 74, 100, 101, 106, 114, 6 L. 556, 565, 567, 570, holding that the bond of a cashier need not be accepted to enable him to enter upon his duties; Ohio, etc., R. R. Co. v. Middleton, 20 Ill. 636, on the point that a signature of the corporation to a contract executed by an agent is not material; Richards v. Merrimac, etc., R. R. Co., 44 N. H. 135, on the point that notes signed by officers acting within their authority are binding; Kramrath v. City of Albany, 127 N. Y. 581, 28 N. E. 401, where the court said that the contract must be within the scope of the corporate powers, and not required to be made in a particular way; Mount Sterling, etc., Tp. Co. v. Looney, 1 Met. (Ky.) 552, 71 Am. Dec. 493, holding that to bind a corporation by a contract of its president, power under the act of incorporation or ratification must be shown; Savings Bank v. Davis, 8 Conn. 202, holding an agent or attorney may be appointed and authorized to convey realty by a vote of the directors, without a seal; Baptist Church v. Mulford, 8 N. J. L. 193, holding assumpsit would lie against the trustees of a church in their corporate capacity, for work and labor and goods sold.

Cited to this point and relied upon also in McKim v. Odom, 3 Bland Ch. 421, on the point that an answer of a representative of a corporation in a suit against it is received as evidence against the corporation itself; Eagle Woollen Mills Co. v. Monteith, 2 Or. 288, on the point that a deed by an agent must be in the name of the corporation; Crowley v. Genesee Min. Co., 55 Cal. 277, on the point that a corporation is bound by acts of its officers if it so acts as to deceive third persons; Tracy v. Talmage, 14 N. Y. 191, 67 Am. Dec. 151, on the point that a corporation may become liable on a contract founded upon a moral obligation; New York, etc., R. R. Co. v. Schuyler, 34 N. Y. 85, holding that a corporation wrongfully permitting the transfer of stock was liable upon an implied promise; San Antonio v. Lewis, 9 Tex. 70, where an action was brought against a city on a contract by a mayor under a parol authority by the board of aldermen; Russell v. Mayor, etc., of N. Y., 2 Den. 473, where a plaintiff sued on assumpsit for merchandise blown up by order of the mayor and aldermen; Memphis v. Adams, 9 Heisk. 529, 24 Am. Rep. 338, holding a city may, without express authority, employ counsel to attend to the corporate interests; Chapman v. City of Brooklyn, 40 N. Y. 380, holding a city is liable to refund property received under a contract, whose consideration has failed; Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 176, where the court said that with the multiplication of corporations there had been a corresponding change in the law relating to them; Chestnut Hill T. Co. v. Rutter, 4 Serg. & R. 16, 8 Am. Dec. 676, holding that an action of trespass on the case lies against a corporation for a tort.

Distinguished in Crescent City Bank v. Carpenter, 26 Ind. 113, holding that an assignment to a cashier was an assignment to him personally and not to the bank; denied in Waller v. Bank of Kentucky, 3 J. J. Marsh. 203, holding a corporation can only contract through the medium of its corporate seal.

Corporations.— Assumpsit will lie against a corporation on an implied contract, p. 306.

Cited and principle applied in Jones v. Trustees, etc., 46 Ala. 630, on an agreement to pay a certain sum as an endowment; Selma v. Mullen, 46 Ala. 414, holding assumpsit would lie against a city upon an express or implied promise; Seagraves v. Alton, 13 Ill. 371, an assumpsit against a city for the support of a pauper; Randall v. Van Vechten, 19 Johns. 66, 10 Am. Dec. 196, holding assumpsit would lie against a city on a contract by its agents under their own seals; Dunn v. St. Andrew's Church, 14 Johns. 119, an assumpsit against a church for work and labor by the clerk of the church; Steele v. Oswego, etc., Mfg. Co., 15 Wend. 266, holding assumpsit would not lie on a note to which the corporate seal was attached; McCullough v. Talladega Ins. Co., 46 Ala. 378, an assumpsit on a written contract to pay money; Foster v. Essex Bank, 17 Mass. 503, 9 Am. Dec. 174, on the point that actions lie against corporations the same as against individuals; Mott v. Hicks, 1 Cow. 542, 13 Am. Dec. 560, dissenting opinion, holding assumpsit lies against a corporation on the simple contracts of its agents; Worrall v. Munn, 5 N. Y. 243, 245, 55 Am. Dec. 339, 340, on the point that assumpsit lies on a contract by an agent under seal where his authority was by parol; People ex rel. Lynch v. Mayor, etc., of N. Y., 25 Wend. 685, on the point that assumpsit will lie for neglect of corporate duty; Ex parte Lynch, 2 Hill, 46, note, another phase of the same case; Kortright v. Buff. Comm. Bk., 20 Wend. 94, holding assumpsit would lie against a corporation refusing to permit a transfer of its stock; Wyman v. American Powder Co., 8 Cush. 181, holding assumpsit would lie on refusal to give the owner of stock certificates on demand; Bank of State v. Harrison, 66 Ga. 700, holding that mandamus would not lie to compel a transfer of stock; Childs v. Bank of Missouri, 17 Mo. 216, holding that actions of malicious prosecution, slander, or false imprisonment would not lie against corporations.

Distinguished in Orr v. Bank of the United States, 1 Ohio, 42, 13 Am. Dec. 590, holding that an action of assault and battery will not lie against a corporation.

Corporations can make promises and enter into contracts without express authority, p. 307.

Cited in Welland Canal Co. v. Hathaway, 8 Wend. 484, 24 Am. Dec. 55, on the point that a corporation can only bind itself in pursuance of the powers given it; Sanborn v. Fireman's Ins. Co., 16 Gray, 454,

77 Am. Dec. 421, holding insurance companies could make oral contracts though authorized to make contracts by the signature of the president; Detweiler v. Breckenkamp, 83 Mo. 53, on the point that corporations have power to make contracts necessary and usual in the course of their business; First National Bank v. North Mo. C. & M. Co., 86 Mo. 140, holding that the authority of a corporation to issue a note need not be expressly given; Falckner v. United States Bank, 8 Wheat. 358, 5 L. 636, on the point that the common law cannot control by implication the powers of a corporation under the statute; Planters' Bank v. Sharp, 6 How. 322, 323, 12 L. 456, 457, holding that a statute limiting the powers of chartered banks to contract was unconstitutional. See note to 13 Am. Dec. 562, on the powers of corporations to contract.

Corporation acting under contract of agent and paying money under it, and the whole benefit of the contract resulting to the corporation, it may be properly inferred that the corporation has adopted the contract, p. 307.

The citations show a number of cases on ratification by corporations, affirming and applying this doctrine: Leggett v. New Jersey Manufacturers, 1 N. J. Eq. 557, 23 Am. Dec. 737, holding a corporation may ratify unauthorized acts of its agents; Melledge v. Boston Iron Co., 5 Cush. 175, 51 Am. Dec. 67, on the point that a corporation acting on a contract of an agent ratifies it; Skinner v. Dayton, 19 Johns. 550, 558, 10 Am. Dec. 305, and Sargent v. Franklin Ins. Co., 8 Pick. 98, 19 Am. Dec. 309, on the point that a contract by agents under their seals is binding on the corporation when it recognized the contract; Pittsburgh, etc., Ry. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 381, 33 L. 160, 9 S. Ct. 773, holding a contract by a president known to the directors and not disapproved by them binds the corporation; Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 51 Fed. 327, 10 U. S. App. 98, holding that a contract letting another railroad into the joint use of the company's bridge was binding, although never formally ratified; Missouri Pac. R. R. Co. v. Sidell, 67 Fed. 469, 35 U. S. App. 152, holding that a contract made to pay for the construction of an extension of the road was valid, although never approved by the stockholders; American Exchange National Bank v. First National Bank, 82 Fed. 972, 48 U. S. App. 652, holding the fact that the directors unite in making a guaranty note to secure a loan previously arranged for by the cashier, is evidence of ratification for the cashier's acts; Mason v. Crosby, 1 Wood. & M. 358, F. C. 9,234, holding a principal could not receive the proceeds of a sale by an agent without being liable civilly for his fraudulent representations; Merchants' Bank v. Central Bank, 1 Ga. 428, 44 Am. Dec. 666, holding that a corporation by use of the property and the receipt of the benefit under a contract, ratifies it; Legrand v. Manhattan Mercantile Assn., 80 N. Y. 639. on the point that a contract of hiring by a manager of a corporation is

binding when it was known and assented to by the directors; Union Bank v. Ridgely, 1 Harr. & G. 427, on the point that money paid on a contract of an agent is evidence of ratification; Durar v. Hudson Co. M. I. Co., 24 N. J. L. 201, on the point that an entry made by the secretary in the books, and subject at all times to inspection, presupposes authority to make it; Logansport v. Dykeman, 116 Ind. 19, 17 N. E. 590, and San Francisco Gas Co. v. San Francisco, 9 Cal. 471, both holding that a city could not receive the benefit of services and property and then deny its liability; Keyser v. District No. 8, 35 N. H. 481, holding that a school district by claiming a building under a purchase in its behalf, ratifies the action of the committee; Peterson v. Mayor, etc., of N. Y., 17 N. Y. 453, holding a resolution adopting plans prepared at the request of a committee not authorized, and directing the erection of the building was a ratification; Goshorn v. County Court, 42 W. Va. 740, 26 S. E. 454, where the court said that if a municipality obtains property without authority, the law, independent of statute, will compel restitution; Fullam v. Inhabitants of West Brookfield, 9 Allen, 5, holding that where a town committee makes a contract binding only themselves, the town revoking the authority and prohibiting the execution is not liable; Taylor v. Lambertville, 43 N. J. Eq. 110, 10 Atl. 811, holding a city liable under an implied contract to pay for gas for a year where it accepts gas for any considerable portion of the year; Cady v. Shepherd, 11 Pick. 406, 22 Am. Dec. 383, holding a partner may bind his copartner by a contract under seal, provided the copartner assents to or ratifies the contract; Herbert v. Hanrick, 16 Ala. 590, holding a subsequent parol ratification by a partner of a deed by his copartner was an adoption of the deed; Worrall v. Munn, 5 N. Y. 242, 55 Am. Dec. 338, where a partner's power to bind his copartner by a deed was discussed.

7 Cr. 307–327, 3 L. 354, CLARK v. CARRINGTON.

Indemnity.— Judgment against the person to be indemnified, if fairly obtained, and especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity, p. 322.

Cited and doctrine applied in Middleton v. Thompson, 1 Spears L. 74, dissenting opinion, holding that reasonable notice to a warrantor to come in and defend is sufficient; Brown v. Chaney, 1 Ga. 414, where the court said that to make such a judgment conclusive, notice was indispensably necessary; Boston v. Worthington, 10 Gray, 499, 71 Am. Dec. 679, where the question was as to the conclusiveness of a judgment against a city for defects in a highway, as against a tenant of the land; Littleton v. Richardson, 34 N. H. 187, holding a party obstructing a highway bound by a judgment by a traveller against the town because of it; Gibson v. Love, 2 Fla.

616, holding that a surety is in privity with a judgment rendered against his cosurety; Lacock v. Commonwealth, 99 Pa. St. 210, on the point that a judgment against a surety is evidence against his principal; The Alert, 40 Fed. 837, on the point that notice by the charterers of a proceeding in rem against the ship bound them; Holbrook v. Holbrook, 15 Me. 12, an action upon a promise to indemnify plaintiff against all claims by one to whom he had previously given a bond to convey; Salle v. Light's Exrs., 4 Ala. 707, 39 Am. Dec. 320, holding a judgment against a vendee by a third person is not evidence that the vendor had no title; Carpentier v. Pier, 30 Vt. 88, 73 Am. Dec. 291, holding that one transferring a note with a warranty was a privy so as to be bound by the judgment; Smeltzer v. White, 92 U. S. 394, 23 L. 509, on the point that a warrantor is concluded by judgments if he had reasonable notice and was required to assist; New York, etc., Co. v. Protection Ins. Co., 1 Story, 462, F. C. 10,216, on the point that if notice of a suit upon the original policy is given reassurers, they must act upon such notice within a reasonable time; Kessler v. McConachy, 1 Rawle, 445, on the point that a judgment ascertaining a precise fact, character or privilege, is always evidence where it comes in question. See also note to 83 Am. Dec. 385, where the subject of judgments as evidence against persons liable to defendants therein was discussed; and note to 2 Am. St. Rep. 878, citing cases on the conclusiveness of judgments.

Assignments.— Assignee of property as security agreeing to comply with a contract of the assignor is liable on the contract to the same extent that the assignor is liable, p. 326.

7 Cr. 327–332, 3 L. 360, DICKEY v. BALTIMORE INS. CO.

Insurance at and from an island insures the vessel while coasting from port to port of the island for the purpose of the voyage insured, p. 331.

Cited in Equitable Ins. Co. v. Hearne, 20 Wall. 497, 22 L. 399, where a policy on a voyage "from Liverpool to Cuba and to Europe via Falmouth" was construed.

Distinguished in Hearn v. New England M. M. S. Co., 3 Cliff. 325, F. C. 6,301, holding that the word "port" does not mean "port or ports."

7 Cr. 332–338, 3 L. 362, MARINE INS. CO. OF ALEXANDRIA v. HODGSON.

Judgments.— Any fact which proves it to be clearly against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery, p. 336.

The citations on this point are a striking tribute to the "great chief justice." They show how extensively the courts have approved and relied upon his statement of this doctrine of law; and approve and apply it as follows: Embry v. Palmer, 107 U. S. 10, 27 L. 349, 2 S. Ct. 31; Phillips v. Negley, 117 U. S. 675, 678, 29 L. 1015, 1016, 6 S. Ct. 905, 906, and Hood v. New Haven, etc., R. R. Co., 23 Conn. 622, all holding no relief will be granted where the courts of law can furnish adequate relief; Batchelder v. Bean, 76 Me. 375, where the court said that equity would not enjoin a judgment on the precise ground the defendant sought to prevent a recovery of the judgment; Barton v. Radclyffe, 149 Mass. 280, 21 N. E. 375, where the defendant presented no different inquiry from that involved in the original suit; Stout v. Slocum, 52 N. J. Eq. 89, 28 Atl. 7, holding equity will never interfere unless the defendant can show merits; Crim v. Handley, 94 U. S. 658, 24 L. 218, holding that absence of one of the counsel is not a ground for relief; Ames v. Snider, 55 Ill. 501, holding that inattention of counsel was no ground for interfering; Thomas v. Phillips, 4 Smedes & M. 424, where the court said that equity would not relieve unless the defense was prevented without fault, even though the contract was against public policy; Ayres v. Morehead, 77 Va. 588, holding that one who by his own and partly his attorney's negligence fails to avail himself of a defense is not entitled to relief; Rogers v. Parker, 1 Hughes, 155, F. C. 12,018, and Dickinson v. Sizer, 4 Rand. 121, where relief was not granted because of the negligence of the attorney; Kersey v. Rash, 3 Del. Ch. 333, a bill in equity because the complainant was not able to attend the trial owing to illness, and because of newly-discovered evidence; Dobson v. Pearce, 12 N. Y. 165, 62 Am. Dec. 154, restraining proceedings upon a judgment fraudulently obtained; Cairo & F. R. R. Co. v. Titus, 27 N. J. Eq. 106, where equity refused to interfere because of new testimony obtainable by diligence; Norton v. Woods, 22 Wend. 523, where the question was as to whether a defendant omitting to file a bill for discovery could subsequently file a bill for relief; Stroup v. Sullivan, 2 Ga. 279, 46 Am. Dec. 390, where a garnishee was not relieved from a judgment in a suit which he supposed was abandoned, but without justification; Trefz v. Knickerbocker, 8 Fed. 180, holding equity would grant relief from a judgment on the ground of fraud; Lazarus v. McGuirk, 42 La. Ann. 201, 8 So. 255, holding that the rule that a judgment silences all defenses does not apply in cases of fraud; State v. Matley, 17 Neb. 567, on the point that a judgment obtained through fraud, accident, or mistake will be set aside; Furnald v. Glenn, 56 Fed. 374, and Mayor, etc., of N. Y. v. Brady, 115 N. Y. 616, 22 N. E. 242, holding that equity would not set aside a judgment for fraud, if complainant had an opportunity to obtain relief; Lyme v. Allen, 51 N. H. 245, on the point that fraud must be such as to deprive the injured person of his rights and be unmixed with any fault; Hinrickson v. Van

Winkle, 27 Ill. 337, holding equity would not relieve against a judgment obtained by fraud or accident if there had been fault; Smith v. Worthington, 53 Fed. 981, 10 U. S. App. 616, where a suit was brought to set aside an administrator's sale for fraud.

Other citing cases have relied upon the principal case to this point, as follows: Wingate v. Haywood, 40 N. H. 441, where the court said that equity had so great an abhorrence of fraud that it would set aside its own decrees if founded thereupon; Parish v. Gear, 1 Pinn. 274, dissenting opinion, where an injunction was sought because the judgment was fraudulent and included a debt paid; Street v. Alden, 62 Minn. 162, 54 Am. St. Rep. 633, 64 N. W. 158, where relief was sought from a verdict fraudulently and surreptitiously obtained by collusion and conspiracy; Graver v. Faurot, 64 Fed. 244, where the only fraud consisted in false swearing and perjury; Young v. Sigler, 48 Fed. 183, where equity enjoined a judgment against two parties where one of the defendants secretly compromised the whole claim; Norman v. Burns, 67 Ala. 250, holding equity will relieve where a party was without fault in failing to assert his legal rights or was prevented from doing so by fraud, accident or mistake; Owens v. Ranstead, 22 Ill. 168, holding a judgment by means of a false return and without notice might be relieved; Graver v. Faurot, 76 Fed. 259, 46 U. S. App. 268, a suit to annul a fraudulent decree, the fraud being positive and actual; Ross v. Banta, 140 Ind. 133, 34 N. E. 868, holding that a judgment may be collaterally attacked in equity where it was against conscience to execute it; Davenport v. Moore, 74 Fed. 947, holding a Circuit Court could annul a decree of a State court for fraud, where there was diverse citizenship; Hibbard v. Eastman, 47 N. H. 509, 93 Am. Dec. 469, where a holder agreed to discharge a maker on receiving the note of a third person, and receiving such note proceeded to judgment; Purviance v. Edwards, 17 Fla. 143, holding equity would enjoin a judgment where one interposes no defense, relying upon the assurance of plaintiff's attorney that he will not take judgment; Tucker v. Talbott, 15 Ind. 118, a suit to enjoin a judgment on a note because of a violation of a prior oral agreement by the plaintiff; Dilly v. Barnard, 8 Gill & J. 185, where the court refused to relieve against a judgment because of bad faith of an adversary, the complainant being guilty of bad faith himself; Ballard v. Railroad Co., 94 Tenn. 206, 28 S. W. 1088, holding equity would not relieve because the plaintiff was deprived of his right of appeal through the refusal of the judge to carry out an agreement to complete a bill of exceptions after the term; Webster v. Skipwith, 26 Miss. 350, where there was a misunderstanding between counsel, and the court relieved against a judgment because of a mistake of fact; Dunn v. Fish, 8 Blackf. 409, and Lieby v. Ludlow, 4 Ohio, 492, in both cases on the point that because a court of law decides a question erroneously it is not ground for relief in equity; Pollock v. Gilbert, 16 Ga. 403, 60 Am. Dec. 735, holding that no

degree of wrong in the determination of a cause would entitle one to relief; Walker v. Shreve, 87 Ill. 477, holding that the mere fact of judgment by default in trespass is for a much greater sum than it ought to have been is not ground for relief; Stilwell v. Carpenter, 59 N. Y. 423, where the court said it is not sufficient ground that the claim was unfounded or that the court acted erroneously; Palmer v. Bethard, 66 Ill. 531, where a judgment settling a partnership account was not set aside because of mistakes subsequently discovered; State Bank v. Campbell, 12 Ind. 45, where a mistake was held not ground for relief after six years; Kearney v. Sascer, 37 Md. 276, holding that mistake as to the facts arising from want of due diligence would not entitle one to relief; Currier v. Esty, 110 Mass. 544, where parties in a writ of entry by mistake included a parcel to which no claim was made; Kibbe v. Benson, 17 Wall. 628, 21 L. 742, where a judgment by default on insufficient service, the defendant having no actual notice and averring a good title in himself, was set aside; Hoey v. Jackson, 31 Fla. 555, 13 So. 463, holding that a party regularly served and neglecting to appear will not be relieved; Handley v. Jackson, 31 Or. 555, 65 Am. St. Rep. 841, 50 Pac. 916, injunction granted on the ground that the only appearances for a defendant not served was by an unauthorized attorney. Still other citing cases affirm and apply the syllabus doctrine, as follows: Crocker v. Allen, 34 S. C. 463, 27 Am. St. Rep. 838, 13 S. E. 653, where equity refused to relieve against a judgment rendered without service of process in the absence of any showing of equitable grounds; Ridgway v. Bank of Tennessee, 11 Humph. 525, holding equity would interfere where a sheriff made a false return, and judgment was rendered without notice or appearance; Goalsby v. St. John, 25 Gratt. 162, holding that one who had notice of a judgment in time to quash it was not entitled to relief; Rhode Island Exchange Bank v. Hawkins, 6 R. I. 204, holding equity would relieve a garnishee where a court of law was unable to do so; Walker v. Heller, 90 Ind. 202, and Vennum v. Davis, 35 Ill. 574, on the point that if one has a good defense not available it is a good ground for an injunction; White v. Herndon, 40 Ga. 498, holding that equitable defenses and defenses accruing since the judgment can be taken advantage of in equity; Powers v. Butler, 4 N. J. Eq. 470, where a judgment was enjoined because of a defense unknown to the defendant at the trial; Hughes v. Nelson, 29 N. J. Eq. 551, holding that a judgment at law is no bar in equity on matters which are grounds of equitable relief only; Stevens v. Hertzler, 114 Ala. 574, 22 So. 124, holding that where a defendant has a purely equitable defense he is not debarred by deferring to file his bill until the judgment was rendered; Barnes v. Dodge, 7 Gill, 118, where a judgment was enjoined until the equities of the parties were adjusted; in Montgomery v. Griffin, Walk. (Miss.) 460; Briesch v. McCauley, 7 Gill, 197, and Chicago, etc., R. R. Co. v. Field, 86 Ill. 273, where relief was granted

so as to enable one to have the benefit of a set-off; Robinson v. Wheeler, 51 N. H. 386, holding equity would not suspend proceedings to enable the defendant to obtain an adjustment of partnership concerns that he may set off a balance due him, unless the bill shows a balance will be due him; Gaines v. Hale, 26 Ark. 197, holding that a judgment based on a certificate of entry which has been properly cancelled will not be enforced; Carter v. Anderson, 4 Ga. 519, holding that the dismission of an executor is a complete bar unless impeached for fraud; Hickerson v. Raiguel, 2 Heisk. 336, where an accommodation indorser was relieved from a judgment where the bill was disposed of in an unauthorized manner without his knowledge; Freeman v. Miller, 53 Tex. 378, where a garnishee applied for relief against a judgment; Fowler v. Dillon, 1 Hughes, 238, 12 Bank. Reg. 314, F. C. 5,000, holding that equity could reduce the amount of judgments in Confederate money to the equivalent in legal money; Walls v. Endel, 20 Fla. 98, where relief was said to be proper against a judgment in ejectment where the deed under which the plaintiff claimed was a mortgage; Warren v. Baker, 43 Me. 573, holding that discovery will not lie for the purpose of obtaining a new trial in an action at law; Marshall v. Holmes, 141 U. S. 596, 35 L. 873, 12 S. Ct. 64, where the court said that equity would not assume to control a judgment at law simply for the purpose of giving a new trial; Sumner v. Marcy, 3 Wood. & M. 114, F. C. 13,609, where a judgment to recover property of a debtor recovered in another State was enjoined; Governor v. Barrow, 13 Ala. 542, where it was held that the mistake or intoxication of a witness was no ground for relief in equity; Bell v. Cunningham, 1 Sumn. 104, F. C. 1,246, holding equity would enjoin pro tanto, so much of a judgment as was recovered by surprise; Montgomery v. Scott, 9 S. C. 34, where one sought relief from a bond and mortgage against a bona fide holder. See note to 54 Am. St. Rep. 242, where the subject of relief in equity against judgment is discussed at length; and note to 19 Am. Dec. 138, citing cases on the power of equity to relieve against judgments.

Judgments.— Equity will not relieve from a judgment on account of a defense which if good anywhere was good at law, and which plaintiff was not prevented by the act of the defendants or by any pure or unmixed accident from making at law, p. 336.

Upon this point also the citing cases are numerous: Kersey v. Rash, 3 Del. Ch. 339, holding that the loss of a case through a party's own laches will defeat his claim; Duncan v. Lyon, 3 Johns. Ch. 357, 8 Am. Dec. 516, where relief was denied to one because of delay; Doyle v. Reilly, 18 Iowa, 113, 85 Am. Dec. 585, on the point that plaintiff must be unmixed with fault or negligence himself; Thomas v. Thomas, 88 Wis. 93, 59 N. W. 506, where a petition was denied because if the petitioner was ignorant, it was through

negligence; Schroeppell v. Shaw, 3 N. Y. 452, holding that the passive neglect of a creditor to enforce a bond and mortgage gave no ground for relief to a surety; Kearney v. Smith, 3 Yerg. 132, 24 Am. Dec. 552, where complainant alleged that his plea in abatement was unexpectedly stricken out and a plea to the merits required instanter, which being filed, the cause was put to the jury without his witnesses; Huston v. Ditto, 20 Md. 324, holding that a defense available at law and lost by acquiescence in the decision was not ground for relief; George v. Tutt, 36 Mo. 142, where it was held that a party properly served who failed to appear would not be relieved; Shricker v. Field, 9 Iowa, 372, where the court said that the negligence of one's attorney was no ground for relief; Richmond Enquirer Co. v. Robinson, 24 Gratt. 552, holding that the negligence of an officer of a corporation would exclude the corporation; Prater v. Robinson, 11 Heisk. 395, where the court refused relief against a default which was grossly unjust, the party not being without fault and having an attorney; Green v. Dodge, 6 Ohio, 83, 25 Am. Dec. 738, holding a judgment will not be relieved against because the complainant incorrectly stated his case or made a false admission in another action; Miller v. Palmer, 55 Miss. 335, where a purchaser at an administration sale was held not to be negligent because he in good faith relied upon the validity of the proceedings; Oregon, etc., Co. v. Gates, 10 Or. 518, holding that generally equity would not interfere to relieve a defendant who has neglected to make his defense; Brown v. County of Buena Vista, 95 U. S. 159, 24 L. 423, holding a court will not relieve where the party has been guilty of laches or fault; Life Ins. Co. v. Bangs, 103 U. S. 783, 26 L. 609, holding that a bill will not lie where the complainant sets up matters which he had full opportunity to plead; Warner v. Helm, 1 Gilm. 231, where the court said that equity will not relieve against accident, the result of one's own negligence; Smith v. Allen, 63 Ill. 476, where the court refused to interfere on the ground that the defendant was necessarily absent and prepared an affidavit which could not be used because the clerk did not attach his seal; Russ v. Wilson, 22 Me. 211, where equity refused to enjoin a judgment because the defendant had failed to comply with an agreement with the plaintiff; Horn v. Queen, 4 Neb. 114, where a new trial was granted in equity because of illness of the defendant; Cammann v. Traphagan, 1 N. J. Eq. 30, holding that matters of defense which came to complainant's knowledge since the trial, are proper grounds for an injunction and requiring discovery.

Other citing cases affirm this principle in making the following holdings: Wells, Fargo & Co. v. Wall, 1 Or. 296, 299, holding that ignorance of a material fact was not a ground as the party had a remedy at law; Phillips v. Pullen, 45 N. J. Eq. 6, 16 Atl. 10, holding equity would not enjoin a judgment because it was unjust; Galveston, etc., Ry. Co. v. Dowe, 70 Tex. 4, 6 S. W. 792, holding an

injunction would not lie to correct errors of an inferior court, even when no appeal would lie; Rosenberger v. Bowen, 84 Va. 663, 5 S. E. 699, holding that equity will not interfere on the ground that the judgment was erroneous; Miller v. Duval, 26 Md. 52, where the principal grounds for equitable interposition were the refusal of the court to admit testimony and the insolvency of the defendant; Skirving v. Nat. L. Ins. Co., 59 Fed. 744, 19 U. S. App. 442, where a judgment fairly and regularly obtained against a school district on warrants was not enjoined, although there was a good defense at law; Barnett v. Barnett, 83 Va. 511, 2 S. E. 736, holding that in equity an obligor could not set up that he had discharged the bond, as that was a defense he should have set up at law; Cotton v. Hiller, 52 Miss. 11, where the court said that a complainant seeking a new trial must establish to a high degree of certainty the validity and potency of his defense; Miller v. Doxey, Walk. (Miss.) 333, dissenting opinion, p. 338, where the court refused to grant relief where the case was wholly cognizable at law and the new proofs were merely cumulative; Pierce v. Winter Iron Works, 32 Ala. 74, holding that a set-off available either at law or in equity is not ground for relief; Parker v. Morton, 5 Blackf. 2, on the point that if defense was set up and tried at law, equity will not interfere; Hendrickson v. Hinckley, 17 How. 445, 15 L. 124, on the point that equity will not relieve unless complainant has an equitable defense of which he could not avail himself at law; Pollock v. Gilbert, 16 Ga. 405, 60 Am. Dec. 737, holding that equity would interfere if the execution of the decree would be against conscience and that such fact could not be taken advantage of at law; Bassett v. Henry, 34 Mo. App. 556, where the court interfered to stay enforcement of a judgment which in equity and good conscience had been paid; McCoy v. President, etc., of Bank of U. S., 5 Ohio, 552, holding that indorsers charged at law on the ground of being secured, cannot be relieved where subsequently deprived of the security fund in favor of a previous lien; Semple v. Hagar, 27 Cal. 169, where relief was sought from a judgment on the ground of fraud; Smith v. Nelson, 62 N. Y. 289, holding a judgment would not be annulled for fraud if there was a good defense and the facts were known; Blackburn v. Bell, 91 Ill. 442, where it was held one could not maintain a bill to obtain relief from a judgment where he was a party to the fraud; Dringer v. Receiver of Erie Ry., 42 N. J. Eq. 582, 8 Atl. 816, holding that to annul a judgment because of fraud it must appear that if there had been no fraud there would be no judgment; Miller v. Gaskins, 1 Smedes & M. Ch. 526, where a judgment was relieved against because of illegality of the contract, the defense not being set up, through ignorance; Knox County v. Harshman, 133 U. S. 154, 33 L. 588, 10 S. Ct. 258, where a court denied a bill to restrain execution on the ground of improper service; Gaines v. Hale, 26 Ark. 209, dissenting opinion, holding that a judgment based on a certifi-

cate of entry which has been properly cancelled, will be annulled; Mattingly v. Nye, 8 Wall. 373, 19 L. 381, on the point that if there is any ground for equitable relief against a judgment, it should be presented directly; Veazie v. Williams, 8 How. 161, 12 L. 1030, on the point that the Supreme Court on its equity side is capable of imposing its own terms on the party to whom it grants relief. See also note to 19 Am. Dec. 603, on power of equity to relieve against judgments at law.

Insurance.— Misrepresentation of the age and tonnage of a vessel by which the insurers agreed to a higher valuation is no ground for relief in equity where the plaintiffs were not prevented or disabled from using it in an action on the policy, p. 338.

Cited in Phœnix Ins. Co. v. McLoon, 100 Mass. 476, on the point that valuation of a subject insured in a policy is conclusive in the absence of fraud.

7 Cr. 339–348, 3 L. 364, LOCKE v. UNITED STATES.

Information for unloading goods without a permit under section 50 of the collection law of March 2, 1799, is sufficient, although the time and place of the importation and the vessel in which it was made are not alleged, p. 344.

Cited and applied in Hartford v. United States, 8 Cr. 110, 3 L. 504, construing section 50 of the collection act of 1799, requiring a permit for the landing of goods; United States v. Three Parcels of Embroidery, 3 Ware, 79, F. C. 16,512, where the essentials in an information in rem for a forfeiture under chapter 22, section 60 of the act were considered; Friedenstein v. United States, 125 U. S. 231, 31 L. 740, 8 S. Ct. 842, dissenting opinion, 237, 31 L. 742, 8 S. Ct. 845, holding an information under the revenue laws for forfeiture of goods where no fine or imprisonment was sought, was a civil action; United States v. O'Sullivan, 27 Fed. Cas. 373, on the point that in libels on information to enforce forfeitures, pleading according to the terms of the statute is sufficient; Gelston v. Hoyt, 3 Wheat. 330, 4 L. 402, upon the point as to the degree of certainty required in an information; American Ins. Co. v. Johnson, Blatchf. & H. 15, F. C. 303, the court saying that the true spirit of all pleadings is to give notice to the opposite party of the charge; Clifton v. United States, 4 How. 250, 11 L. 961, on the point that one good count will uphold a general verdict, although some of the counts are bad; Claasen v. United States, 142 U. S. 147, 35 L. 968, 12 S. Ct. 170, where a president of a bank was indicted for embezzling property of the institution; United States v. Whiskey, 28 Fed. Cas. 537, where amendments to the information by adding counts were allowed.

Probable cause.— Term "probable cause" means less evidence than would justify condemnation, and in all cases of seizure has a

fixed and well-known meaning; it imports a seizure made under circumstances which warrant suspicion, p. 348.

Cited in The Thompson, 3 Wall. 162, 18 L. 57, applying this principle to a case where a captured vessel was restored without costs or damages; United States v. Ship Recorder, 2 Blatchf. 121, F. C. 16,130, holding it made no difference whether the collector acted under a mistake as to facts or as to the law; The Ship La Manche, 2 Sprague, 214, F. C. 8,004, where a vessel was led into the predicament in which she was found by the mistakes of the revenue officers of the captor's own government; The George, 1 Mason, 27, F. C. 5,328, holding that justification from probable cause may be forfeited by subsequent misconduct or negligence; United States v. The Reindeer, 27 Fed. Cas. 768, holding that the court will certify that reasonable cause existed for the seizure, when there was ground for suspicion; United States v. Three Bales of Cloth, 28 Fed. Cas. 108, holding the fact that the public appraiser reported that certain goods were invoiced 19 per cent. below their market value, was of itself reasonable ground of suspicion; The Gala Plaid, Brown's Adm., 7, F. C. 5,183, holding that where goods are restored, a claimant cannot recover damages where the officer was warranted in the seizure; Averill v. Smith, 17 Wall. 92, 21 L. 616, holding trespass would not lie when the seizure was made by the collector where it was his duty to make it; Brown v. Griffin, Chev. L. 33, holding that a true bill found constituted a presumption of probable cause; Lincoln v. Smith, 27 Vt. 357, holding that under the act to prevent traffic in liquor a finding of liquor was evidence of probable cause; Sarah B. Harris, 1 Hask. (Fox's Dec.) 60, F. C. 12,344, holding that a verbal assent from a customs officer to land goods was not a compliance with the act of 1799; United States v. One Sorrel Horse, 22 Vt. 657, holding a horse was within the provisions of an act requiring one importing "merchandise" to give a manifest; The City of Mexico, 25 Fed. 925, the court saying that persons who carry on trade up to the brink of illegality must avoid at their peril additional circumstances of suspicion; United States v. Three Thousand Eight Hundred and Eighty Boxes, 8 Sawy. 133, 12 Fed. 405, holding that where opium was seized, the burden of proof is on the claimant to show the property was of domestic manufacture; The Brig Busy, 2 Curt. 587, F. C. 2,232, holding that the having on board of a considerable number of cigars not entered and with no account of their purchase and price was sufficient to put the burden on the claimant; Chaffee v. United States, 18 Wall. 546, 21 L. 914, on the point that the burden of proof is on the claimant where probable cause was shown for the seizure; Lilienthal's Tobacco v. United States, 97 U. S. 265, 24 L. 904, holding an instruction that if one violated the revenue laws the burden was on him to prove it was not done to defraud the government, to be correct.

The principal case was said to be qualified in its interpretation of

the words "reasonable cause" in United States v. Diamond Rings, 1 Sprague, 297, F. C. 16,572, where the court considered what was a sufficient concealment of goods under the collection law of 1799.

Miscellaneous.— Cited on the point that statutes prescribing for the seizure of things without service of process have been held constitutional in Glennon v. Britton, 155 Ill. 245, 40 N. E. 598, holding a statute authorizing search warrants was constitutional. Cited erroneously, Smith v. Montoya, 3 N. Mex. 11, 1 Pac. 181.

7 Cr. 349, 3 L. 367, SCHOONER GOOD CATHARINE v. UNITED STATES.

Embargo.— Condemnation for violation of embargo act is proper where a vessel originally American was captured and condemned and purchased by her former master, an American, and took on goods other than the provisions and stores necessary for the voyage and cleared out as a Dane, p. 349.

Cited on the point as to the right to withhold freight where goods are damaged in Bradstreet v. Heron, Abb. Adm. 214, F. C. 1,792, holding that consignees are entitled to a reasonable opportunity to ascertain whether the goods correspond in quantity and condition.

7 Cr. 350–354, 3 L. 367, BOND v. JAY.

Statute of limitations.— In Maryland the statute of limitations does not run against accounts between merchant and merchant, either of whom resided out of the province, p. 353.

Cited in West v. Hymer, 7 Ohio, 236, on the point that "beyond seas" and "out of the State" are analogous; Sneed v. Ewing, 5 J. J. Marsh. 483, 22 Am. Dec. 62, upon the power and duty of a State to refuse to admit an application of a public law adopted by other States for regulating international rights.

Distinguished in Didier v. Davison, 2 Sandf. Ch. 69, where the accounts between the merchants were within the statutory bar.

Statute of limitations.— Averment that a creditor had come within province so as to set the statute of limitations in motion, is not sufficient unless it aver that the plaintiff had become a resident of the State within such time as to cause the statute to run, p. 354.

7 Cr. 354–356, 3 L. 369, PRESTON v. TREMBLE.

Equity.— Bill in equity will not lie for relief where an equitable title is merged in a grant; the remedy, if any, being at law, p. 356.

Cited in Porter v. Robb, 7 Ohio, 210, where an owner of an entry in Virginia military lands made a mistake in surveying and obtained a patent accordingly.

7 Cr. 356–358, 3 L. 369, THE PENOBSCOT v. UNITED STATES.

Nonintercourse act.— Under the nonintercourse laws a vessel comes into our waters at her peril; she is to get information as to the nonintercourse law elsewhere, p. 358.

Cited in United States v. One Hundred and Twenty-nine Packages, 27 Fed. Cas. 288, upon the point as to what are overt acts of "proceeding to."

7 Cr. 358–363, 3 L. 370, CAZE v. BALTIMORE INS. CO.

Insurance.— Underwriter on the cargo of a ship is not responsible for the payment of freight where there was an abandonment, p. 362.

Cited in Indianapolis Ins. Co. v. Mason, 11 Ind. 182, note, where a flat boat stranded and sank and it became necessary to reship the cargo, which was damaged; Shultz v. Ohio Ins. Co., 1 B. Mon. 345, holding that the law of insurance is scrupulous in scrutinizing the cause of loss; Daniels v. Atlantic M. S. Co., 24 N. Y. 454, on the point that the existence of a lien on a cargo for freight does not vary the legal responsibility of the underwriter of such cargo after abandonment; Columbian Ins. Co. v. Catlett, 12 Wheat. 396, 6 L. 670, holding that freight was not a charge upon the salvage of a cargo in the hands of the underwriters, whether the assured is owner of the ship or not.

Shipping.— Freight pro rata itineris is not due where a voyage has been abandoned unless there is a voluntary acceptance of the goods themselves at an intermediate port, p. 362.

The following cite, affirm and apply this principle: The Ann D. Richardson, Abb. Adm. 504, F. C. 410, holding that without delivery at destination the acceptance at an intermediate place was necessary to enable the shipowner to recover freight; Halwerson v. Cole, 1 Spears L. 323, 40 Am. Dec. 604, where a vessel put into an intermediate port owing to stress of weather, where the vessel was sold; Brown v. Harris, 2 Gray, 360, holding that passage money may be recovered back on the breaking up of a voyage; The Ship Nathaniel Hooper, 3 Sumn. 550, 551, 554, F. C. 10,032, where a vessel struck on a reef, part of her cargo jettisoned, and she abandoned; Marcardier v. The Chesapeake Ins. Co., 8 Cr. 50, 3 L. 484, where a technical total loss was sought on the ground of deterioration of the cargo; Sampayo v. Salter, 1 Mason, 44, F. C. 12,277, where a vessel was captured and condemned at an intermediate port and part of the cargo was restored and sold at the same port; Shultz v. Ohio Ins. Co., 1 B. Mon. 339, holding an insurance company not to be liable for the extra freight incurred by transshipment; Weston v. Minnot, 3 Wood. & M. 442, 444, F. C. 17,453, holding that freight contracted for in gross cannot be apportioned for part unless an apportionment becomes feasible

and just; Rogers v. West, 9 Ind. 407, note, on the point that freight pro rata itineris is never allowed unless there is a new contract express or implied; Rossiter v. Chester, 1 Doug. (Mich.) 176, where a vessel was by stress of weather compelled to put into an intermediate port and the goods were there accepted; Adams v. Haught, 14 Tex. 254, holding it was not acceptance where a vessel was compelled to put into an intermediate port and the master refusing to repair, the owner received the goods; Welch v. Hicks, 6 Cow. 510. 16 Am. Dec. 445, holding that the acceptance must be voluntary. See note to 60 Am. Dec. 154, citing cases on the subject of freight pro rata itineris; Rosenberg v. Frank, 58 Cal. 405, as to the meaning of the words "pro rata" where these words in a will were construed.

Discussed and disapproved in Columbian Ins. Co. v. Catlett, 12 Wheat. 402, 403, 404, 405, 406, 6 L. 672, 673, and said to be a hasty decision against pro rata freight. Distinguished, Scow No. 190 and Four Hundred, etc., Bales of Cotton, 88 Fed. 321, holding where there are several distinct carriers for different stages of the transportation, a pro rata recovery may be had where goods are damaged in transit and sold.

7 Cr. 363–366, 3 L. 372, SCHOONER JANE v. UNITED STATES.

Nonintercourse act.— On an information for violation of nonintercourse act the evidence to sustain a conviction should be so strong as to fully satisfy the mind of the fact it is intended to establish, p. 365.

Nonintercourse act.— On an information against a vessel for violation of the nonintercourse act, evidence of the identity of the vessel is sufficient when it impresses the mind with a conviction almost irresistible, p. 365.

No citations.

7 Cr. 366–370, 3 L. 373, LEE v. MUNROE.

Estoppel.— Where one about to lend money on realty applies to prior mortgagee to ascertain whether he has any interest, if the latter denies having any interest he will be postponed to the claim of the other, p. 368.

Cited in Laselle v. Barnett, 1 Blackf. 150, holding that the same rule applied to an assignee of the mortgagee; Veazie v. Williams, 8 How. 157, 12 L. 1028, where false steps were taken to enhance the price of property sold at auction.

Officers.— United States is not liable for damage suffered on account of the misstatements of a public official, where the statements were gratuitous and not within the sphere of the official duties, p. 369.

Subsequent citing cases have affirmed and relied upon this rule as follows: Whitesides v. United States, 93 U. S. 257, 23 L. 885, holding an assistant special agent had no authority to bind the government by a contract to pay the expenses of transporting captured or abandoned cotton; Hawkins v. United States, 96 U. S. 692, 24 L. 608, holding an assistant superintendent of a public building could not vary a contract; United States v. Martin, 2 Paine, 71, F. C. 15,732, holding the United States were not liable for the declarations of an agent unless it clearly appears that he was acting within his authority; Parcel v. Barnes, 25 Ark. 267, holding a county clerk could not issue county warrants otherwise than upon an order of the County Court; Dartmouth Sav. Bk. v. School Dists. 6 and 31, 6 Dak. 344, 43 N. W. 825, holding that a school district was not estopped to deny the organization of the district; Yules v. Canova, 11 Fla. 47, holding that an impressing officer cannot change the terms of the impressment statute; State v. Southwestern R. R. Co., 66 Ga. 406, holding an attorney-general could not settle tax executions at less than their full amount; Indiana Central Canal Co. v. State, 53 Ind. 593, holding a State was not bound when the governor and auditor pointed out land sold by the State; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 283, holding that a city could not be held for the unauthorized acts of its agent; State v. Bank of State, 45 Mo. 538, holding that a governor could not ratify a sale of State lands; Sooy v. State, 38 N. J. L. 338, holding that the State was not bound by the gratuitous statements of its officers; Suprs. of Richmond Co. v. Ellis, 59 N. Y. 625, holding that supervisors could not audit a claim not legally chargeable to the county; State ex rel. Proudfit v. Hastings, 10 Wis. 554, holding the secretary of state could not order blank forms from the State printer; Mayor v. Musgrave, 48 Md. 289, 30 Am. Rep. 465, holding a city not to be liable for acts outside of the authority of the commissioners appointed to condemn property for a street; Mayor, etc., of Baltimore v. Reynolds, 20 Md. 11, 83 Am. Dec. 541, holding that city contractors must take notice of the powers of a city commissioner; Murdock v. Chaffe, 67 Miss. 752, 7 So. 521, holding that one claiming under a statutory power of sale must see that the precedent facts warrant the power; Sooy v. State, 41 N. J. L. 399, holding that notice to the individual members of the legislature was not notice to the State; McLean v. State, 8 Heisk. 234, on the point that the State is not liable for the misconduct of its officers in the discharge of their duties; Wright v. Nagle, 48 Ga. 392, on the point that towns have authority to bind the public only where authority is expressly given. See note to 53 Am. Dec. 775, 777, discussing the admissibility of an agent's admissions against a principal.

7 Cr. 370-382, 3 L. 374, HERBERT v. WREN.

Dower.— Courts of equity and of law have concurrent jurisdiction in assigning dower, p. 376.

Rule approved and applied in Godwin v. King, 31 Fla. 540, 13 So. 111, where a widow who was administratrix applied for dower and a part of the personal property; Yeo v. Mercereau, 18 N. J. L. 404, holding that equity had jurisdiction in matters of dower although the right was a legal right; Jones v. Van Doren, 130 U. S. 692, 32 L. 1080, 9 S. Ct. 687, where a bill in equity to obtain a right of dower was brought; Bean v. Smith, 2 Mason, 271, F. C. 1,174, on the point that there is concurrent remedy at law and in equity where the remedy at law is not complete; Mayor ' v. Foulkrod, 4 Wash. 353, F. C. 9,341, holding that a legatee could resort to equity; Pierpont v. Fowle, 2 Wood. & M. 32, F. C. 11,152. holding equity had jurisdiction of an accounting and disclosure of sale under a copyright; Baker v. Biddle, 1 Bald. 408, 416, 421, F. C. 764, citing authorities on jurisdiction of equity and holding a bill for an accounting does not lie where an accounting has been rendered and received; Foster v. Swasey, 2 Wood. & M. 221, F. C. 4,984, on the point that equity has jurisdiction to proceed and complete inquiries or send the case to a court of law if the relief is fully as adequate; Bishop v. Woodward, 103 Ga. 284, 29 S. E. 969, holding equitable jurisdiction existed notwithstanding code provision. See also 79 Am. Dec. 604, on assignment of dower.

Election.— Widow is put to an election where provision is made for her in the will and it is manifest the testator did not intend the provision to be in addition to her dower, for the same person cannot hold both under and against a will, p. 378.

Affirmed and followed in Wright v. West, 2 Lea. 81, 31 Am. Rep. 588, holding that a widow who is insane and did not dissent from a will may in equity claim as if she had dissented; Washburn v. Van Steenwyk, 32 Minn. 351, 20 N. W. 328, where a Probate Court made an election in behalf of an insane widow to take against a will; Carter's Appeal, 59 Conn. 587, 22 Atl. 322, holding that the presenting of a claim for a life interest and the receipt of dividends was a waiver of dower; Schorr v. Etling, 124 Mo. 48, 27 S. W. 396, holding there was no inconsistency between taking a devise under a will and a homestead under the law; Schwatken v. Dandt, 53 Mo. App. 3, holding an acceptance under a will defeated dower in personalty; Fisher v. Boyce, 81 Md. 53, on the point that equity will not permit one to hold under and against a will; Van Duyne v. Van Duyne, 14 N. J. Eq. 52, holding that a party could not take a beneficial interest under a will and at the same time set up any claim of his own; Bannister v. Bannister, 37 S. C. 531, 16 S. E. 613, holding that if a provision

is given "in lieu of dower" the widow is put to an election; Pemberton v. Pemberton, 29 Mo. 413, holding that a bequest of personalty would not be a bar; Norris v. Clark, 10 N. J. Eq. 56, where a bequest of money and personalty was held to be a bar of dower both in personalty and realty; Brown v. Pitney, 39 Ill. 473, holding a testator may make a bequest of personalty in lieu of dower; Dixon v. McCue, 14 Gratt. 550, holding that if a widow's taking real estate will interfere with a will, she must elect; McLeod v. McDonnel, 6 Ala. 242, where a widow was put to her election; Bailey v. Duncan, 4 T. B. Mon. 266, holding a widow is entitled to dower in lands which another is seized of to the use of her husband; Crawford v. Bloss, 72 N. W. 149, refusing to let a widow take under will as to realty and under statute as to personalty.

Dower.— On a lease for years by the husband joined in by the wife, the wife is entitled to her dower in the rent, p. 380.

Rule applied in Sykes v. Sykes, 49 Miss. 218, holding that a widow was entitled to dower in realty occupied by a tenant under a lease; Boyd v. Hunter, 44 Ala. 719, the court saying that if rent is reserved, the widow is entitled to a proportionate part of the rent; Maccubbin v. Cromwell, 2 Harr. & G. 456, holding that a widow was entitled to dower in money from the sale of a husband's lands

Dower.— If land subject to dower is sold, a gross sum cannot be allotted in lieu of dower if any of the parties do not consent, p. 381.

Cited and rule applied in Wilson v. Branch, 77 Va. 70, holding that a court cannot, without the consent of a widow, decree a sale of the realty and give her money in lieu of dower; Holden v. Boggess, 20 W. Va. 72, 88, holding a wife had a dower interest in the surplus where land was sold to satisfy a lien; Wilson v. Davison, 2 Rob. (Va.) 402, where a bill was filed by a widow against persons in possession and others to whom the land had been aliened, claiming to be endowed; Blair v. Thompson, 11 Gratt. 452, holding that a court erred in decreeing a gross sum against a purchaser in lieu of dower; Winsted, ex parte, 92 N. C. 705, holding that on a sale in partition of lands subject to dower, her life estate may be valued in money; Harrison v. Payne, 32 Gratt. 389, 391, and Williams' Case, 3 Bland Ch. 252, on the point that one-third of the proceeds must be invested and the interest paid to the widow; Beavers v. Smith, 11 Ala. 34, holding that where compensation is made in money, the decree should not be for a gross sum, but for a payment annually; Burgess v. Burgess, 2 Ind. 545, where the court said, that if land subject to dower was sold, the dower right attached to the proceeds; Martin v. Whartou, 38 Ala. 642, on the point that no absolute money valuation could be fixed upon dower rights.

7 Cr. 382-389, 3 L. 378, CARGO OF BRIG AURORA v. UNITED STATES.

Statute.— Legislature may provide that operation of an act may depend upon any subsequent combination of events; and may provide that an act may be revived by a proclamation of the president, p. 388.

The following citing cases approve and rely upon this ruling: Ex parte Wall, 48 Cal. 314, 17 Am. Rep. 428, where the court considered the nature of the contingency upon which the taking effect must depend; Pratt v. Allen, 13 Conn. 128, holding an act providing for holding an election was not void because it depended on a contingency; Chicago v. Stratton, 162 Ill. 502, 53 Am. St. Rep. 329, 44 N. E. 855, holding valid an ordinance making it unlawful to locate a stable except by the consent of the lotowner; People v. Fire Assn. of Phila., 92 N. Y. 321, 44 Am. Rep. 385, holding retaliatory insurance laws to be valid; Galveston, etc., R. R. Co. v. Gross, 47 Tex. 436, where an act provided for substituting land grants for State bonds when the State had the power; Ex parte Bassitt, 90 Va. 682, 19 S. E. 454, holding an act authorizing County Courts to appoint additional justices where needed, to be valid; Pueblo Co. v. Smith, 22 Colo. 542, 45 Pac. 361, where an act authorizing an additional justice in precincts containing over a certain number of inhabitants was held constitutional; Fell v. State, 42 Md. 85, holding that an act whose going into effect depended on popular vote was valid; Bull v. Read, 13 Gratt. 90, holding an act making a free school system dependent upon a popular vote to be valid; St. Louis v. Alexander, 23 Mo. 514, where an act for a subscription to a railroad providing that the matter be submitted to the voters was held valid; in Fell v. State, 42 Md. 111, 20 Am. Rep. 87; Rice v. Foster, 4 Harr. (Del.) 494; Paul v. Gloucester Co., 50 N. J. L. 594, 15 Atl. 276, dissenting opinion, p. 614, 15 Atl. 286, and Parker v. Commonwealth, 6 Pa. St. 526, 47 Am. Dec. 496, all holding statutes allowing voters to control the sale of liquor to be valid; State ex rel. v. Pond, 93 Mo. 653, 6 S. W. 486, dissenting opinion, and Gordon v. State, 46 Ohio St. 634, 23 N. E. 67, both holding local option laws to be valid; Rohrbacker v. City of Jackson, 51 Miss. 775, dissenting opinion, where an act regulating the sale of liquor at retail was held valid; State v. Liedtke, 9 Neb. 498, 4 N. W. 80, where an act appropriating money was not to be effected until the general government reimbursed the State; Gray v. Delaware, 2 Harr. 96, where the legislature dispensed with trial by jury conditionally.

Statute.— On the revival of an act, the legislature must be understood to give it from the time of its revival precisely that force and effect which it had at the moment when it expired, p. 388.

Cited in Field v. Clarke, 143 U. S. 682, 691, 36 L. 306, 309, 12 S. Ct.

501, 504, dissenting opinion, p. 698, 36 L. 312, 12 S. Ct. 506, holding that an act conferring on the president power to suspend by proclamation the free introduction of certain articles was valid; Ex parte Wells, 21 Fla. 323, on the point that congress may make the revival of a law conditional on a fact contingent; Fisher v. Higgins, 5 T. B. Mon. 149, where an act repealing a statute revived a statute in operation before the repealed act was passed.

Libel.— Need not state any fact which constitutes the defense of the claimant, p. 389.

Principle applied in Six Hundred and Fifty-one Chests of Tea v. United States, 1 Paine, 514, F. C. 12,916, holding that an information against teas for want of proper marks need not allege an illegal importation or nonpayment of duties; United States v. Schooner Little Charles, 1 Brock. 352, F. C. 15,612, holding that a libel against a vessel for violating the embargo laws need not state she is within the exception; United States v. Tilden, 28 Fed. Cas. 179, holding an indictment for carrying a letter out of the mail need not negative the citizenship of the owner; Our House, No. 2 v. State, 4 G. Greene, 175, holding an indictment stating a charge substantially in the language of the code was sufficient; The Meteor, 17 Fed. Cas. 182, holding it to be discretionary to permit amendments to libel of forfeiture.

Miscellaneous.— Cited in Talcott v. Tp. of Pine Grove, 1 Flip. 156, F. C. 13,735, on established practice as evidence of the law.

7 Cr. 389–395, 3 L. 380, SCHOONER HOPPET v. UNITED STATES.

Nonintercourse acts.— To constitute an offense under the nonintercourse act, a union of a lading with an intention to import and with the knowledge of the owner or master is necessary, p. 392.

Information in admiralty for violation of the nonintercourse law must contain a substantial statement of the offense upon which the prosecution is founded, p. 394.

Cited and doctrine applied in United States v. Schooner Little Charles, 1 Brock. 350, F. C. 15,612, holding that a libel for violating the embargo laws need not state the particular character of the vessel; United States v. Seventy-eight Casks of Books, 2 Bond, 273, F. C. 16,258, holding an information for fraud in undervaluing merchandise must aver the valuation was under cost at the place of exportation; United States v. Fifteen Barrels of Distilled Spirits, 51 Fed. 422, where the sufficiency of an information for forfeiture of imported spirits was considered; Friedenstein v. United States, 125 U. S. 236, 31 L. 741, 8 S. Ct. 844, dissenting opinion, holding an information need not allege that the acts were done with actual intent to defraud; Schooner

Anne v. United States, 7 Cr. 572, 3 L. 442, and United States v. Weed, 5 Wall. 68, 18 L. 533, both holding a libel must aver specifically all the facts; The Confiscation Cases, 20 Wall. 110, 22 L. 324, where an information was held sufficient although its allegations were in the alternative; The Merino, 9 Wheat. 401, 6 L. 121, holding it was sufficient if an information set out the offense so clearly as to bring it within the statute; United States v. Three Hundred and Ninety-six Barrels, 28 Fed. Cas. 122, holding that the allegations must be sufficiently specific to enable the claimant to traverse them; Wells v. The Anne Caroline, 29 Fed. Cas. 641, holding that an omission of a libel to state cardinal facts is faulty pleading; United States v. One Distillery, 4 Biss. 27, F. C. 15,929, holding an information for forfeiture of a distillery must describe with reasonable certainty the things on which a judgment is asked; United States v. Mann, 95 U. S. 586, 24 L. 533, on the point that the charge in libel ought to conform to the true sense and meaning of the words of the statute; United States v. Schooner Paryutha Davis, 1 Cliff. 535, F. C. 16,003, holding a libel against a vessel in an illegal employment need not specify the particular trade; United States v. Huckabee, 16 Wall. 431, 21 L. 463, the court saying the information should propound in distinct articles the cause of forfeiture; Ex parte Hull, 12 Fed. Cas. 854, on the point that the plain terms of a statute must be executed without regard to its reason or justice; Anonymous, 1 Gall. 26, F. C. 444, on the point as to allowance of amendments of informations in rem.

Criminal law.— Defendant cannot be charged with one crime and convicted of another, p. 394.

Cited in Click v. Texas, 3 Tex. 287, holding it is not sufficient to charge a defendant with kidnapping generally.

Information which fails to contain a substantial statement of the offense is not cured by alleging that the act was done contrary to and in violation of the provisions of the statute, p. 394.

Judgments.— Decree must be secundum allegata as well as secundum probata, p. 395.

Cited in Bender v. Bender, 14 Or. 355, 12 Pac. 714, holding this rule applicable under the system of pleading in Oregon; The Steamship Rhode Island, Olcott, 511, F. C. 11,745, on the point that in admiralty proofs must correspond to the pleadings, and the decree with the pleadings and proofs.

Nonintercourse act.— Where goods are imported into the United States previous to the passage of the nonintercourse law, on their exportation and reimportation they are subject to the provisions of that law, p. 395.

7 Cr. 396-399, 3 L. 383, MUTUAL ASSURANCE SOCIETY v. KORN.

Insurance.— Insurers cannot add to the consideration to be paid for insurance generally, but owing to the peculiar circumstances the case under consideration was held to be exempt from the ordinary rule, p. 399.

No citations.

7 Cr. 399-402, 3 L. 384, WEBSTER v. HOBAN.

Auctions.— Upon refusal by a vendee at an auction of land to comply with his bid, no action lies against the vendee until after a resale of the land, p. 401.

Cited in Anderson v. Truitt, 53 Mo. App. 593, and Townshend v. Simon, 38 N. J. L. 242, holding that the difference in price between the first and second sales may be taken as a criterion but is not conclusive; in the note to 67 Am. Dec. 278, 279, discussing the liability of a vendee refusing to comply with his contract.

Distinguished in Friedly v. Scheetz, 9 Serg. & R. 163, 11 Am. Dec. 696, where a declaration was filed on a bond for the purchase price; criticised in School Commrs. v. Aiken, 5 Port. 179, where school lands were sold and the vendee did not comply with the terms of the sale.

7 Cr. 402-408, 3 L. 385, MARYLAND INS. CO. v. WOOD.

Neutrality.— It is no violation of neutrality to proceed to a blockaded port to inquire as to the continuance of the blockade where one is led to do so in consequence of a communication addressed by the British minister to the secretary of state, p. 408.

Cited in Marshall v. Balt. & Ohio R. R. Co., 16 How. 348, 14 L. 967, dissenting opinion, in illustration of the point as to the conditions under which corporations might be parties to suits in Federal courts.

7 Cr. 408-415, 3 L. 386, FERGUSON v. HARWOOD.

Exemplification.— If a record from another court is certified in the manner prescribed by statute, evidence that the attestation is not in due form is not admissible and the record so authenticated is properly admitted in evidence, p. 412.

This ruling is approved and the principle applied in the following citing cases: Wickersham v. Johnston, 104 Cal. 414, 43 Am. St. Rep. 122, 38 Pac. 90, where the question was as to how proof was made of probate of a foreign will; Giles v. Shaw, Breese, 126, holding the certificate of the judge omitting to state that the attestation is in due form is insufficient; Morris v. Patchin, 24 N. Y. 396, 82 Am. Dec. 313, holding that the attestation of a judgment signed only

by a deputy clerk is insufficient; Duncommun v. Hysinger, 14 Ill. 251, on the point that the judge need not certify to the official character of the clerk; Haynes v. Cowen, 15 Kan. 643, where a record attested by the clerk with the seal attached and the certification by the presiding judge that the attestation is in due form was held admissible; Hutchins v. Gerrish, 52 N. H. 206, 13 Am. Rep. 20, on the point that the certificate of the presiding judge is indispensable and conclusive; Gatling v. Robbins, 8 Ind. 187, holding a certificate of a judge to be at least prima facie if not conclusive evidence of the form of the attestation being correct; Folsom v. Blood, 53 N. H. 435, holding the record of a judgment must be accompanied by the certificate that the clerk's attestation was in due form; Hatcher v. Rocheleau, 18 N. Y. 94, holding that a certificate by the presiding judge proved itself and was sufficient prima facie evidence of the official character; Grover v. Grover, 30 Mo. 403, where the clerk certified the transcript to be full and the judge certified that the certificate and attestation were in due form; Ordway v. Conroe, 4 Wis. 48, 49, holding that a record does not require proof that one is the officer in whose custody the same must be kept; Bellamy v. Hawkins, 17 Fla. 757, holding that a certificate by the custodian stating the copy to be an extract is not admissible; McRae v. Stokes, 3 Ala. 403, 37 Am. Dec. 700, holding a certificate is sufficient if it complies with the form prescribed in the place where made; Bonesteel v. Sullivan, 104 Pa. St. 13, where an exemplification of papers as the same remain on file was held admissible; Edmiston v. Schwartz, 13 Serg. & R. 135, holding a certificate "that the paper was truly copied from the records" imports that it is an entire record; Warner v. Brinton, 29 Fed. Cas. 235, on the point that one may refer to the minutes to show the foundation of the decree of a register's court; Kungle v. Fasnacht, 29 Kan. 562, on the point that courts when necessary resort to the contents of the instrument to which it is attached for the purpose of upholding a certificate; Carr v. Gale, 3 Wood. & M. 60, F. C. 2,435, holding that the whole record in proceedings in bankruptcy was competent, including the schedule annexed to the petition; Tayler v. Carpenter, 2 Wood. & M. 4, F. C. 13,785, where a document attested by a clerk with the seal and the certificate of the presiding judge and called an "exemplified copy" was held admissible.

Distinguished in Richardson v. Hobart, 1 Stew. 504, 18 Am. Dec. 72, where a decree was held to be evidence although the whole record was not produced.

Evidence.— Writing which is a mere transcript to the minutes of a court is not admissible, p. 412.

Cited and rule applied in Pepin v. Lachemeyer, 45 N. Y. 32, where a transcript from the docket of a court was held inadmissible

under the act of congress; Donald v. McKinnon, 17 Fla. 748, where it was held that enough should appear to show jurisdiction; In re Coleman, 15 Blatchf. 426, F. C. 2,980, holding that where docket entries stand in the place of any other record, they receive the same consideration as a record; White v. Strother, 11 Ala. 723, on the point that the presumption is that judgments and probates of wills are everywhere matters of record.

Variance is immaterial where it does not change the nature of the contract, p. 414.

The following citing cases affirm and apply this rule: Cannell v. Milburn, 3 Cr. C. C. 424, F. C. 2,384, and Harrison v. Weaver, 2 Port. 545, where a variance in the description of a contract did not change its nature or legal effect; Drake v. Fisher, 2 McLean, 73, F. C. 4,061, holding a note dated at Cincinnati and described as dated Cincinnati in the State of Ohio, is admissible; Pearsall v. Phelps, 3 Ala. 528, where the variance was held material in an action on a judgment of a sister State; James v. Scott, 7 Port. 32, where, in a description on a bond, the words "value received" were inserted; Neale v. Fowler, 31 Md. 157, where the declaration on a bond alleged an indebtedness in a certain sum and the contract offered in evidence was materially variant; Barkman v. Duncan, 10 Ark. 466, where plaintiff sued as an administrator of goods unadministered and the obligation was made to the plaintiff as administrator de bonis non; Hough v. Rawson, 17 Ill. 592, where the declaration read "wheat of the weight of fifty-six pounds to the bushel" and the contract read "per bushel of fifty-six pounds;" Silver v. Kendrick, 2 N. H. 161, 162, holding that declarations for false affirmations on an express contract need not contain the precise words used; Moore v. Lake Co., 58 N. H. 255, holding the expressions "would draw lumber to the pond of said mill" and "would deliver lumber to said mill" were equivalent; State Bank v. Peel, 11 Ark. 753, where a Christian name was described as "John" and in the note offered it was "Jno;" Badger v. Burleigh, 13 N. H. 512, 513, where the sufficiency of a complaint for breach of warranty of a horse was considered; McLendon v. Godfrey, 3 Ala. 184, where a contract was alleged to be for services for a particular year and the contract produced was for one year; Connolly v. Cottle, Breese, 365, where the note declared on was payable to the plaintiff and the note produced was payable to the creditors of a third person jointly; Stone v. Lawrence, 4 Cr. C. C. 11, F. C. 13,484, holding a note on its face payable "at St. Louis in the territory of Mo." was not admissible upon a count not so describing the note; People v. Braman, 30 Mich. 466, on the point that a writing must be continued to be understood in the pleading in the same sense as out of it; Kellogg v. Denslow, 14 Conn. 429, holding that where a declara-

tion was for the sale of a condenser and the evidence was of the sale of various articles, the variance was fatal.

Contracts.— In pleading a contract it is sufficient if the plaintiff declare according to the true intent of the parties as apparent on the contract, p. 415.

7 Cr. 415–420, 3 L. 389, BIAYS v. CHESAPEAKE INS. CO..

Insurance.— When part of a cargo is lost, and the residue arrives in safety at its port of destination, the cargo consisting all of the same kind of articles, the loss is a partial one, p. 419.

Cited and rule applied in Insurance Co. v. Fogarty, 19 Wall. 643. 22 L. 218, on the point that there cannot be a total loss of part of a cargo; Hernandez v. Sun Mut. Ins. Co., 6 Blatchf. 324, F. C. 6,415, on the point as to the effect of the words "free from average unless general;" Woodside v. Canton Ins. Co., 84 Fed. 284, 285, where a policy on "personal effects" and warranted "free from all average" was construed; Waln v. Thompson, 9 Serg. & R. 121, 122, 11 Am. Dec. 677, 679, and Louisville M. & F. I. Co. v. Bland, 9 Dana (Ky.), 156, 157, both holding that under a policy "warranted free from average" it was held there must be an actual total loss to enable the plaintiff to recover; Wadsworth v. Pac. Ins. Co., 4 Wend. 40, 43, holding underwriters were not liable for a partial loss on memorandum articles, except for general average; Poole v. Protection Ins. Co., 14 Conn. 60, where there was a total loss of part of the goods insured, being memorandum articles; Moreau v. United States Ins. Co., 1 Wheat. 227, 4 L. 78, holding that an insurer on memorandum articles is only liable for a total loss, which cannot happen where a part of the cargo reaches its destination; Pearse v. Quebec S. S. Co., 24 Fed. 287, where a clause that shipowners would not be liable for more than invoice value was construed; Humphreys v. Union Ins. Co., 3 Mason, 443, F. C. 6,871, where there was an insurance on a cargo principally of lemons and oranges, where the oranges were lost and the lemons were saved; Newlin v. Insurance Co., 20 Pa. St. 316, holding that where the loss was to equal a certain per cent., the per cent. was to be calculated on the total value of the goods; Wallerstein v. Columbian Ins. Co., 44 N. Y. 216, 4 Am. Rep. 666, on the point that each article insured is deemed the subject of a distinct insurance; Wright v. Williams, 20 Hun, 323, where a complaint was held to sufficiently aver a total loss; Pierce v. Columbian Ins. Co., 14 Allen, 324, where goods were transshipped into other vessels, one of which was lost; Neidlinger v. Ins. Co., 10 Bened. 262, F. C. 10,086, where the court said that an insurance upon grain in sacks could not be said to consist of a single article; Brooke v. La. Ins. Co., 5 Mart. (La.) (N. S.) 536, 541, where the court said a constructive total loss is excluded in all memorandum articles; Silloway v.

Neptune Ins. Co., 12 Gray, 87, holding an insurance company to be liable for a total loss on any one kind of article which is so damaged as to be of no value.

Distinguished in Shultz v. Ohio Ins. Co., 1 B. Mon. 338, holding that insurers who are to be liable only if the loss equals a certain per cent. are bound for their proportion of salvage, although the loss falls below.

Insurance.— Underwriters are not liable for salvage where part of a cargo consisting of one species of articles is lost, p. 419.

Cited in Wadsworth v. Pac. Ins. Co., 4 Wend. 39, on the right to recover salvage charges on memorandum articles; Indianapolis Ins. Co. v. Mason, 11 Ind. 184, note, on the point that the expenses of the insured cannot be added to the loss to bring it up to a certain per cent.

7 Cr. 420–422, 3 L. 391, STARK v. CHESAPEAKE INS. CO.

Naturalization.— Record of naturalization need not show that all of the requisites to entitle one to be admitted to citizenship have been complied with, p. 423.

Cited and rule followed and applied in In re Coleman, 15 Blatchf. 426, F. C. 2,980, where the court considered what constituted a record of naturalization; Priest v. Cummings, 16 Wend. 625, holding that proceedings in relation to naturalization are liberally construed and every intendment is in their favor; Harley v. State ex rel. Atty.-Gen'l, 40 Ala. 697, holding that a plea of naturalization in answer to an information need not cover more than the judgment or record; Andres v. Arnold, 77 Mich. 88, 43 N. W. 858, where the question was as to whether a declaration of intention could be made before a clerk of a court anywhere but in his office or in open court; Ritchie v. Putnam, 13 Wend. 526, holding the judgment of a court admitting the alien to become a citizen is conclusive evidence upon that point; The Acorn, 2 Abb. (U. S.) 443, F. C. 29, and People v. Snyder, 41 N. Y. 409, both holding that naturalization was a judicial act and, as such, conclusive; McCarthy v. Marsh, 5 N. Y. 284, holding that a judgment admitting to citizenship could not be impeached by proof contradicting the recitals; Commonwealth v. Towles, 5 Leigh (Va.), 747, holding that a certificate of naturaliaztion stating that a party took an oath, imported he took the oath in the form prescribed; In re Bodek, 63 Fed. 814, on the point that courts admitting to citizenship act judicially; Crœsus M., etc., Co. v. Colorado L. & M. Co., 19 Fed. 82, on the point that courts of record of various States have power to admit to citizenship; Morgan v. Dudley, 18 B. Mon. 719, 68 Am. Dec. 743, holding that any court of record having common-law jurisdiction can naturalize; Mut. Benefit L. I. Co. v. Tisdale, 91 U. S. 245, 23 L. 318, on the point that the certificate of naturalization is not evidence of residence, age or char-

acter of applicant; McLane v. Moore, 6 Jones (N. C.), 524, on the point that judgment cures all mere irregularity. See note to 19 Am. Rep. 150, on judgment as evidence.

7 Cr. 423–434, 3 L. 392, WILLIAMS v. AMROYD.

Judgments.— Sentence of a competent court proceeding in rem is conclusive with respect to the thing itself and operates as an absolute change of the property, p. 432.

Cited and principle applied in Holcomb v. Phelps, 16 Conn. 132, holding this principle to be especially true as to judgments of sister States; The Trenton, 4 Fed. 657, holding that the sale in Ontario of an American vessel discharges a lien for necessaries furnished in Cleveland; McKinsey v. Harding, 16 Fed. Cas. 227, 4 N. B. R. 38, on the point that the judgment of a competent court is conclusive as to the matter involved; Pelton v. Platner, 13 Ohio, 217, 42 Am. Dec. 199, holding that a foreign judgment has the same effect as in the place it was rendered; Cushing v. Laird, 107 U. S. 80, 27 L. 395, 2 S. Ct. 204, on the point that a proceeding of a prize court in rem is conclusive against all the world; Hilton v. Guyot, 159 U. S. 167, 40 L. 109, 16 S. Ct. 145, where the court considered the conclusiveness of a foreign judgment; The Parkhill, 18 Fed. Cas. 1,192, on the point that jurisdiction of prize courts is exclusive of that of all other courts; Alabama, etc., R. R. Co. v. Jones, 7 Bank. Reg. 171, 1 Fed. Cas. 282, on the point that a bankruptcy record cannot be impeached. See note to 75 Am. Dec. 723, on the effect of judgments in rem.

Judgments.— Property captured and sold under a decree of a foreign court violating the law of nations, and afterwards brought into this country, cannot be claimed by the original owners, p. 433.

Admiralty.— Where captured goods are sold before condemnation, a subsequent condemnation relates back to the capture and affirms it, p. 433.

Cited in Jecker v. Montgomery, 13 How. 516, 14 L. 248, on the point as to the power of a captor to sell captured property and proceed to an adjudication afterwards.

Judgments.— Decree condemning captured property is not the less binding because the decree is subversive of the law of nations, p. 433.

Cited in Melhop v. Doane, 31 Iowa, 401, 7 Am. Rep. 150, on the point that whatever disposition a court makes of property it is held valid in every other country; Arnold v. Shields, 5 Dana, 25, 30 Am. Dec. 675, on the point that condemnation of goods under the Milan decree is binding, although the decree is against the law of nations; Faudel v. Phœnix Ins. Co., 4 Serg. & R. 69, on the point that the Berlin and Milan decrees are a direct and flagrant violation of international law.

Judgments.— Manifest error in a decree of a court of competent jurisdiction does not render it the less binding, p. 433.

Cited in Ex parte Watkins, 3 Pet. 206, 7 L. 654, holding that a judgment in its nature concludes the subject on which it is rendered; Wright v. Marsh, 2 G. Greene, 114, holding that where a petition states all the facts conferring jurisdiction, but omits to describe the interests of unknown owners, the defect cannot be collaterally assailed.

7 Cr. 434, 435, 3 L. 396, SMITH v. DELAWARE INS. CO.

Verdict.— Judgment on a verdict "subject to the opinion of the court on the points reserved," will be reversed where the facts do not appear so that the judgment might be reversed or affirmed on the merits, p. 435.

No citations.

7 Cr. 436–455, 3 L. 396, HALKER v. PARKER.

Attorney may refer a cause to arbitrators without the consent of his client, p. 449.

In the following citing cases this rule is affirmed and applied: Beverley v. Stephens, 17 Ala. 704, holding the same as the principal case; Lee v. Grimes, 4 Colo. 189, where parties to a replevin suit submitted to an arbitration; McGinnis v. Curry, 13 W. Va. 47, and Daniels v. City of New London, 58 Conn. 172, 19 Atl. 575, both holding that an attorney could not submit a cause by a submission in pais; Stokely v. Robinson, 34 Pa. St. 317, where the court said this power must be exercised in a formal submission precedent to the award; Mills v. Conner, 1 Blackf. 8, note 1, holding that the consent of the parties to a rule of reference must appear of record; Denny v. Brown, 7 Fed. Cas. 491, holding that such submission would bind the client without acquiescence; Morris v. Grier, 76 N. C. 411, holding a reference without the knowledge or authority of a client to be binding; Talbot v. McGee, 4 T. B. Mon. 377, holding a client bound by the admissions of his attorney; Jenney v. Delesdernier, 20 Me. 193, holding an attorney may approve a receipt taken by an officer for personalty; Ball v. Bank of Alabama, 8 Ala. 599, 42 Am. Dec. 653, holding an attorney cannot remit a liability his client may enforce against a witness; Jones v. Horsey, 4 Md. 314, 59 Am. Dec. 83, holding an attorney may transfer a case from the judges selected by the client; Alton v. Gilmanton, 2 N. H. 521, holding an attorney has authority ex officio to bind his client by an agreement in certain cases; Pike v. Emerson, 5 N. H. 394, 22 Am. Dec. 468, holding that an attorney may waive his client's right of appeal; Fogg v. Dummer, 58 N. H. 507, holding that selectmen may submit to arbitration; Hale v. Lawrence, 22 N. J. L. 87, holding that attorneys may stipulate touching the conduct and management of

suits; Clark v. Randall, 9 Wis. 138, 76 Am. Dec. 255, holding that an attorney employed to collect a debt has authority to indemnify officers making a levy; Smith v. Bossard, 2 McCord's Ch. (S. C.) 408, holding that an attorney may refer all matters of account to special accountants; Whitestown Mill Co. v. Zahn, 9 Ind. App. 273, 36 N. E. 654, holding an attorney may bind a client as to the manner of trial; Eastman v. Burleigh, 2 N. H. 488, holding that if one agree to refer a cause on behalf of himself and another his authority must appear. See note to 30 Am. Rep. 360, and to 30 Am. Dec. 628, discussing the question as to who may submit causes to arbitration when acting for another.

Attorney, as such, cannot, strictly speaking, compromise a case without the consent of his client, yet a court would be disinclined to disturb such a compromise unless so unreasonable as to indicate imposition or fraud, p. 452.

The citations reveal a variety of cases upon this proposition, approving and applying this rule: Maddux v. Bevan, 39 Md. 493, 501, and Davidson v. Rozier, 23 Mo. 389, both holding the same as the principal case; Levy v. Brown, 56 Miss. 89, holding an attorney could release all attachments and liens not belonging to the original demand; Bonnefield v. Thorp, 71 Fed. 928, where the court said the subject-matter of the litigation is exclusively within the control of the client; Saleski v. Boyd, 32 Ark. 83, 84, and Smith v. Dixon, 3 Met. (Ky.) 444, both holding that an attorney under a general power cannot compromise; Preston v. Hill, 50 Cal. 51, 19 Am. Rep. 650, holding that an attorney could not compromise an action and consent to the entry of judgment in accordance with a stipulation; Dewart v. Loomer, 21 Conn. 257, holding that an attorney employed to commence and prosecute a suit could not settle and discharge it; North Whitehall v. Keller, 100 Pa. St. 108, 45 Am. Rep. 362, where an attorney compromised an award obtained against a township for road damages; Watt v. Brookover, 35 W. Va. 326, 29 Am. St. Rep. 814, 13 S. E. 1008, holding that an attorney employed to collect cannot compromise a claim after judgment; Eaton v. Knowles, 61 Mich. 632, 28 N. W. 742, holding that authority to compromise a claim cannot be implied from authority to collect and receive payment; Crotty v. Eagle, 35 W. Va. 151, 13 S. E. 62, holding that an attorney cannot by an agreement in pais commute a debt or compromise the suit; Jeffries v. Mut. L. Ins. Co., 110 U. S. 309, 28 L. 157, 4 S. Ct. 11, holding that an attorney could compromise after the death, where his power of attorney was coupled with an interest; Huston v. Mitchell, 14 Serg. & R. 309, 16 Am. Dec. 507, where an attorney compromised by an agreement that land should be taken in place of money; Beliveau v. Amoskeag, etc., Co., 40 Atl. 735, sustaining a final settlement in the nature of a compromise made by an attorney; Union, etc., Ins. Co. v. Buchanan, 100 Ind. 78, holding that an attorney has no general power to compromise

claims; Potter v. Parsons, 14 Iowa, 289, on the point that a compromise will not be relieved against unless so unreasonable as to warrant belief that the attorney was imposed upon; Williams v. Nolan, 58 Tex. 713, holding that equity will set aside a judgment on an unauthorized agreement only when the plaintiff has received injury requiring relief; Whipple v. Whitman, 13 R. I. 514, 43 Am. Rep. 45, holding that a fair compromise with the assent of the parties in interest but not of the plaintiff of record, will not be disturbed; De Louis v. Meek, 2 G. Greene, 70, 50 Am. Dec. 504, holding equity would interfere if it worked a great injustice; Roller v. Woolbridge, 46 Tex. 495, where the court said that the conduct of a party seeking to be relieved should be faultless; Mayer v. Foulkrod, 4 Wash. C. C. 511, F. C. 9,342, where one, after receiving the fruits, acquiesced for ten or twelve years in what had been done; Luce v. Foster, 42 Neb. 827, 60 N. W. 1030, holding an attorney could not execute an indemnity bond to a sheriff.

Other citing cases affirming this point are the following: Markley v. Amos, 8 Rich. L. 469, holding an attorney may submit a client's cause to arbitration by rule of court but in no other way; Adams' Assignee v. Roller, 35 Tex. 712, where an attorney agreed that the plaintiff should take judgment by default for a certain sum, with a stay of execution; Fife v. Bohlen, 22 Fed. 882, holding an attorney could not bid for his client at a sheriff's sale; Hardesty v. Pyle, 15 Fed. 781, where an attorney without any special authority signed an agreement as the basis of a consent decree; Dalton v. West End St. Ry. Co., 159 Mass. 223, 38 Am. St. Rep. 411, 34 N. E. 262, holding that such a judgment on an unauthorized agreement by an attorney will be vacated on application, though paid; Bunton v. United States, 62 Fed. 171, holding that after judgment a decree will not be opened because an agreement of an attorney was unauthorized; Jubilee Placer Co. v. Hossfield, 20 Mont. 237, 50 Pac. 717, where a letter from a client was held only to authorize a dismissal, not a decree determining the rights; Hale v. Crowell, 2 Fla. 540, 50 Am. Dec. 305, on the point that one should not be permitted to suffer because of the mismanagement and errors of his attorney; Halliday v. Stuart, 151 U. S. 235, 38 L. 144, 14 S. Ct. 304, where an agreement was made by attorneys that property might be sold pending an appeal; Merritt v. Clow, 2 Tex. 589, and Powell v. Spaulding, 3 G. Greene, 468, holding that an unauthorized confession of judgment will be set aside; Marbourg v. Smith, 11 Kan. 562, holding that an unauthorized agreement by an attorney that a dismissal should be a bar was a nullity; White v. Davidson, 8 Md. 186, 63 Am. Dec. 703, holding that an attorney in an injunction suit cannot bind his client to indemnify a surety; Glezen v. Farrington, 7 R. I. 282, and Holbert v. Montgomery, 5 Dana, 14, both holding that the powers and duties of an attorney cease when final judgment is rendered; Holbert v. Montgomery, 5 Dana (Ky.) 13,

holding that after final judgment counsel cannot consent to set it aside; Foster v. Wiley, 27 Mich. 247, 15 Am. Rep. 186, where the court said the authority of an attorney does not cease on the recovery of a judgment in all cases; Southern Kansas Ry. Co. v. Pavey, 57 Kan. 527, 46 Pac. 971, holding a stipulation that the issue of negligence should abide a Supreme Court decision in another case, was binding; Isaacs v. Boyd, 5 Port. 393, where the court considered the powers of a prochein ami. See also valuable notes in 76 Am. Dec. 261, 30 Am. Rep. 359, and 41 Am. Rep. 849.

7 Cr. 456–471, 3 L. 403, BARNITZ v. CASEY.

Statutes.— If the legislature proceed on a mistake it is dangerous to declare that a court of law is bound to enlarge the natural import of words in order to supply deficiencies occasioned by that mistake, p. 468.

Cited in Blair v. Adams, 59 Fed. 247, where a statute giving bastards a right to inherit and transmit was construed.

Descent.— Maryland statute of descents does not provide for descent from brother to brother; this is to be governed by the common law, p. 468.

Cited in Carroll v. Lessee of Carroll, 16 How. 283, 14 L. 940, on the point as to the effect of a change in the statute relating to wills. See note to 12 Am. St. Rep. 105, discussing intestate succession at length.

Wills.—Executory devise is not too remote if the contingency may happen within a life or lives in being, or twenty-one years and a few months after, p. 469.

Cited in Van Horne v. Campbell, 100 N. Y. 320, 3 N. E. 778, dissenting opinion, on the point that subsequent words of limitation creating a remainder control the apparent import of a prior devise; Dallam v. Dallam, 7 Harr. & J. 239, 249, where the words were the same as in the principal case; Abbott v. The Essex Co., 2 Curt. 135, F. C. 11, on the point as to when an estate is a conditional fee simple and not an estate tail. See note to 49 Am. St. Rep. 117, on the rule against perpetuities.

Wills.— Contingent remainders and executory devises are transmissible to the heirs of a party to whom they are limited, if he chance to die before the contingency happens, p. 469.

Cited and doctrine applied in Ackless v. Seekright, Breese, 79, where an executory devise was held to pass to one's heirs, although he died before the contingency happened; Conner v. Waring, 52 Md. 734, where the court held that an estate vested by way of reverter in the heirs-at-law of the original donor of a power;

Shadden v. Hembrec, 17 Or. 24, 18 Pac. 576, where the court considered the contingency upon which an executory devise may be limited; Buck v. Lantz, 49 Md. 444, 445, where the one through whom claim is made died before the contingency happened; Garrison v. Hill, 79 Md. 81, 47 Am. St. Rep. 365, 28 Atl. 1063, holding that only those in esse when the contingency happens can take; Payne v. Rosser, 53 Ga. 664, holding that interests descend to such as answer the character of heirs when the estate was determined; Bevan v. Taylor, 7 Serg. & R. 398, where the court construed the statute of descents in Pennsylvania; George v. Green, 13 N. H. 527, on the point that it is not necessary that the possession or an unexecuted interest should be in the testator; Medley v. Medley, 81 Va. 271, where the court said that the rule laid down in the principal case was the rule of the common law and that it had been abrogated in Virginia; Howard v. Trustees, 41 Atl. 159, devise in trust for X. for lifetime, then in trust for his children for twenty years, vests only at the end of the twenty years if X. die without issue.

Cotenancy.— Tenant in common cannot maintain ejectment against his cotenant unless there is an actual ouster, p. 471.

Rule applied in Story v. Saunders, 8 Humph. 668, where the court said that tenants in common are jointly seized of the entire estate; Fuller v. Montague, 59 Fed. 215, 16 U. S. App. 391, holding a partition suit could not be maintained by persons not having legal title against persons in possession claiming adversely; Abercrombie v. Baldwin, 15 Ala. 368, holding that the possession of one tenant in common may become antagonistic and exclusive; Neher v. Armijo, 54 Pac. 241, holding grantors of certain tenants in common had acquired adverse title against the remaining tenants; Taylor v. Hill, 10 Leigh (Va.), 465, holding that in ejectment by one tenant in common against a cotenant, actual ouster must be found.

Miscellaneous.— Cited in Adams v. Yazoo, etc., R. R. Co., 24 So. 319, remarking that Mr. Justice Story corrected and changed the opinion in the principal case after the first edition of 7 Cranch was published, in holding that decision reversing a cause might be added to after a retrial below.

7 Cr. 471–480, 3 L. 408, BLACKWELL v. PATTON.

Registration.— Where the law directs conveyances to be recorded and prescribes the testimony on which they shall be recorded, it is the practice of all courts to hold themselves at liberty to examine the proof on which the registration is made, and this, although the judgment of a competent court has been given on the sufficiency of the testimony, p. 476.

Deed.— A deed for land in Tennessee, made out of the State, proven by a subscribing witness before a judge of another State and duly registered, is valid under the statute of 1809, p. 477.

Ejectment.— Declaration in ejectment may be amended by making the date of a conveyance alleged conform to the proof, p. 477.

Cited and rule applied in Den ex dem. Williamson v. Snowhill, 13 N. J. L. 32, 22 Am. Dec. 505, holding that amendments of declarations in ejectment are freely allowed; Garland v. Davis, 4 How. 154, 11 L. 918, where the court refused to allow a repleader, but remanded a cause so that the pleading might be amended; Buchanan v. Trotter, 4 Fed. Cas. 539, on the point that courts do not hesitate to grant amendments in matters of substance up to the period that the case terminates in judgment.

Distinguished in Den ex dem. Vanarsdalen v. Hull, 9 N. J. L. 282, on the ground that there was no analogy between the Circuit Court of the United States and of the State Circuit Court.

Grant from North Carolina is valid, although issued on a duplicate warrant, and the original being in the possession of the surveyor-general, a subsequent grant is issued upon it, p. 479.

7 Cr. 481–487, 3 L. 411, MILLS v. DURYEE.

Judgment of one State has same effect in other States as in the State where rendered, p. 484.

This is a leading case upon this important doctrine and the citations accordingly reveal a great number of cases concerned with and variously applying it, as follows: Wiggins Ferry Co. v. Chicago, etc., R. R. Co., 3 McCrary, 613, 614, note, 11 Fed. 381, note, on the point the congress has full power to give conclusive effect to judgments of State courts; Suydam v. Barber, 18 N. Y. 471, 75 Am. Dec. 256, holding such judgments are not entitled to any higher or other effect than in the State where rendered; Sharon v. Hill, 11 Sawy. 304, 371, 26 Fed. 346, 391, where the court said that the law of the State where a judgment was rendered governs its effect and operation in the national courts; Dearing v. Bank of Charleston, 5 Ga. 518 48 Am. Dec. 316, on the point that a judgment of a sister State void where made is void elsewhere; Wilbur v. Abbott, 60 N. H. 51, holding that a judgment valid in a sister State is not in another State unless it would have been valid if rendered there; Gulick v. Loder, 13 N. J. L. 70, 23 Am. Dec. 712, and Scott v. Bogart, 14 La. Ann. 263; Crapo v. Kelly, 16 Wall. 637, 21 L. 440, on the point that a judgment of another State has the same effect in every other State as in the State where rendered; Christmas v. Russell, 5 Wall. 302, 18 L. 478, holding a statute destroying a right to enforce a judgment was void; Hilton v. Guyot, 159 U. S. 182, 187, 200, 40 L. 115, 116, 121, 16 S. Ct. 151, 152, 157, and McElmoyle v. Coken, 13 Pet. 326, 328, 10 L. 184, 185, both holding a judgment was conclusive upon the merits; Mackee v. Cairnes, 2 Mart. (N. S.) 601, holding such a judgment between the same parties for the same thing sustains

the plea of res judicata; Barnes v. Gibbs, 31 N. J. L. 318, 86 Am. Dec. 210, holding a judgment in one State bars a second action for the same cause in another State; Moore v. Paxton, Hemp. 51, F. C. 9,772a, holding that where process was served on a defendant or his appearance entered the judgment was conclusive; Sayre v. Harpold, 33 W. Va. 557, 11 S. E. 17, and Goodrich v. Jenkins, 6 Ohio, 44, both holding a judgment was conclusive not only as to all matters determined but as to all which could have been determined; Dudley v. Lindsey, 9 B. Mon. 488, 50 Am. Dec. 524; McCauley v. Hargroves, 48 Ga. 52, 15 Am. Rep. 661, and Dickinson v. Railroad Co., 7 W. Va. 418, all considering the effect of Federal judgments; in Blackwell v. Glass, 43 Ark. 212; Mastin v. Gray, 19 Kan. 464, 27 Am. Rep. 154; Warren v. Flagg, 2 Pick. 449; Robinson v. Prescott, 4 N. H. 453; Silver Lake Bk. v. Harding, 5 Ohio, 547, and Thomas v. Robinson, 3 Wend. 269, all discussing the effect of judgments of a justice of the peace; Stell v. Glass, 1 Ga. 486, on the point that an order by a court within its jurisdiction cannot be attacked indirectly; Anderson v. Chicago Title, etc., Co., 77 N. W. 712, giving Illinois county judgment full faith in Wisconsin; McDade v. Burch, 7 Ga. 564, 50 Am. Dec. 411, where the rule was applied to an order of a court of ordinary directing an administrator to sell; Mut. Life Ins. Co. v. Harris, 97 U. S. 336, 24 L. 962, holding a final judgment to be admissible under the general issue in assumpsit or when specially pleaded; Dow v. Johnson, 100 U. S. 186, 25 L. 642, where one sued in a Circuit Court on a judgment rendered in a State court against an officer during the war for seizing goods; Holcomb v. Phelps, 16 Conn. 132, where the rule of the principal case was applied to a decree of a Probate Court; Slack v. Walcott, 3 Mason, 519, F. C. 12,932, on the point that a probate, conclusive where made, is conclusive in other courts; Latine v. Clements, 3 Ga. 429, holding that an action will lie against an administrator with the will annexed in Georgia on a judgment obtained in Virginia against an executor; Virginia v. Levy, 23 Gratt. 38, holding that a decree construing a will in one State was conclusive in another; Sanborn v. Perry, 86 Wis. 366, 56 N. W. 339, holding that a disallowance of a claim was given the same effect in a sister State as where rendered; Kingman v. Paulson, 126 Ind. 509, 22 Am. St. Rep. 613, 26 N. E. 393, applying the rule to a judgment by confession; Dillingham v. Hawk, 60 Fed. 498, 23 U. S. App. 273, holding a judgment in a State court against a receiver appointed by a Federal court to be conclusive; Cheever v. Wilson, 9 Wall. 123, 19 L. 608, and Dickson v. Dickson, 1 Yerg. 114, 24 Am. Dec. 447, both holding that a decree of divorce valid where made was valid everywhere; Alkine Grocery Co. v. Richesin, 91 Fed. 83, holding a State court judgment estopped parties from raising a question thus decided in the Federal court; Cochran v. Fitch, 1 Sandf. Ch. 146, holding an attachment regularly prosecuted was a bar to a suit by the creditor to enforce

the demand; Mutual F. I. Co. v. Phœnix Fur. Co., 108 Mich. 172, 62 Am. St. Rep. 694, 66 N. W. 1095, holding a judgment against a corporation fixing the indebtedness and directing an assessment is conclusive in an action for the assessment; Cole v. Flitcraft, 47 Md. 320, holding a prior suit in another State in personam between the same parties for the same cause of action would not bar a suit; Harrington v. Harrington, 154 Mass. 519, 28 N. E. 903, holding an action to compel a transfer of a trust estate and to pay over rents and profits was a bar to an action for the rents and profits; Burnham v. Webster, 1 Wood. & M. 175, F. C. 2,179, where an action was brought on a note, and defendant, to bar it, offered in evidence a former judgment in a foreign court; City of New Bedford, 20 Fed. 62, where the court said that a compulsory payment under a judgment on a garnishee process in Massachusetts should be deemed valid by comity; Kittredge v. Emerson, 15 N. H. 263, Whittemore v. Adams, 2 Cow. 633, and Haggerty v. Amory, 7 Allen, 459, discussing the effect of a discharge in bankruptcy in another State; Green v. Van Buskirk, 7 Wall. 148, 19 L. 112, considering the effect of a judgment on an attachment in one State against a chattel mortgage in another State where the parties were domiciled; Tucker v. Harris, 13 Ga. 10, 58 Am. Dec. 493, and Hollister v. Abbott, 31 N. H. 448, 64 Am. Dec. 344, on the point that the correctness of a judgment cannot be attacked collaterally; West Feliciana R. R. Co. v. Thornton, 12 La Ann. 738, 68 Am. Dec. 781, holding a judgment cannot be impeached on account of its not being a logical sequence of the opinion; Kinnier v. Kinnier, 45 N. Y. 541, 6 Am. Rep. 137, holding a judgment of a sister State cannot be impeached by showing irregularity or nonconformity with some law; Wyman v. Campbell, 6 Port. 237, 31 Am. Dec. 686, holding that a judgment was conclusive though the record abounded with irregularities which would authorize its reversal; Walker v. Sleight, 30 Iowa, 326, holding it could not be shown that the judgment was for a greater amount than claimed.

Cited to this point also in Barras v. Bidwell, 3 Woods, 7, F. C. 1,039; Wilcox v. Kassick, 2 Mich. 168, 169, 171, 173; Marton v. Naylor, 1 Hill's Law (S. C.), 440; Estes v. Kyle, Meig's R. 42; Fletcher v. Ferrel, 9 Dana (Ky.), 377, 35 Am. Dec. 148, and Bank of North America v. Wheeler, 28 Conn. 439, 73 Am. Dec. 684, all holding that whatever plea would be good in the State where the judgment was rendered would be good and no other; Dunbar v. Hallowell, 34 Ill. 169, and Tenny v. Townsend, 9 Blatchf. 277, F. C. 13,832, both holding the judgment is prima facie evidence of jurisdiction; in Citizens' Bank v. Brooks, 23 Fed. 22, 23 Blatchf. 138; Crawford v. Simonton, 7 Port. 127; Lawrence v. Jarvis, 32 Ill. 309; Wernwag v. Pawling, 5 Gill & J. 507, 25 Am. Dec. 319; Miller v. Ewing, 8 Smedes & M. 431, Pennywit v. Foote, 27 Ohio St. 617,

22 Am. Rep. 349, Rathbone v. Terry, 1 R. I. 77, and McCreery v. Davis, 44 S. C. 211, 51 Am. St. Rep. 805, 22 S. E. 184, all holding that want of jurisdiction may be shown in an action upon the judgment; Price v. Hickok, 39 Vt. 300; Middlesex Bk. v. Butman, 29 Me. 24, and Hunt v. Ellison, 32 Ala. 202, all holding that the judgment is void if the record shows that the court had no jurisdiction; Foster v. Glazener, 27 Ala. 398, and Hall v. Williams, 6 Pick. 237, 246, 17 Am. Dec. 359, 366, holding that, under a plea of nil debet, the defendant may show a want of jurisdiction; in Graham v. Spencer, 14 Fed. 605; Thompson v. Whitman, 18 Wall. 462, 21 L. 899; Bradshaw v. Heath, 13 Wend. 415, 416, 423, and Price v. Schaeffer, 161 Pa. St. 534, 29 Atl. 279, all holding the record may be contradicted by evidence of facts impeaching the jurisdiction; People v. Dawell, 25 Mich. 269, holding a recital of facts showing jurisdiction was not conclusive where the judgment came collaterally in question; Zepp v. Hager, 70 Ill. 225, and Carpentier v. City of Oakland, 30 Cal. 446, both holding that an inquiry into the jurisdiction is restricted to an inspection of the record; Wheeler v. Raymond, 8 Cow. 314, holding defendant's appearance conclusive of sister State court's jurisdiction; Potter v. Merchants' Bk., 28 N. Y. 654, 86 Am. Dec. 279, on the point as to whether jurisdiction may be proved by recitals in the record; Barrett v. Oppenheimer, 12 Heisk. 302, on the point that the question of jurisdiction, when determined, is as conclusive as any other question decided; Hunt v. Ellison, 32 Ala. 212, on the point that knowledge of a suit shown by parol evidence and dehors the record fixes liability; Hoxie v. Wright, 2 Vt. 267, holding the judgment to be conclusive, although the defendant resided out of the State, if he appeared and made defense; Fisher v. March, 26 Gratt. 778, where the effect of a record showing, or failing to show, jurisdiction was considered; Sammis v. Wightman, 31 Fla. 25, 12 So. 530, holding that one attacking the jurisdiction must negative every fact upon which such jurisdiction can be predicated; Jarvis v. Robinson, 21 Wis. 525, 94 Am. Dec. 560, holding that want of jurisdiction must be specially pleaded, unless it positively appears from the record; Wilson v. Jackson, 10 Mo. 332, 333, where the sufficiency of a plea to the jurisdiction was considered; Moch v. Insurance Co., 4 Hughes, 119, 10 Fed. 706, holding that, although a court may inquire into the question of jurisdiction, this does not relieve the parties from the operation of the principle of res judicata.

Elsewhere, the principal case is cited to this point, as follows: In Aldrich v. Kinney, 4 Conn. 383, 10 Am. Dec. 152; Pritchett v. Clark, 3 Harr. 259; Moulin v. Trenton, etc., Ins. Co., 24 N. J. L. 230, 231, 236, 240, 241; Shumway v. Stillman, 6 Wend. 450; Hoffman v. Hoffman, 46 N. Y. 33, 7 Am. Rep. 301; Ferguson v. Crawford, 70 N. Y. 261, 26 Am. Rep. 595; Newcomb v. Peck, 17 Vt. 309, 44 Am. Dec. 341, and Crumlish v. Central Imp. Co., 38 W. Va. 398, 45

Am. St. Rep. 878, 18 S. E. 459, all holding that a judgment without any service of process and without appearance is void; Melhop v. Doane, 31 Iowa, 400, 406, 7 Am. Rep. 150, 154, and Middlesex Bk. v. Butman, 29 Me. 23, and Burt v. Delano, 4 Cliff, 616, F. C. 2,211, holding a judgment is void if rendered against a nonresident upon whom no service has been made; Dowver v. Shaw, 22 N. H. 282, on the point that an attachment of property cannot have the effect to extend jurisdiction over the person of the absent owner; Gilchrist v. West Va. O. & O. L. Co., 21 W. Va. 118, 45 Am. Rep. 557, and Dearing v. Bank of Charleston, 5 Ga. 512, 48 Am. Dec. 310, holding a decree against a corporation, without any appearance, was of no effect; Jardine v. Reichert, 39 N. J. L. 167, holding that no mere irregularity in service could be set up; in Wetherill v. Stillman, 65 Pa. St. 115; Bennett v. Morley, 10 Ohio, 102, 103, and May v. Jameson, 11 Ark. 373, holding that a record showing personal service cannot be contradicted; Swift v. Stark, 2 Or. 101, 88 Am. Dec. 465, and Bonesteel v. Todd, 9 Mich. 376, 80 Am. Dec. 91, considering the effect of a judgment under the joint debtor act, where all were not served; Bowler v. Huston, 30 Gratt. 274, 32 Am. Rep. 677, holding a judgment against all the members of a dissolved firm will not bind a partner who was not served; Easterly v. Goodwin, 35 Conn. 278, holding that a judgment, where property had been attached but no service made, could not be the basis of an action of debt; Sanford v. Sanford, 28 Conn. 20; Harshey v. Blackmarr, 20 Iowa, 172, 89 Am. Dec. 522, and Sperry v. Reynolds, 65 N. Y. 187, all holding a judgment may be set aside when there is no appearance or an unauthorized appearance; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 467, holding that defendant may deny the authority of the attorney who appeared for him; Rogers v. Burns, 27 Pa. St. 526, holding a judgment cannot be impeached, because exemplification does not show a warrant of attorney to institute the suit; Lynch v. Columbus, etc., Ry. Co., 57 Fed. 996; Middlebrooks v. The Springfield F. I. Co., 14 Conn. 307; Van Cleaf v. Burns, 133 N. Y. 542, 30 N. E. 662, and Burnley v. Stevenson, 24 Ohio St. 479, 15 Am. Rep. 626, considering the effect of judgments operating on property in another State; Miller v. Leach, 95 N. C. 231, holding judgments of sister States are conclusive of all questions involved, except fraud and want of jurisdiction; Benton v. Burgot, 10 Serg. & R. 242, holding a plea of fraud was bad; in Davis v. Smith, 5 Ga. 297, 48 Am. Dec. 296; Hunt v. Hunt, 72 N. Y. 225, 28 Am. Rep. 134, and Bimeler v. Dawson, 5 Ill. 540, 39 Am. Dec. 432, all holding a decree of a sister State could be impeached for fraud or for want of jurisdiction; Ambler v. Whipple, 139 Ill. 324, 32 Am. St. Rep. 211, 28 N. E. 844, holding a plea of fraud was not admissible where the court had jurisdiction of the person and the subject-matter; McJilton v. Love, 13 Ill. 493, 54 Am. Dec. 452, holding a pendency of a suit in one State was no bar to

a suit in another; in Rogers v. Odell, 39 N. H. 458, 460; Morris v. Burgess, 116 N. C. 42, 21 S. E. 28; McGilvray v. Avery, 30 Vt. 540, 541; Whiting v. Burger, 78 Me. 294, 4 Atl. 696; Bank of U. S. v. Merchants' Bk., 7 Gill, 418, 432, and Wright v. White, 14 La. Ann. 585, all holding a plea that, since the commencement of the action, a judgment had been rendered in a sister State, was good; Paine v. Schenectady Ins. Co., 11 R. I. 413, 416, and Piedmont, etc., L. I. Co. v. Ray, 75 Va. 823, both considering the effect of an appeal or writ of error; Gulick v. Loder, 14 N. J. L. 574, where the court said that the record of a judgment was binding, however unlike the record the court was used to.

Further citing cases affirming this rule are: Breugle v. McClellan, 7 Gill & J. 441, holding a judgment of a sister State was a simple contract debt and not entitled to the priority it had in the State where rendered; Besley v. Palmer, 1 Hill, 484, holding a judgment of a sister State had the same effect in extinguishing a demand as a domestic judgment; Bank of U. S. v. Bank of Baltimore, 7 Gill, 435, holding that assumpsit cannot be maintained on the original demand; Citizens' Bk. v. Hancock, 35 La. Ann. 44, on the point that a cause of action is merged in the judgment; Baxley v. Linah, 16 Pa. St. 248, 55 Am. Dec. 496, holding a judgment to be conclusive of the subject-matter and merger of the original cause of action; Wyman v. Mitchell, 1 Cow. 319, 320, on the point as to the right to maintain assumpsit on a judgment; Knapp v. Knapp, 59 Fed. 643, holding an action will lie in a Federal court upon a decree of divorce of a State court, for alimony; McKim v. Odam, 12 Me. 96, 110, holding that debt will lie on a decree of a court of chancery of another State for the payment of money only; Williams v. Preston, 3 J. J. Marsh. 604, 20 Am. Dec. 184; Tenney v. Townsend, 9 Blatchf. 277, F. C. 13,832, holding that a declaration need not aver that the court had jurisdiction; Sharman v. Morton, 31 Ga. 45, holding such a judgment does not preclude pleading any special matter in avoidance of the judgment; Carter v. Wilson, 1 Dev. & B. 365, holding the only proper plea is nul tiel record; Jackson v. Baxter, 1 Ind. 44, where nul tiel record was pleaded to a declaration setting out a judgment and statute; Hunt v. Mayfield, 2 Stew. 128, 129, holding special matters of defense must be specially pleaded; Keith v. Estill, 9 Port. 671, holding the statute of limitations was not a good plea in bar to debt on a judgment; Napier v. Gidiere, 1 Speers Eq. 229, 40 Am. Dec. 615, where the court said that pleas in suits on judgments are left to be prescribed by the States; Dunlap v. Waldo, 6 N. H. 453, where the court considered the effect to be given to a seal to a record from a sister State; Lincoln v. Tower, 2 McLean, 478, 480, F. C. 8,355, holding the record imports absolute verity and cannot be traversed; Taylor v. Carpenter, 2 Wood. & M. 4, F. C. 13,785, holding a document attested by the clerk under seal with the certificate of

the judge and called an exemplified copy was competent evidence of the judgment described; Hampton v. McConnell, 3 Wheat. 235, 4 L. 379, a case precisely the same as the principal case; D'Arcy v. Ketchum, 11 How. 175, 176, 13 L. 653, where a judgment was given against two partners, one of whom was a nonresident; Chicago, etc., R. R. Co. v. Wiggins Ferry Co., 119 U. S. 622, 30 L. 522, 7 S. Ct. 402, on the point that the public acts of every State shall be given the same effect as they have by law and usage at home; Joice v. Seales, 18 Ga. 727, on the point that the provision requiring full faith is referable to such records as pleadings and evidence; Mervin v. Kumbel, 23 Wend. 303, debt on a judgment against joint debtors, only one of whom was served; Merritt v. American Steel Barge Co., 75 Fed. 818, 40 U. S. App. 127, considering whether the question as to whether full faith and credit had been given was a constitutional question; Crapo v. Kelly, 16 Wall. 619, 21 L. 434, holding that the overruling of the plea gave a Federal court authority over the question; Pelton v. Platner, 13 Ohio, 217, on the point that foreign judgments in rem in regard to personalty are conclusive; Williams v. Preston, 3 J. J. Marsh. 601, 20 Am. Dec. 181, on the point that a foreign judgment is only prima facie evidence where a suit is brought upon it; Fisher v. Fielding, 67 Conn. 116, 34 Atl. 719, on the point that the common-law doctrine as to the effect of foreign judgments has been generally adopted; Hilton v. Guyot, 159 U. S. 215, 217, 40 L. 126, 127, 16 S. Ct. 163, 164, holding judgment for money in foreign country is prima facie and not conclusive evidence as to the merits. See also valuable notes in 2 Am. Dec. 42, 43, 44, 26 Am. Rep. 30, and 75 Am. Dec. 149; also 8 Ind. 200, note.

Distinguished in Commonwealth v. Green, 17 Mass. 546, holding a conviction in one State of an infamous crime does not make the defendant incompetent as a witness in another State; Blackman v. Wright, 96 Iowa, 551, 65 N. W. 846, holding a judgment in New York setting aside a deed of land in Iowa to be void, for want of jurisdiction; Hyatt v. McBurney, 18 S. C. 210, where the court considered as to whether a judgment was res judicata; Cameron v. Wurtz, 4 McCord (S. C.), 280, holding that a judgment of a sister State ranks only as a simple contract, in marshalling assets; Hall v. Williams, 10 Me. 286, 287, where the court said that a judgment erroneously entered up against one could have no binding efficacy; discussed and its doctrine held to be limited to cases where the court had jurisdiction in the following cases: McElmoyle v. Cohen, 13 Pet. 326, 10 L. 184, where the statute of limitations was pleaded to an action on a judgment of a sister State; Fullerton v. Horton, 11 Vt. 426, saying the principal case did not cover the case where the court was without jurisdiction; Pritchett v. Clark, 3 Harr. 247, 525, 526, holding that full faith and credit are given when it appears from the record that the court had jurisdiction; Mitchell v.

Ferris, 5 Houst. 38, 39, holding that, notwithstanding the Constitution and the statutes, the jurisdiction may be contradicted, inquired into, and disproved; Harding v. Alden, 9 Me. 149, 23 Am. Dec. 554, holding a judgment against a party not amenable to its jurisdiction is entitled to no credit; Starbuck v. Murray, 5 Wend. 155, 21 Am. Dec. 175, holding a judgment could be examined to see if the court had jurisdiction; Shumway v. Stillman, 4 Cow. 294, 295, 15 Am. Dec. 375, 376, and Lucas v. Bank of Darien, 2 Stew. 315, both holding a judgment may be avoided by showing want of jurisdiction; Eaton v. Hasty, 6 Neb. 426, 29 Am. Rep. 367, holding that a judgment may be impeached for fraud or want of jurisdiction; Sallee v. Hayes, 3 Mo. 118, holding a judgment rendered without notice is not entitled to full faith and credit; Crone v. Dawson, 19 Mo. App. 219, where the court held that the plea of nil debet will allow the defendant to show that the court had no jurisdiction; Marx v. Fore, 51 Mo. 76, 77, 11 Am. Rep. 435, and Gleason v. Dodd, 4 Met. (Mass.) 336, both holding that one could impeach by proof that he had no legal notice of the suit and did not appear; Miller v. Miller, 1 Bailey L. 248, holding an action would not lie on a judgment against a defendant not within the State and who had not appeared; Shumway v. Stillman, 6 Wend. 451, holding that if the record set forth that the defendant did appear by attorney, the defendant may disprove it; Wood v. Augustins, 70 Vt. 639, 640, 41 Atl. 584, examining principal case at length, declaring it modified by Thompson v. Whitman, 18 Wall. 457, and holding it competent to impeach a judgment of a sister State by showing that defendant not served, not an inhabitant of the State, and his appearance by attorney, unauthorized.

Distinguished upon this point, also in Carleton v. Bickford, 13 Gray, 594, 74 Am. Dec. 654, holding the return of the officer, that he made personal service on the defendant, may be contradicted by parol; Rape v. Heaton, 9 Wis. 336, 76 Am. Dec. 274, holding want of jurisdiction may be shown where the record recites the jurisdictional facts; Ritchie v. Carpenter, 2 Wash. 523, 26 Am. St. Rep. 886, 28 Pac. 384, and Aultman v. Mills, 9 Wash. 69, 70, 36 Pac. 1046, 1047, both holding that want of jurisdiction may be shown even to the extent of contradicting express recitals in the record; Leith v. Leith, 39 N. H. 41, holding that the question of residence in another State is open when a divorce is granted in a sister State, although the record of the proceedings is in due form; Iglehart v. Moore, 16 Ark. 54, 55, holding that nothing less than actual notice or a waiver of it could give validity to a judgment against a nonresident; Borden v. Fitch, 15 Johns. 143, 8 Am. Dec. 228, holding that a judgment of divorce in another State without jurisdiction would not be recognized; Anderson v. Anderson, 8 Ohio, 109, 110, holding that the plea that the judgment was obtained by fraud is not available; Boston India Rubber Fac-

tory v. Hoit, 14 Vt. 98, holding assumpsit would not lie upon a judgment of a sister State, but the declaration must be in debt; Thompson v. Whitman, 18 Wall. 463, 464, 21 L. 900, the court saying it was not intended in the principal case to exclude pleas of avoidance and satisfaction; also in the note to 11 Am. Rep. 438, citing cases on the effect of judgments of sister States, not approved in Hazzard v. Nottingham, Tappan, 116, 119, 121, 122, 123, holding a judgment of a sister State to be a foreign judgment and only prima facie evidence.

Judgments.— Nil debet cannot be pleaded to an action on a judgment of a sister State, p. 484.

Cited and principle applied in Andrews v. Montgomery, 19 Johns. 163, 164, 10 Am. Dec. 213, 214, Gulick v. Loder, 13 N. J. L. 70, 23 Am. Dec. 712, both holding a judgment was conclusive evidence of debt; Buller v. Sidell, 43 Fed. 117, holding that a paragraph of the answer which merely denied indebtedness should be stricken out; Ridley v. Buchanan, 2 Swan, 560, holding that an order compelling an election between pleas of nil debet and nul tiel record was error; Amory v. Amory, 3 Biss. 271, F. C. 334, holding it is the duty of Circuit Courts to give full faith to the judgments of State courts; in Marr v. Wetzel, 3 Colo. 5; Lucas v. Bank of Darien, 2 Stew. 308, and Kopf v. Huckins, 11 Tex. Civ. App. 88, 32 S. W. 42, all holding that it is still open to a party to deny the jurisdiction; Holt v. Alloway, 2 Blackf. 109, holding a defendant may show fraud or want of jurisdiction; Lapham v. Briggs, 27 Vt. 32, holding that the question of jurisdiction is conclusively determined by its record, construed according to the law of its own State; Davis v. Lane, 2 Ind. 549, saying the principal case had been construed not to extend to pleas of payment, release, etc.; Earthman v. Jones, 2 Yerg. 485, 487, holding a judgment against a nonresident upon an attachment without process or appearance is no evidence of debt; Jacquette v. Hugunon, 2 McLean, 129, F. C. 7,169, holding that a judgment is conclusive of the subject-matter, and no plea can be filed which contradicts the record; Westerwelt v. Lewis, 2 McLean, 513, F. C. 17,446, holding that the record when duly authenticated was conclusive; Warren Mfg. Co. v. Ætna Ins. Co., 2 Paine, 508, F. C. 17,206, holding that whatever plea would be good where rendered would be good and no other; Breugle v. McClellan, 7 Gill & J. 440, 441, the court saying the "full faith and credit" has never been carried further than to give a judgment the same effect it had in the State where rendered; Maxwell v. Stewart, 22 Wall. 81, 22 L. 566, and Allison v. Chapman, 19 Fed. 488, both holding that a plea of fraud was no defense; Kimmel v. Shultz, 1 Ill. 170, where judgment was obtained against joint debtors; Wells v. Edmison, 4 Dak. 51, 22 N. W. 499, and Williams v. Guignard, 2 How. (Miss.) 723, where discharge in insolvency was pleaded; Evans v. Tatem, 9

Serg. & R. 260, 11 Am. Dec. 720, holding that in an action on a decree of equity the pleas of nil debet and nul tiel record are bad on general demurrer; Coleman v. Waters, 13 W. Va. 307, holding a judgment by confession, by virtue of a warrant of attorney, was entitled to full faith and credit; Black v. Smith, 13 W. Va. 792, where the court considered how far a judgment would be inquired into; Indianapolis, etc., R. W. Co. v. Risley, 50 Ind. 62, holding the same as the principal case; Buchanan v. Port, 5 Ind. 265, where the court said the principal case was decisive of the case under consideration; Hindman v. Mackall, 3 G. Greene, 173, and Judkins v. Union Mut. F. I. Co., 37 N. H. 475, 476, 477, 479, 481, holding that under a plea of nil debet the defendant may show want of jurisdiction and fraud; Draper v. Gorman, 8 Leigh, 631, 638, 639, 641, where, in an action on a judgment of the District of Columbia, the plea of nil debet was received and the plea that the money was won at gambling was rejected; Morehead v. Grisham, 13 Ark. 435, holding a judgment was conclusive and that debt and not assumpsit was the proper form of action.

Judgments.— In an action on a judgment of a sister State, exemplification of the record is decisive; the original need not be produced, p. 485.

Cited in Turnbull v. Payson, 95 U. S. 422, 24 L. 439, where the court said that the attestation of the clerk with the seal of the court annexed is a sufficient authentication; Emery v. Berry, 28 N. H. 486, 61 Am. Dec. 626, where the court considered how laws of a sister State were to be proved.

Judgments may be complete and perfect and have full effect independent of the right to issue execution, p. 485.

Cited in New York Security & T. Co. v. Equitable Mtg. Co., 71 Fed. 560, an application by a creditor in the Circuit Court for Missouri to have his claim determined, although the original proceedings were in New York; Bank of United States v. Merchants' Bank of Baltimore, 7 Gill, 423, on the point that execution cannot issue on a judgment of a sister State.

Judgments of sister States are conclusive in the District of Columbia, p. 485.

7 Cr. 487–496, 3 L. 414, OLIVER v. MARYLAND INS. CO.

Shipping.—An idle waste of time, after a vessel has completed the purposes for which she entered a port, is a deviation which discharges the underwriters, p. 490.

Cited in Natchez Ins. Co. v. Stanton, 2 Smedes & M. 376, 41 Am. Dec. 595, holding that the taking of a brig in tow amounted to a deviation; Riggin v. Patapsco Ins. Co., 7 Harr. & J. 291, 16 Am. Dec. 308, holding a fear of capture at the port of destination founded on mere rumors will not justify a deviation.

Distinguished in Columbian Ins. Co. v. Catlett, 12 Wheat. 390, 6 L. 668, where the court said that whether a delay constituted a deviation depended upon the usage of trade.

Shipping.— If a vessel exhausts the whole time at one port which, according to the usage, was allowable only for the purpose of taking in the whole cargo, the subsequent delay at another port, for the purpose of completing the cargo, is unreasonable and will discharge the underwriters, p. 491.

Cited and principle applied in Hostetter v. Park, 137 U. S. 40, 34 L. 572, 11 S. Ct. 4, on the point that touching at a port out of the course is no deviation where such departure was within the usage of trade; Constable v. National S. S. Co., 154 U. S. 66, 38 L. 911, 14 S. Ct. 1068, holding that the berthing of a ship at a pier other than her own was not in legal effect a deviation; Hostetter v. Gray, 11 Fed. 181, holding that after the express provisions of the contract, the usage of the trade was the predominating test as to deviation; Thatcher v. McCulloh, Olcott, 370, F. C. 13,862, where it was the known usage of trade and navigation to touch at this intermediate port.

Shipping.—Apprehension of danger of capture will justify a vessel in remaining in a port; but the danger must be obvious and immediate in reference to the situation of the ship at the particular time, p. 493.

Cited in Crosby v. Fitch, 12 Conn. 421, 31 Am. Dec. 749, on the point that a pretended danger will not justify any unusual or hazardous experiment.

Miscellaneous.— Cited on the point that if there was negligence, one is liable for loss, although the immediate cause of the loss was an act of God, in Morgan v. Dibble, 29 Tex. 120, 94 Am. Dec. 268.

7 Cr. 496–500, 3 L. 417, BRIG CAROLINE v. UNITED STATES.

Libel for a forfeiture must aver specially all the material facts constituting the offense, p. 500.

Cited and rule applied in United States v. Huckabee, 16 Wall. 431, 21 L. 463, the court saying that informations should propound in distinct articles the causes of forfeiture and should aver the same are contrary to the statute; United States v. Weed, 5 Wall. 69, 18 L. 533, where the court said a claimant had a right to be informed by the libel of the specific act; United States v. One Distillery, 4 Biss. 27, F. C. 15,929, where there was an information under the internal revenue law claiming a forfeiture of a distillery; United States v. Mann, 95 U. S. 586, 24 L. 533, on the point that a commission of a statutory offense must be accurately and clearly alleged; United States v. Fifteen Barrels of Distilled Spirits, 51 Fed. 421, where an information for forfeiture of certain spirits was held bad for in-

definiteness; The Confiscation Cases, 20 Wall. 106, 22 L. 323, where there was an information under the confiscation act of 1862; The Emily and The Caroline, 9 Wheat. 387, 6 L. 117, holding a libel of information does not require all the technical provisions of an indictment at common law; State v. Perry, Wright, 671, holding that the object of pleading is brevity and certainty, and whatever attains to that is sufficient; Commonwealth v. King, 1 Whart. 459, on the point that a penalty does not arise on an offer to do the act where it is consequent on an act completed.

Libel for a forfeiture, which is defective, may be amended, p. 500.

Rule affirmed and applied in The Martha, 1 Blatchf. & H. 166, F. C. 9,144, where the court said that courts of admiralty dealt liberally with suitors in matters of practice; Anonymous, 1 Gall. 26, F. C. 444, holding that such amendments are not allowed as of course; The Edward, 1 Wheat. 264, 4 L. 87, holding that in revenue or instance courts, the Circuit Court may, upon appeal, allow the introduction of new allegations by way of amendment; Merriam v. Langdon, 10 Conn. 472, holding a qui tam information was amendable after the time limited for presenting a new information has elapsed; Garland v. Davis, 4 How. 154, 11 L. 918, where the court abstained from awarding a repleader but remanded the case so that the pleadings might be amended; The Mabey, 10 Wall. 420, 19 L. 963, on the point that there can be no substantial amendment in the Supreme Court, but the cause will be remanded with directions to amend; The Sarah, 8 Wheat. 397, note, 5 L. 645, where a bill charged a seizure on land where in fact it was made on water; Bieren v. Steamboat Triumph, 2 Ala. 742, on the point that admiralty never sends a party out of court so long as the proceedings can be perfected by amendment; Richmond v. The New Bedford Copper Co., 2 Low. 317, F. C. 11,800, where the court said it had been held that an action can never fail for want of proper allegations, if merits appear; Cleveland Ins. Co. v. Globe Ins. Co., 98 U. S. 376, 379, 25 L. 204, 205, dissenting opinion, and Stickney v. Wilt, 11 Bank. Reg. 107; S. C., on appeal, 23 Wall. 164, 23 L. 54, both on the point as to the practice where the court below had no jurisdiction in any form of proceeding.

Miscellaneous.— Cited in Baker v. Biddle, 1 Bald. 406, F. C. 764, on the point that the appellate jurisdiction of the Circuit Court is subject to control of congress; Robinson v. Hook, 4 Mason, 153 et seq., F. C. 11,956, where the court considered the rights of informers.

7 Cr. 500–504, 3 L. 419, RIGGS v. LINDSAY.

Bills and notes.— One authorizing another to draw upon him is liable to such other in an action for money paid, for the amount of the drafts, protest and costs, if he fails to accept and pay them in consequence of which the other is compelled to take them up, p. 503.

Rule approved and followed in Greene v. Goddard, 9 Met. 223, holding that one requesting another to draw bills of exchange, undertook and was liable to indemnify him for so doing; Bowen v. Stoddard, 10 Met. 380, holding an acceptor was not liable for damages but only for the amount of the bill, with interest and costs; Russell v. Wiggin, 2 Story, 242, F. C. 12,165, where an action was brought against a banker for not paying drafts drawn under a letter of credit; Pendleton v. Knickerbocker L. I. Co., 7 Fed. 172, on the point that failure to accept and pay renders one liable in damages; Ulster County Bank v. McFarlan, 3 Den. 557, on the point that a promise to accept should describe the bill so it could not be mistaken.

Evidence.— If one defendant produces a letter written by his co-defendant to the plaintiff, evidence to show that the writer had, at another time, given a very different account of the same transaction is admissible, p. 504.

Cited in Blossom v. Barrett, 37 N. Y. 438, 97 Am. Dec. 750, on the point that one voluntarily accepting an immaterial issue and giving evidence upon it cannot complain if the court allowed the other side to answer.

Miscellaneous.— Cited in Chesapeake, etc., Co. v. Knapp, 9 Pet. 567, 9 L. 232, holding that if a special contract is open, the remedy is on the contract, but if it is ended, assumpsit lies.

7 Cr. 504–506, 3 L. 420, McINTIRE v. WOOD.

Mandamus.— Power of Circuit Courts to issue mandamus is confined exclusively in those cases in which it may be necessary to the exercise of their jurisdiction, p. 506.

This important decision, following in the wake of Marbury v. Madison, 1 Cr. 137, 2 L. 60 (q. v.), left the Circuit as well as the Supreme Court without power to issue mandamus except in aid of a jurisdiction already otherwise acquired. The citing cases indicate other applications and developments of the doctrine: Gares v. Northwestern, etc., Assn., 55 Fed. 210, holding that Circuit Courts could not issue mandamus even when, in the State where the court sits, mandamus was regarded as a civil action; Smith v. Jackson ex dem. Allyn, 1 Paine, 455, F. C. 13,064, holding that mandamus will not lie to a District Court to compel it to expunge amendments improperly made in the record; United States v. New Bedford Bridge Co., 1 Wood. & M. 438, F. C. 15,867, holding that the Circuit Court has such jurisdiction only as is conferred upon it; Ladd v. Tudor, 3 Wood. & M. 332, F. C. 7,975, where the question was whether a Federal court could issue the writ to a State court; In re Forsyth, 78 Fed. 301, where the court refused to issue mandamus on the petition of a receiver in a State court as against a clerk of the District Court; United States v. Judges, etc., 85 Fed. 179; S. C., sub

nom. In re Harless, 56 U. S. App. 35, rule applies to Circuit Court of Appeals, where there was an application to compel judges to admit one to bail; Ex parte Van Orden, 3 Blatchf. 169, F. C. 16,870, on the point that Federal courts cannot issue mandamus to any magistrate other than to those in the District of Columbia; Ex parte Crane, 5 Pet. 206, 8 L. 98, holding that the Supreme Court could compel a circuit judge to sign a bill of exceptions; Fisk v. Union Pac. Ry. Co., 6 Blatchf. 396, 397, F. C. 4,827, holding that mandamus was not necessary to enforce affirmative action to remove a cause from a State to a Federal court; State v. Lake Erie & W. Ry. Co., 85 Fed. 3, holding that an application for a mandamus begun in a State court is not removable to the Federal court; Rosenbaum v. Board of Supervisors, 11 Sawy. 621, 28 Fed. 224, holding that the jurisdiction could not be conferred by commencing the proceedings in a State court and removing them to a Circuit Court; in the same case on appeal in 120 U. S. 453, 454, 455, 30 L. 745, 7 S. Ct. 634, 635, affirming the same principle; United States v. Plumer, 3 Cliff. 61, F. C. 16,056, holding that a writ of error coram nobis does not lie to the Circuit Court in a criminal case; Denton v. Baker, 79 Fed. 194, 48 U. S. App. 44, holding that a holder of a judgment against an insolvent national bank on a claim rejected by a receiver cannot resort to mandamus; Lyell v. Supervisors of Lapeer Co., 6 McLean, 456, F. C. 8,618, on the point that the Circuit Court cannot issue mandamus to a State officer; Commissioner v. Smith, 5 Tex. 478, holding the writ will lie to the heads of departments where the duty is plain and there is no discretion; Van Antwerp v. Hulburd, 7 Blatchf. 433, F. C. 16,826, holding that the Circuit Court could not compel an officer to perform a ministerial duty; Hoover v. McChesney, 81 Fed. 482, on the point that courts cannot interfere with the conduct of an officer except where the duties are ministerial; Enterprise Sav. Assn. v. Zumstein, 67 Fed. 1007, 37 U. S. App. 71, on the point that discretionary acts will not be controlled; Litchfield v. The Register & Receiver, Woolw. 312, F. C. 8,388, holding that the court will not interfere by injunction with political or discretionary power; State ex rel. Bayha v. Phillips, 97 Mo. 346, 10 S. W. 861, holding that mandamus would lie to correct an arbitrary exercise of discretion.

Other citing cases affirm the rule and apply it as follows: Meyer v. Carolan, 9 Tex. 253, where the question was whether mandamus would lie to the clerk of the District Court to compel the approval of an appeal bond; Bledsoe v. International R. R. Co., 40 Tex. 557, where there was an application to compel the countersigning and registering of bonds by the controller; Kuechler v. Wright, 40 Tex. 660, 665, holding a ministerial duty of the commissioner of the general land office would not be enforced by mandamus; Lewis v. Lewis, 9 Mo. (185), 186, 43 Am. Dec. 541, on the point that State courts cannot control officers of general government in the disposal of the public domain; Gaines v. Thompson, 7 Wall. 349, 19 L. 64,

holding that the cancelling an entry will not be interfered with; The Secretary v. McGarrahan, 9 Wall. 311, 19 L. 583, holding mandamus would not lie to compel issuance of a patent; Louisiana v. Jumel, 107 U. S. 762, 27 L. 466, 2 S. Ct. 170, 171, dissenting opinion, where mandamus was sought to compel an auditor and a State treasurer to apply funds to the retirement of bonds; in Riggs v. Johnson County, 6 Wall. 189, 198, 18 L. 774, 777; Bath County v. Amy, 13 Wall. 249, 20 L. 541; Heine v. The Levee Commissioners, 19 Wall. 660, 22 L. 226; Stryker v. Board of Commissioners of Grand County, 77 Fed. 574, 40 U. S. App. 583, all proceedings to compel the levy of a tax; Decatur v. Paulding, 14 Pet. 601, 10 L. 610, where a court refused to issue a mandamus against a secretary of the navy; United States v. Pearson, 32 Fed. 310, 24 Blatchf. 454, holding that the writ could not issue against a postmaster to compel him to transmit mail as third and not as second class matter; McClung v. Silliman, 6 Wheat. 599, 604, 5 L. 340, 341, holding that a State court cannot issue a mandamus to an officer of the United States; United States v. Schurz, 102 U. S. 393, 26 L. 170, holding that the Supreme Court of the District of Columbia could issue mandamus as an original process; State v. Curtis, 35 Conn. 383, 95 Am. Dec. 268, where the court discussed the right of Federal courts to issue writs. Discussed at length and explained in Kendall v. United States, 5 Cr. C. C. 172, 173, 174, 183, 184, 185, 187, 242–247, 255, F. C. 15,517, and in the same case on appeal in 12 Pet. 615, 616, 617, 618, 624, 626, 627, 633, 642, 646, 9 L. 1217, 1218, 1221, 1222, 1224, 1228, 1229, dissenting opinion, reported in 13 Pet. 609, 10 L. 318, holding that the Circuit Court could issue the writ to compel the postmaster-general to perform a ministerial duty. Cited generally in Ex parte Hill v. Confederate States, 38 Ala. 485, where the question was as to whether State courts could discharge enrolled conscripts from the custody of Confederate States officers; American Constr. Co. v. Jacksonville, etc., Ry. Co., 148 U. S. 380, 37 L. 490, 13 S. Ct. 762, on the point that certiorari is used as an auxiliary process only.

Distinguished in King v. McLean Asylum, 64 Fed. 343, 21 U. S. App. 481, citing authorities and distinguishing writs of habeas corpus from mandamus.

Federal courts.— Circuit Courts have such powers only as are delegated to them by statute, p. 506.

Cited and doctrine approved and applied in Case of the Sewing Machines Cos., 18 Wall. 577, 21 L. 919, and Sheldon v. Sill, 8 How. 449, 12 L. 1151, both holding that a court created by statute can have no jurisdiction but such as the statute confers; Harrison v. Hadley, 2 Dill. 234, F. C. 6,137, holding that there must be an act of congress expressly conferring jurisdiction; United States v. New Bedford Bridge Co., 1 Wood. & M. 432, 435, F. C. 15,867, on the point that acts of congress as well as the Constitution must generally unite to give jurisdiction to a particular court; United States v. Shaw, 39 Fed.

433, holding that the limitation on the amount necessary to give jurisdiction does not apply to suits in which the United States is a party; Ex parte Crane, 5 Pet. 202, 8 L. 97, dissenting opinion, holding that the Supreme Court could issue mandamus to compel the circuit judge to sign a bill of exceptions; United States v. Eckford, 6 Wall. 488, 18 L. 92, holding that jurisdiction could not be exercised by a Circuit Court unless the plaintiff could bring his case within some act of congress; The Assessors v. Osborne, 9 Wall. 575, 19 L. 751, holding that where jurisdiction depends wholly on a statute, suits brought during its existence fall with its repeal; In re Heath, 144 U. S. 95, 36 L. 300, 12 S. Ct. 616, holding the Supreme Court has no appellate jurisdiction over judgments of the Supreme Court of the District of Columbia in criminal cases; North Carolina v. Trustees of University, 1 Hughes, 137, F. C. 10,318, and State v. Trustees of University, 65 N. C. 718, both holding that Circuit Courts have no jurisdiction of a case in which a State is plaintiff against its own citizens; In re Cilley, 58 Fed. 978, where there was a petition for the removal to a Federal court of a probate appeal. See note to 12 Am. Rep. 547, discussing the jurisdiction of Circuit Courts.

7 Cr. 506–548, 3 L. 421, LIVINGSTON v. MARYLAND INS. CO.

Insurance.— False representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, p. 535.

Cited in Marshall v. Columbian M. F. I. Co., 27 N. H. 166, holding that, in an application for fire insurance, whatever is material to the risk should be set forth correctly in the application; Clark v. Manufacturers' Ins. Co., 8 How. 248, 12 L. 1066, where there was a representation that no lamps were used; Callaghan v. Atlantic Ins. Co., 1 Edw. Ch. 77, holding that the assertion of a material circumstance in an unqualified manner, without knowledge, vitiates the policy.

Insurance.— To constitute a representation, there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If expressions are ambiguous, insurer ought to ask an explanation and not substitute his own conjectures for an alleged representation, p. 536.

Cited in Nicoll v. American Ins. Co., 3 Wood. & M. 536, F. C. 10,259, on the point that, if the representations are ambiguous, the defendant should ask for explanations before taking the insurance; Allegre v. Maryland Ins. Co., 2 Gill & J. 160, 20 Am. Dec. 429, holding that orders for insurance must be liberally construed and with respect to the situation and circumstances of the parties.

Insurance.— Concealment of papers in general amounts to a breach of warranty; but this rule does not apply where, by the usage of trade, such papers ought to be on board, p. 536.

Residents.— A Spanish subject coming here to carry on trade between this country and the Spanish provinces under a royal Spanish license, and remaining during the war between Spain and Great Britain, is to be considered an American merchant, whether he carried on trade generally or confined himself to a trade from the United States to the Spanish provinces, p. 537.

Cited in Elbers v. United Ins. Co., 16 Johns. 134, on the point that a bona fide settler is deemed to be a resident.

Insurance.— Usage of trade to take on board certain papers is to be considered by the jury in determining whether such taking on board avoided a policy, p. 537.

Insurance.— In estimating materiality to the risk of papers taken on board, their effect, taken together, should be considered, not of one of them by itself, p. 538.

Notice.— Paper which expressly refers to another paper within the power of the party gives notice of the contents of that other paper, p. 538.

Cited in Den v. McKnight, 11 N. J. L. 393, on the point that one is deemed to have notice of facts of which he has the means of knowledge.

Usage may be proved by parol, although founded on the law or edicts of another country, p. 539.

Cited in Drake v. Hudson, 7 Harr. & J. 408, where parol evidence of the usages of customs officers at Havana was introduced.

Abandonment.— Whether abandonment was in reasonable time or not is not a fact to be left exclusively to the jury, but to be decided by them under the direction of the court, p. 539.

Captures.— Such acts or omissions as would induce a capture and detention according to the common practice of belligerents are proper for the consideration of the jury in estimating the risk, p. 540.

Instructions.— Party has a right to direct and positive instructions, and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference, per Story, J., p. 544.

Principle approved and applied in Campbell v. Campbell, 54 Wis. 98, 11 N. W. 458, holding that a refusal in slander of a proper instruction as to the damages was error; Cahn v. Reid, 18 Mo. App. 136, holding one was entitled to instructions on every legal phase of the case justified by the evidence; Gray v. McDonald, 28 Mo. App. 492, where the court said the principle governing should be substantially stated in the instructions; Koontz v. Kaufman, 31 Mo. App. 420, holding that a party has a right to direct and positive instructions; Rives v. McLosky, 5 Stew. & P. 337, holding that

refusal of an instruction is error, although the court subsequently gives an instruction which, by inference, may lead to the extent of the charge refused; Taylor v. Hillyer, 3 Blackf. 435, 26 Am. Dec. 432, where the evidence clearly showed that the instruction asked was relevant; Long v. Rodgers, 19 Ala. 337, holding that a charge, if full and fair, is not erroneous, although not in the language requested; Colquitt v. Thomas, 8 Ga. 272, holding that where one requests a charge in the presence of the jury, and the court replies, "I will charge it," without anything more, it is error; Blake v. Smith, 3 Fed. Cas. 606, on the point that misdirection affecting the result is ground for setting aside a verdict; Snyder v. Laframboise, Breese, 346, 12 Am. Dec. 190, holding that the instructions should be positive and specific and leave nothing to inference.

7 Cr. 548–550, 3 L. 435, YOUNG v. GRUNDY.

Contracts.— Right of action on contract for nonperformance is done away where a new contract is entered into between the parties for the express purpose of making compensation for the loss sustained in consequence of the nonperformance, p. 550.

Distinguished in Hunt v. Martin, 2 Litt. (Ky.) 86, holding that a debt contracted by the payee of a note to the payor after an assignment of the note is no ground to enjoin the assignee recovering the amount.

Miscellaneous.— Cited in Whittemore v. Patten, 81 Fed. 528, but not in point.

7 Cr. 550–565, 3 L. 436, PALMER v. ALLEN.

Arrest.— Where one is arrested under an attachment and fails to give bail, a deputy marshal may commit him to jail without a mittimus, p. 563.

Federal courts.— Municipal regulations of a State not having any immediate relation to the progress of the suit, but imposing restraints upon State officers in the execution of the process of their courts, are not binding upon the officers of the United States, p. 565.

Cited and principle affirmed and applied in Boyle v. Zacharie, 6 Pet. 659, 8 L. 536, holding that acts of Maryland, regulating the proceedings on injunctions and other matters, do not affect Federal courts; In re Freeman, 2 Curt. 493, F. C. 5,083, where the statute of Massachusetts, abolishing imprisonment for debt, was construed; Duncan v. Darst, 1 How. 306, 11 L. 306, holding that a person in custody under the authority of the Circuit Court cannot be discharged by a State officer under a State insolvent law; Seller's Lessee v. Corwin, 5 Ohio, 404, 24 Am. Dec. 305, holding that judgments of the Circuit Court attached as liens on the adoption by that court of the executions laws of the State; Ex parte Boyd,

105 U. S. 651, 26 L. 1202, holding that a holder of a Federal judgment might resort to proceedings supplementary to execution; Lamson v. Mix, 14 Fed. Cas. 1056, holding that the State laws furnish the rule of decision in cases of common law, but a State law cannot enlarge the subjects of chancery jurisdiction in Federal courts; United States v. Humphreys, 3 Hughes, 205, F. C. 15,422, on the point that conditions or exceptions in State laws do not limit the rights conferred by the act of congress adopting the State law; United States. v. Tetlow, 2 Low. 161, F. C. 16,456, holding that the process and forms of proceedings adopted by congress from State laws are binding on the United States; McNutt v. Bland, 2 How. 17, 11 L. 162, on the point that a discharge under a State law not adopted by congress does not exonerate an officer; Springer v. Foster, 1 Story, 602, F. C. 13,265, on the point that where a Federal court adopts State processes, a change in the State law does not affect the Federal court unless adopted; The Antelope, 10 Wheat. 66, note, 6 L. 268, holding that an act prohibiting a sale under execution for less than a certain sum did not apply to the Circuit Court; explained in Wayman v. Southard, 10 Wheat. 37, 38, 39, 40, 41, 6 L. 261, 262, holding that a State law regulating executions was not applicable to Federal judgments unless expressly adopted.

7 Cr. 565–570, 3 L. 440, YOUNG v. BLACK.

Assumpsit.— Under nonassumpsit the defendant may give in evidence anything which shows that no debt was due at the time the action was commenced, including a former judgment, p. 567.

Cited, and this rule affirmed and applied, in Hennequin v. Barney, 24 Fed. 582; Lampton v. Jones, 5 T. B. Mon. 236; Reynolds v. Stansbury, 20 Ohio, 350, 55 Am. Dec. 461; Insurance Co. v. Harris, 97 U. S. 336, 24 L. 962; Eastman v. Cooper, 15 Pick. 286, 26 Am. Dec. 605; Arnold v. Paxton, 6 J. J. Marsh. 505, and Bartels v. Schell, 16 Fed. 343, all on the point that a former judgment was admissible for defendant under the plea of the general issue; Wood v. Jackson, 8 Wend. 22, 35, 22 Am. Dec. 610, holding a judgment may be given in evidence with parol proof to show the grounds upon which it proceeds; Winne v. Elderkin, 2 Pinn. 251, 52 Am. Dec. 161, holding that evidence of an award in favor of the defendant is admissible in assumpsit under the general issue; Young v. Rummell, 2 Hill, 480, 38 Am. Dec. 596; Miller v. Manice, 6 Hill, 124; Offutt v. John, 8 Mo. 127, 40 Am. Dec. 130, all holding that a judgment given in evidence under the general issue was as conclusive as though specially pleaded in bar; Wann v. McNulty, 7 Ill. 360, 43 Am. Dec. 61, holding that a judgment admitted under the general issue was but prima facie evidence, while, if pleaded, it was a complete bar; Kingsland v. Spalding, 3 Barb. Ch. 343, on the point that a former judgment may be given in evidence in those cases where the form

of pleading does not permit of special pleading; Meredith v. Santa Clara M. Assn., 56 Cal. 183, holding that tender and set-off were admissible; Reed v. The Fanny, 20 Fed. Cas. 440, holding that a prior decree in an admiralty cause should be given in evidence and not set up by summary motion to prevent further hearing; Oscanyan v. Winchester, etc., 15 Blatchf. 87, F. C. 10,600, holding the defense that the contract was against public policy could be set up; Mason v. Eldred, 6 Wall. 234, 18 L. 784, on the point that one may show that the alleged cause of action never existed; Dingee v. Letson, 15 N. J. L. 262, holding that partial as well as full payment may be given in evidence.

Judgments.— Controversy which has become res judicata, the law will not suffer again to be drawn into question, p. 567.

The following citing cases affirm and apply this rule: Carl v. Knott, 16 Iowa, 383, where the court said it is not always necessary that it should appear affirmatively on the record that the same cause of action was embraced in the pleadings; Marsh v. Pier, 4 Rawle, 286, 26 Am. Dec. 140, holding a recovery in assumpsit for the price of goods is a bar to replevin; Coville v. Gilman, 13 W. Va. 327, holding this rule to be applicable where matters determined in a common-law court were afterwards in controversy in equity; Beckwith v. Thompson, 18 W. Va. 119, holding that facts not necessarily involved in a former suit, however important, are open to controversy; Washington, etc., S. P. Co. v. Sickles, 24 How. 344, 16 L. 654, holding a judgment on a general verdict on a declaration containing special and common counts, is not a bar in a suit on the special count; Godding v. Live Stock Co., 4 Colo. App. 18, 34 Pac. 943, holding that a point once adjudicated may be relied on as an estoppel, whenever either party or privy alleges anything inconsistent with it; Embury v. Conner, 3 N. Y. 523, 53 Am. Dec. 333, and Aurora City v. West, 7 Wall. 101, 19 L. 49, both holding that a former judgment is final as to every matter which might have been litigated; Hanna v. Read, 102 Ill. 603, 40 Am. Rep. 612, holding that a judgment to set aside a deed because of insanity is conclusive as to another deed made at the same time; Emmons v. Dowe, 2 Wis. 356, where a judgment for the plaintiff in replevin was construed and was held not to conclude the question of ownership; Stiel v. Glass, 1 Ga. 486, on the point that orders of a court of competent jurisdiction within its authority cannot be attacked indirectly; Carmony v. Hoober, 5 Pa. St. 310, holding that a former recovery on a technical objection merely is not pleadable in bar; Hargus v. Goodman, 12 Ind. 632, where a judgment in an action of trespass was held no bar to an action of ejectment; Wyman v. Campbell, 6 Port. 237, 31 Am. Dec. 686, holding that a judgment is conclusive, although there were irregularities for which the judgment would have been reversed; Gaines v. Hennen, 24 How. 579, 16 L. 779, on the point that a judgment is not a bar where there is a difference

between the causes of action and the parties; King v. Chase, 15 N. H. 15, 41 Am. Dec. 677, holding that a former judgment is conclusive only as to the matter directly in issue; in Yates v. Yates, 81 N. C. 401; Caperton v. Schmidt, 26 Cal. 505, 85 Am. Dec. 200; Lyman v. Becannon, 29 Mich. 470, and Wood v. Jackson, 8 Wend. 44, 22 Am. Dec. 619, on the point that parol evidence is admissible to show what was litigated.

Distinguished in Gerrish v. Pratt, 6 Minn. 62, holding that a judgment in a former suit for costs only, on the ground that the complaint contained no cause of action and in which the merits were not litigated, was not a bar.

Contracts.— Joint contract can never be defeated by the mere private contract of an individual to whom the others have confided no authority, p. 568.

Cited in Lawrence v. Vilas, 20 Wis. 391, on the point that a debt owing by one of two or more partners cannot be set off against a partnership demand.

Demurrer to evidence is allowed or denied in the exercise of a sound discretion under all the circumstances of the case, p. 568.

Rule applied in the following citing cases: Duncan v. State, 29 Fla. 451, 10 So. 817, holding that in criminal trials it is entirely discretionary to entertain a demurrer to evidence, even though both counsel consent; Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 134, 35 L. 963, 12 S. Ct. 183, holding that the action of the court is not assignable as error; Alexander v. Fitzpatrick, 4 Port. 409, holding that error would lie for a refusal in a proper case; Sawyer v. Fitts, 2 Port. 14, 15, holding that on a demurrer to evidence the party must admit the facts and conclusions which may be reasonably inferred; Suydam v. Williamson, 20 How. 436, 15 L. 981, holding that a demurrer to evidence made the evidence part of the record; State v. Soper, 16 Me. 297, 33 Am. Dec. 667, where it was said that demurrers to evidence were an unusual and antiquated practice calculated to suppress truth and justice; Miller v. Baltimore, etc., Ry. Co., 17 Fed. Cas. 304, holding that a demurrer is allowed in no case where there are facts and circumstances which tend to establish the issues; Waul v. Kirkman, 27 Miss. 830, holding that a demurrer admitted the evidence but not the facts which it was offered to prove; People v. Roe, 1 Hill, 472, note, where cases on the office and effect of a demurrer to evidence are collected; Welch v. County Court, 29 W. Va. 68, 1 S. E. 340, holding the rule that discretionary matters are not reviewed must be confined to cases which are purely matters of discretion or such as in their result cannot do injury; Jenkins v. Brown, 21 Wend. 456, on the point that a bill of exceptions will not reach a decision which rests in discretion; State v. Muldoon, 9 La. Ann. 27, and State v. Hunt, 4 La. Ann. 439, on the point that a writ of error does not lie to a refusal to grant a new trial or a continu-

ance; Lee v. Hardgrave, 3 Mich. 84, on the point that a refusal to reopen a cause will not be reviewed.

Distinguished in Moye v. Petway, 76 N. C. 330, where a motion was made for a judgment non obstante veredicto.

Demurrer.— Party demurring to evidence must admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove, p. 568.

Cited and principle applied in Johnson v. United States, 5 Mason, 436, F. C. 7,419, holding that a party demurring is bound to admit all the facts the evidence conduces to prove; Nolan v. Shiekle, 3 Mo. App. 310, on the point that on a demurrer only such inferences from the facts as are reasonable and legal can be taken as admitted; Joliet, etc., Ry. Co. v. Velie, 140 Ill. 62, 29 N. E. 707, holding that if a defendant demur to the evidence and there is evidence to prove the issues in favor of the plaintiff the judgment must be in his favor; Pickel v. Isgrigg, 10 Biss. 233, 6 Fed. 679, holding that every fact there is any evidence tending to prove must be admitted so that the court will have nothing to do but apply the facts; Mobile, etc., R. R. Co. v. McArthur, 43 Miss. 186, holding a demurrer ought not to be allowed unless the evidence be stated in the form of facts proved so as to limit the court to merely applying the law; Higgs v. Shehee, 4 Fla. 384, holding that where the evidence is loose and indeterminable, the court should not give judgment on a demurrer to evidence; Indianapolis, etc., R. R. Co. v. McLin, 82 Ind. 445, holding that on a demurrer the court need not weigh or reconcile conflicting evidence nor consider which favors the demurrant; Copeland v. New England Ins. Co., 22 Pick. 139, holding a party demurring cannot avail himself of such facts as the evidence tends to prove in his own favor; Pino v. Hatch, 1 N. Mex. 131, holding that if there is a disagreement as to the facts, the court cannot decide what facts have been proved and compel a party to join in the demurrer.

Demurrer to evidence ought not to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove, and offers contradictory evidence or attempts to establish inconsistent propositions, p. 568.

Cited in Morrison v. McKinnon, 12 Fla. 558, holding that it is discretionary with a court to compel one to join in a demurrer to evidence; Catlin v. Gilders, 3 Ala. 545, on the point that one offering evidence cannot demur to the facts which his adversary has proved; United States Bank v. Smith, 11 Wheat. 183, note, 6 L. 448, note, where the court said the practice of demurring to evidence should be discouraged.

Miscellaneous.— Cited, erroneously, in State v. Brette, 6 La. Ann. 660.

7 Cr. 570–572, 3 L. 442, SCHOONER ANNE v. UNITED STATES.

Nonintercourse act of March 1, 1809, was in force in February, 1811, p. 571.

Libel for forfeiture, stating generally the grounds on which the forfeiture is claimed, is insufficient, p. 572.

Cited in United States v. Mann, 95 U. S. 586, 24 L. 533, on the point that a charge in a libel should conform to the true sense and meaning of the words as used by the legislature; United States v. One Distillery, 4 Biss. 27, F. C. 15,929, on the point that every fact and circumstance material must be set forth.

Libel in admiralty which is insufficient may be amended, p. 572.

Rule approved and applied in Anonymous, 1 Gall. 26, F. C. 444, holding the Circuit Court could allow amendments in revenue cases or proceedings in rem, brought by appeal from the District Court; The Martha, 1 Blatchf. & H. 166, F. C. 9,144, on the point that amendments are freely allowed in admiralty; The Sarah, 8 Wheat. 397, note, 5 L. 645, note, on the point that if there are merits and an amendment is wanted to make the allegations correspond with the proof, the cause will be remanded with directions to permit an amendment; Wiggins Ferry Co. v. Ohio & Miss. Ry. Co., 142 U. S. 415, 35 L. 1062, 12 S. Ct. 194, on the point that it is within the discretion even of the appellate court to permit an amendment; Richmond v. The New Bedford Copper Co., 2 Low. 317, F. C. 11,800, the court saying some authorities held an action can never fail for want of proper allegations, if merits appear; United States v. Three Hundred and Ninety-six Barrels of Whiskey, 28 Fed. Cas. 122, holding that informations of forfeiture filed by the United States attorneys are amendable, even after pleas filed; Merriam v. Langdon, 10 Conn. 472, holding a qui tam information was amendable after the time limited for presenting a new information.

7 Cr. 572–575, 3 L. 443, UNITED STATES v. JANUARY.

Re-reported by Judge Story, in 5 Mason, 87, note.

Payments.— Debtor may make application of payment; if he neglect to, the creditor may make the application; if he also neglects it, the law will make it, p. 575.

Rule affirmed and applied in Martin v. Pope, 6 Ala. 540, 41 Am. Dec. 70, where a factor sold goods and appropriated the proceeds to his account; Hilton v. Burley, 2 N. H. 196, on the point that where no direction is given the creditor may appropriate it to any legal demand; National Bank v. Mechanics' Nat. Bk., 94 U. S. 439, 24 L. 178, on the point that neither party can make an application after a controversy has arisen; Schulenberg v. Martin, 1 McCrary, 351, 2 Fed. 750, holding that where money is paid on a running account without application the chancellor can apply it to an unsecured portion; Robinson v. Doolittle, 12 Vt. 249, on the point that

in equity a payment will be applied on the debt where the security is most precarious; Caldwell v. Wentworth, 14 N. H. 438, holding that payment made on account of illegal claims could not be rescinded and be applied to other and legal claims; Matassy v. Frosh, 9 Tex. 613, where the debtor neglected to appropriate a payment and the creditor by his bookkeeper applied it; Summers v. Lake, 12 N. J. L. 106, holding evidence that a payment was specific and not general, was admissible; Randall v. Pettes, 12 Fla. 535, where the subject of appropriation of payments was considered and leading authorities were referred to; Illsly v. Grayson, 105 Iowa, 687, 75 N. W. 518, affirming rule in discussing questions under certain pleadings.

Distinguished in Pattison v. Hull, 9 Cow. 771, where debts were of a different character and a general payment was made without application.

Payments.— Rule as to application of payments does not apply to the case of payments by a public officer, who has given different bonds with different sets of sureties, p. 575.

Cited in United States v. Eckford, 1 How. 261, 11 L. 124, holding that if a collector continued in office more than one term, but gave different sureties, their liability is estimated as if a new person had been appointed; Draffen v. City of Boonville, 8 Mo. 398, where a collector of city revenue gave different bonds for each year with different sureties; Boody v. United States, 1 Wood. & M. 168, F. C. 1,636, holding a payment by a deputy postmaster before the giving of a second bond was presumptively to be applied on the first bond. See note to 10 Am. St. Rep. 850, on this point.

Suretyship.— Where a public officer gives two bonds at different times and with different sets of sureties, moneys collected subsequent to the execution of the second bond cannot be applied to the payment of the first bond and vice versa, p. 575.

This rule is affirmed and applied by the following citing cases: United States v. Honsman, 70 Fed. 583, 44 U. S. App. 174, where the question was between sureties on different bonds of a postmaster; Jones v. United States, 7 How. 688, 691, 12 L. 873, 874, where there was but one bond given by a postmaster and the question was as to the application of payments successively made; Pickering v. Day, 2 Del. Ch. 366, where bonds were executed by a receiver of public revenue at different times, with different sets of sureties; Pickering v. Day, 3 Houst. 540, 541, 95 Am. Dec. 312, 313, where a sheriff gave different bonds with different sets of sureties; Texas v. Middleton's Sureties, 57 Tex. 190, holding that taxes collected and paid into the treasury, cannot be applied to the discharge of a pre-existing debt of the tax collector; Paw Paw v. Eggleston, 25 Mich. 40, and United States v. Linn, 2 McLean, 502, 505, F. C. 15,606, both holding that sureties are not bound for

any previous defalcation; Seymour v. Van Slyck, 8 Wend. 420, and State v. Chadwick, 10 Or. 432, both holding that payments made during a particular term were to be credited to that term; Postmaster-General v. Norvell, Gilp. 126, F. C. 11,310, holding that each set of sureties must answer for its own defaults and is entitled to be credited with its own payments; Boring v. Williams, 17 Ala. 523, 524, where a tax collector held office for two successive terms with different sets of sureties; Anaheim U. W. Co. v. Parker, 101 Cal. 490, 35 Pac. 1050, holding the bond of a secretary of a corporation was not retroactive; Inhabitants of Porter v. Stanley, 47 Me. 519, 74 Am. Dec. 502, holding that appropriations by selectmen of taxes to make up deficiencies of former years were unauthorized; Myers v. United States, 1 McLean, 498, F. C. 9,996, on the point that moneys received by the government cannot be applied to a balance due before the date of the bond; Commonwealth v. Reitzel, 9 Watts & Serg. 114, where an officer was a defaulter for several years previous to the time defendant became a surety; United States v. Morgan, 28 Fed. 51, affirmed in 35 Fed. 490, where there were deficits in the accounts of a disbursing officer in funds for which sureties never became responsible; United States v. Nicholl, 12 Wheat. 511, 6 L. 710, and 5 Mason, 94, note, F. C. 16,640n, holding sureties were not responsible for moneys placed in the hands of the principal after the termination of his office; Stone v. Seymour, 15 Wend. 36, where payments were made by a collector after a new bond with new sureties had been given; State v. Sooy, 39 N. J. L. 547, holding that sureties of a State treasurer are liable for moneys received in payment of arrears due at the time the bond was given; discussed in United States v. Wardwell, 5 Mason, 87–92, F. C. 16,640, holding officers of the treasury department cannot apply payments against the will of the debtor; Chapman v. Commonwealth, 25 Gratt. 743–747, holding that if debts be due by an officer with different bonds, payments under one bond will be applied on that bond.

Distinguished in Postmaster-General v. Furber, 4 Mason, 335, F. C. 11,308, where there were running accounts between a postmaster-general and a deputy, and it was held the credits were to be applied on the debits in the order due in the absence of any appropriation; United States v. Bicket, 24 Fed. Cas. 1143, where an action was brought on a distiller's bond; Stone v. Seymour, 15 Wend. 39, 43, ante.

7 Cr. 575, 576, 3 L. 444, UNITED STATES v. PATTERSON.

Payment to an officer whose office has become extinct cannot be considered a payment to the government, p. 576.

Officers.— One delivering evidences of debt to an officer to collect the money due and apply it on a debt due the government by the

former is not entitled to credit until the money is in the hands of some public officer entitled to receive it, p. 576.

Cited in State v. Newton, 33 Ark. 285, where a State treasurer accepted from his predecessor the receipt or check of a depositary with whom the same was left by the officer.

7 Cr. 577–589, 3 L. 444, LIVINGSTON v. DORGENOIS.

Writ of error does not lie to an order to stay the proceedings finally upon suggestion of the attorney for the United States, where the United States was not a party, but a mandamus nisi in the nature of a procedendo will be awarded, p. 589.

Cited in Stephenson v. Mansony, 4 Ala. 320, holding an order striking a cause from the docket was not revisable, but that if wrong was done, a mandamus would lie; State ex rel. v. Superior Court, 14 Wash. 698, 45 Pac. 674, on the point that the appellate court will issue mandamus where there is no appeal and the act was not discretionary; Woodstock v. Gallup, 28 Vt. 592, on the point that mandamus is the appropriate remedy where a court disposes of the matters upon some incidental question and declines to hear the case upon its merits; Lloyd v. Brinck, 35 Tex. 9, holding mandamus lies to compel the entry of a judgment on a verdict; People v. Pearson, 3 Ill. 204, 33 Am. Dec. 448; Ex parte Crane, 5 Pet. 219, 8 L. 103, dissenting opinion, and Jelley v. Roberts, 50 Ind. 7, all holding that the Supreme Court may compel the signing of a bill of exceptions.

Mandamus in the nature of a procedendo awarded by Supreme Court against Federal District Court, to stay proceedings in a cause, p. 589.

Cited in Schintz v. Morris, 13 Tex. Civ. App. 598, 35 S. W. 525, holding mandamus will issue to inferior court to compel performance of ministerial duty.

7 Cr. 589–596, 3 L. 448, OTIS v. BACON.

Embargo.—Vessel cannot be seized for violating the embargo law after she has actually arrived at her port of discharge and has received from the collector of the port a permit to discharge her cargo, p. 596.

Cited in Otis v. Walter, 6 Wheat. 590, 5 L. 338, holding that a demand of a permit to land does not terminate a voyage, so as to preclude the right of detention; Hendricks v. Gonzales, 67 Fed. 353, 35 U. S. App. 131, on the point that if a plaintiff has complied with the conditions entitling him to a clearance, the collector cannot refuse him one.

Distinguished in Otis v. Walter, 2 Wheat. 23, 4 L. 175, holding it is not indispensable to the termination of the voyage that a vessel arrive at the terminus of her original destination.

7 Cr. 596–601, 3 L. 451, THORNTON v. CARSON.

Award in the alternative and which gives a party an election is not void, p. 600.

Distinguished in Archer v. Williamson, 2 Harr. & G. 69, where an award comprehending part only of the matter submitted was held to be void.

Award is not unreasonable because it requires the plaintiff to get other parties to join in a conveyance to the defendant, p. 601.

Award.— If facts to prove award unreasonable do not appear in the record, they cannot be noticed by the court, p. 601.

Cited and principle applied in Nolan v. Colorado Cent. Min. Co., 63 Fed. 934, 27 U. S. App. 433, holding the appellate court will confine its rulings to questions of law arising upon the facts shown; York, etc., R. R. Co. v. Myers, 18 How. 252, 15 L. 383, on the point as to the practice of reviewing awards in Federal courts; Bond v. Dustin, 112 U. S. 606, 28 L. 836, 5 S. Ct. 297, on the point that in actions referred to arbitrators, only rulings and decisions on matters of law are reviewable; Heckers v. Fowler, 2 Wall. 130, 17 L. 761, where the court said it had been the practice of the Federal courts to revise judgments and opinions of arbitrators; Roberts v. Benjamin, 124 U. S. 71, 31 L. 336, 8 S. Ct. 396, holding that exceptions to rulings on evidence or to findings or refusal to find would not be reviewed; Duncan v. Atchison, etc., R. R. Co., 72 Fed. 811, 44 U. S. App. 431, holding the right of review is limited to questions of law appearing on the face of the record.

7 Cr. 602, 3 L. 452, WALLEN v. WILLIAMS.

Possession.— Circuit Court of Tennessee, sitting as a court of equity, cannot issue a writ of habeas facias possessionem, p. 603.

No citations.

7 Cr. 603–632, 3 L. 453, FAIRFAX v. HUNTER.

Grants.— By virtue of the charter and the intermediate grants, Lord Fairfax, at the time of his death, had the absolute property of the soil of the waste and unappropriated lands in the Northern Neck of Virginia, p. 618.

Cited in Stephen v. Swann, 9 Leigh, 414, holding that D. M. Fairfax took the whole interest of Lord Fairfax under his will; Martin v. Waddell, 16 Pet. 429, 10 L. 1020, construing the letters-patent to the Duke of York by King Charles the Second.

Aliens.— By the common law an alien can take lands by purchase though not by descent, p. 619.

The following citations affirm and apply this holding: Elmendorff v. Carmichael, 3 Litt. (Ky.) 474, 14 Am. Dec. 88, holding an inquest

of office was absolutely necessary to divest an alien; People v. Conkling, 2 Hill, 69, 71, on the point that there is no difference between a title acquired by devise and one acquired by any other form of purchase; Kershaw v. Kelsey, 100 Mass. 575, 576, 97 Am. Dec. 137, 138, holding an alien enemy could acquire lands by purchase during a war; Guyer v. Smith, 22 Md. 247, 85 Am. Dec. 652, holding that illegitimate alien children may take by devise; Stemple v. Herminghouse, 3 G. Greene, 410, holding that a nonresident foreigner cannot inherit the estate of his resident parent; Orser v. Hoag, 3 Hill, 82, holding that a person born in this country but who left it in July, 1783, and never returned, was an alien and incapable of taking by descent; Shanks v. Dupont, 3 Pet. 258, 7 L. 672, dissenting opinion, where the treaty with Great Britain of 1794 was construed and the effect of marriage with an alien considered; Hardy v. De Leon, 5 Tex. 240, holding that where one dies leaving issue who are aliens, the estate goes to the next of kin who are citizens; O'Hanlin v. Van Kleeck, 20 N. J. L. 44, holding that the realty of a person dying intestate and leaving no heirs capable of inheriting, vests in the State at the instant of his death; Jackson v. Adams, 7 Wend. 368, holding that if an alien holding land under the acts of 1802 and 1808 dies intestate, his lands descend to his heirs, though aliens; Craig v. Radford, 3 Wheat. 599, 4 L. 469, where the point was made that a British subject could not take a legal title in Virginia, and that a grant to him in 1788 was void and not protected by the treaty of 1794; Conrad v. Waples, 96 U. S. 289, 24 L. 724, where the act of 1862, relating to the confiscation of property, was construed.

Aliens.— By common law an alien can take but not hold lands; until the lands are seized by the sovereign, however, he has complete dominion over the same, p. 620.

This doctrine is affirmed and applied by the citations, as follows: Quigley v. Birdseye, 11 Mont. 446, 28 Pac. 743, holding that an alien may acquire title to a ditch and water right and hold the same until office found; Cunningham v. Browning, 1 Bland Ch. 308, where the court considered the objects of inquest of office and the cases in which it was necessary; Montgomery v. Dorion, 7 N. H. 480, 481, holding that where an alien dies her land vests at once in the State; Miller v. Harwell, 3 Murph. 202, 205, holding that an alien can be a devisee; Vaux v. Nesbit, 1 McCord Ch. 381, holding that an alien devisee may hold in exclusion of the next heir until office found; Leazure v. Hillegas, 7 Serg. & R. 322, holding the Bank of North America could purchase land in a distant country, although their title was defeasible; Mollett v. Simpson, 94 N. C. 41, 55 Am. Rep. 596, and National Bank v. Matthews, 98 U. S. 628, 25 L. 190, both holding that where a corporation was incompetent to take a title to realty, a conveyance to it was voidable and not void; Williams v.

Wilson, Mart. & Y. 253, 254, where a title to lands derived through an alien was held to be valid; Farmers' Loan & T. Co. v. McKinney, 6 McLean, 5, F. C. 4,667, on the point that an alien may convey a defeasible estate which may be divested on office found; Jenney v. Laurens, 1 Spears L. 365, where the court said that if he were out of possession it would seem he could maintain no action to recover it; Bradstreet v. Oneida County, 13 Wend. 548, on the point that an alien may defend but cannot prosecute an action touching realty; Rouche v. Williamson, 3 Ired. 147, holding an alien can bring an action of ejectment; Etheridge v. Malempre, 18 Ala. 574, on the point that an alien can convey and bring an action for possession; Lobdell v. Hall, 3 Nev. 516, on the point that an alien may defend himself against a real action; Wadsworth v. Wadsworth, 12 N. Y. 380, on the point that a conveyance by an alien is good as against himself, but the title is voidable by the sovereign; Crane v. Reeder, 21 Mich. 73, 4 Am. Rep. 443, where it was said no alien could inherit or transmit by inheritance; Guyer v. Smith, 22 Md. 248, 85 Am. Dec. 653, holding that an escheat patent had the same effect as office found; Baker v. Shy, 9 Heisk. 90, on the point that the government alone can allege the escheat of lands in possession of an alien; Kershaw v. Kelsey, 100 Mass. 574, 97 Am. Dec. 136, on the point that a country can confiscate the property of an alien; Heirn v. Bridault, 37 Miss. 229, holding that alien enemies could not maintain any action or acquire any right to property. See note to 6 Am. Rep. 382, on the subject of escheat.

Distinguished in Wulf v. Manuel, 9 Mont. 285, 23 Pac. 725, holding that an act of naturalization would not retroact to a purchase or possessory right in a mining claim.

Aliens.— There is no difference between alien friends and alien enemies in respect to their general rights and disabilities as to holding property, p. 620.

Cited in Hauenstein v. Lynham, 100 U. S. 484, 25 L. 629, where the right of an alien, a native of Switzerland, as an heir to one dying in Virginia, was considered; Kershaw v. Kelsey, 100 Mass. 575, 97 Am. Dec. 137, where the court said it had been held that an alien enemy could take by devise; Yeo v. Mercereau, 18 N. J. L. 397, holding that children of an alien who purchased while he was an alien enemy before January 22, 1817, and continued to hold after that time and after he became an alien friend, may inherit; Hardy v. De Leon, 5 Tex. 239, where the court said there were circumstances where their rights widely differed; Jenkins v. Noel, 3 Stew. 80, holding that an alien may purchase and hold land until office found and may sue for its possession; Crutcher v. Hord, 4 Bush (Ky.), 367, holding that an alien enemy may be a devisee or legatee.

Aliens.— British subject born before the Revolution cannot, since the Revolution, take lands by descent in the United States, p. 620.

Aliens.— The title acquired by an alien by purchase is not divested until office found; but lands cast by descent upon an alien vest in the commonwealth without office found, p. 621.

Cited and doctrine applied in United States v. Repentigny, 5 Wall. 268, 17 L. 646, holding that a legislative act is equivalent to office found and that the mode of assuming a forfeited grant is subject to the legislative authority; Schenck v. Peay, 21 Fed. Cas. 682, as to the nature of an inquest of office; Tibbitts v. Ah Tong, 4 Mont. 537, 2 Pac. 760, holding that an alien can neither locate nor acquire title by patent to mineral land; Harley v. State ex rel. Attorney-General, 40 Ala. 696, holding that an alien may purchase and hold his land by a defeasible title; Reid v. State ex rel. Thompson, 74 Ind. 256, holding that where an alien dies the State has title at once, and may enter without office found; Slater v. Nason, 15 Pick. 349, holding that an alien has no inheritable blood and that no one can derive title through him; Haigh v. Haigh, 9 R. I. 29, holding that prior to chapter 700 of the statutes, an alien had no inheritable blood and no trust in real estate could be created in his favor; Cross v. Del Valle, 1 Cliff. 286, F. C. 3,430, and Taylor v. Benham, 5 How. 270, 12 L. 148, both holding that land taken by devise did not escheat until office found; Crane v. Reeder, 21 Mich. 80, 4 Am. Rep. 448, holding where an alien owning lands in Michigan, leaves a child born in England, the land escheated; Sands v. Lynham, 27 Gratt. 297, 21 Am. Rep. 351, where the effect of a sale of the land to pay a debt was considered; Priest v. Cummings, 20 Wend. 357, holding that a widow was not entitled to dower in lands of her husband before the act of 1802, to enable aliens to purchase; Runyan v. Lessee of Coster, 14 Pet. 131, 10 L. 387, where the powers of a corporation in another State were considered; Perry v. Commissioners of Clinton, etc., R. R. Co., 11 Rob. ((La.) 415, holding an act declaring a railroad forfeited to the State to be unconstitutional; Cross v. De Valle, 1 Cliff. 286, F. C. 3,430, holding the same.

Aliens.— Commonwealth cannot grant land held by an alien by purchase until the title of the commonwealth was perfected by an inquest of office followed by entry and seizure where the possession was not vacant, p. 622.

Cited in Thompson v. Bright, 1 Cush. 430, holding that this principle applies to all cases of forfeiture except as to the forfeiture of lands of persons attainted of high treason; Society, etc. v. New Haven, 8 Wheat. 492, 5 L. 669, holding an act granting lands belonging to a society to the respective towns in which the lands lie was void; Commonwealth v. Hite, 6 Leigh, 594, 29 Am. Dec. 228, holding that the king or a State can acquire possession of escheated lands only by some matter of record.

Aliens.— Statute should not be construed upon light grounds to vest the lands of aliens in the commonwealth without an inquest for the cause of alienage, p. 622.

Cited in Robinson v. Huff, 3 Litt. (Ky.) 38, holding that the rule requiring office found may be repealed, but that it must be in clear terms; Rosebaugh v. Saffin, 10 Ohio, 36, on the point that nothing is presumed in favor of a forfeiture in a statute if there is any room for doubt; Bennett v. Hunter, 9 Wall. 336, 19 L. 676, on the point that a forfeiture is not to be inferred from language capable of any milder construction; Griffin v. Mixon, 38 Miss. 445, on the point that statutes declaring forfeitures are not supplied by intendment; Martin v. Snowden, 18 Gratt. 127, holding an act forfeiting lands for nonpayment of taxes to be unconstitutional; Atlantic R. R. Co. v. Mingus, 165 U. S. 432, 41 L. 778, 17 S. Ct. 353, holding that congress did not exceed its powers in forfeiting a land grant; Exeter v. Stratham, 2 N. H. 104, on the point that inchoate rights depending upon existing statutes cease on the repeal of those statutes; King v. Mullins, 171 U. S. 417, construing West Virginia law forfeiting property for failure to place it on the prescribed books for taxation.

Treaties.— Treaty is the supreme law of the land, p. 627.

Cited in Opel v. Shoup, 100 Iowa, 424, 69 N. W. 563, holding that a treaty giving aliens a right to inherit does not alter the statute of a State as to descents so as to render it unconstitutional; Wunderle v. Wunderle, 144 Ill. 54, 33 N. E. 197, on the point that disqualification of alien is removed by a treaty conferring the right to take, hold and transfer real property; Hauenstein v. Lynham, 100 U. S. 490, 25 L. 630, on the point that the treaty of 1794 with Great Britain removed the impediments of alienage and was within the constitutional powers of the Union. Cited generally in Stockton v. Montgomery, Dall. (Tex.) 480, on the point as to the general theory of the co-ordinate branches of government. See note in 12 Am. St. Rep. 95, on intestate succession. Affirmed, Pollard v. Kibbe, 14 Pet. 412, 10 L. 519.

Miscellaneous.— Cited in Stanley v. Schwalby, 162 U. S. 280, 282, 40 L. 969, 16 S. Ct. 764, 765, upon the appellate jurisdiction of the Supreme Court of the United States; In re Booth, 11 Wis. 508, holding the Constitution gave congress the power to provide for an appeal to the Supreme Court of the United States from a State court.

The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series:

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN FEBRUARY TERM, 1814.

VOL. VIII.

BY WILLIAM CRANCH.

Chief Judge of the Circuit Court of the District of Columbia.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. I.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

Honorable JOHN MARSHALL. Chief Justice,
Honorable BUSHROD WASHINGTON,
Honorable WILLIAM JOHNSON,
Honorable BROCKHOLST LIVINGSTON,
Honorable THOMAS TODD,
Honorable GABRIEL DUVALL,
Honorable JOSEPH STORY,
Associate Justices.

RICHARD RUSH, Esquire, Attorney-General.*

*The commissions of the Honorable G. Duvall and the Honorable J. Story bear date November 18th, 1811.
R. Rush, Esq., was commissioned as Attorney-General February 10th, 1814, in place of William Pinkney, Esq., resigned.

Supreme Court of the United States.

FEBRUARY TERM, 1814.

GRIFFITH *v.* FRAZIER.

Present—All the Judges.

So long as a qualified executor is capable of exercising the authority with which he has been invested by the testator, that authority cannot be conferred, either with or without limitation by the court of ordinary, on any other person. And if during such capability of the executor, the ordinary grant administration, either absolute or temporary, to another person, that grant is absolutely void. If a judgment be rendered against one as executor who is not executor, it does not bind the estate of the testator, and an execution upon such a judgment could not legally be levied upon such estate. By the law of South Carolina, administration *durante absentia testatoris*, cannot be granted after probate of the will and letters testamentary granted.

The acts of a tribunal, upon a subject not within its jurisdiction, are void.

By the law of South Carolina the 30 day rule is substituted for a *scire facias* to a judgment in those cases only where lapse of time prevents the plaintiff from suing out execution.

ERROR to the Circuit Court for the South Carolina District.

This was an action of trespass *quare clausum fregit*, brought by the plaintiff in the Circuit Court (who was also plaintiff in error), to recover a tract of land lying in the District of South Carolina, and in the possession of the defendant, to which the plaintiff asserted a title derived from a certain Joseph Salvadore.

Both parties admitted that Salvadore was legally seized of an estate, in fee, in the land in dispute. It appeared further, that Salvadore had executed several bonds in favor of a certain Daniel Bordeaux; that Bordeaux brought an action against Salvadore on these bonds, and obtained thereon a judgment by default, which was entered up and signed on the 30th of August, 1786; that no further steps were taken in the cause until the 2d of January, 1787, when an execution issued thereon, and was lodged in the sheriff's office on the same day; that Salvadore departed this life on the 29th of December immediately preceding. Salvadore left a will and two or three codicils, by which he appointed his three daughters, a certain William Stevens, and a certain Joseph Dacosta, his executors. All these persons were absent, out of the state, excepting Dacosta, who proved the will and codicils, and regularly qualified as executor thereto, on the 5th of January, 1787; he continued to reside in the city of Charleston, South Carolina, until some time in the year 1789, when he went to Savannah, in the state of Georgia, where he continued to reside until 10*] *November, 1790. On the second day of October, 1790, one James Lamotte requested and obtained from the ordinary of Charleston a citation, in behalf of the principal creditor of Salvadore, who was Bordeaux, to show cause why letters of administration with the will annexed should not be granted to him. On the return of the citation, no cause being shown to the contrary, the ordinary did, on the 8th of October, 1790, grant general letters of administration with the will annexed, on the estate of Salvadore, to Lamotte. A certificate was also obtained from the ordinary, by which it appeared that it was the custom of the ordinary court to grant letters of administration *durante absentia* of the executor. Bordeaux, on the 27th January, 1791, obtained a rule from the court of Common Pleas, against Lamotte, as administrator of Salvadore, to show cause within thirty days why the judgment obtained against Salvadore, as aforesaid, should not be revived, and an execution issue thereon. This rule was made absolute on the 15th of March, 1791, "subject to future argument." On the 16th of April following (no further argument or proceeding having been had on the said rule and no court intervening in the meantime), an execution issued on said judgment, against Lamotte, administrator, &c., was lodged in the sheriff's office, and levied upon the land in question, by the sheriff, on the 11th of May, 1791. The land was sold at public outcry to the highest bidder, on the 6th of June, 1791, and by a deed of the same date was conveyed by the sheriff to Peter Freneau, the purchaser. On the 16th of July, 1796, a decree was rendered in the suit, *Pierce Butler* v. *Daniel Bordeaux and Peter Freneau*, directing the said Peter to convey to such person as Pierce Butler should appoint. In pursuance of this decree Peter Freneau conveyed to Samuel Jackson, under whom Griffith, the plaintiff in this case, claims by regular conveyances. Frazier, the defendant, represents the heirs of Salvadore.

On the motion of the defendant the Circuit Court instructed the jury, that the letters of administration granted to James Lamotte were totally void; that therefore the judgment of Bordeaux was not revived against the estate of Salvadore; that the sale and conveyance by the sheriff passed no title to the purchaser; and that *the evidence was not sufficient to [*11 maintain the plaintiff's action. The jury found a verdict for the defendant, and judgment was rendered in his favor. The plaintiff excepted to the opinion of the court, and sued out a writ of error to the judgment.

Harper, for the plaintiff in error, after stating the facts of the case, contended,

1st. That the letters of administration, being *durante absentia* of the executor, were lawfully and properly granted by the ordinary to James Lamotte.

2d. That the question whether the granting of these letters were legal or not, was a question

proper for the decision of the court of ordinary; and that the judgment of that tribunal was conclusive until reversed on appeal to the state court having competent jurisdiction; that, consequently, the sale in the present case was valid, and the plaintiff's title good.

Jones, contra,

1. The grant of administration *durante absentia* was absolutely void: which being the case, it is clear that the subsequent sale of the property in question by the sheriff was illegal and invalid.

Dacosta, the executor, had duly qualified; and the circumstance of his having absented himself from the state of South Carolina for the space of twelve months, is a matter of no importance, unless at the same time he was incapable of performing his duty as executor. But this does not appear to have been the fact. The ordinary therefore had no right to grant letters of administration to Lamotte.

As to the certificate, said to have been given by the ordinary, stating that it was the custom of the ordinary court to grant administration *durante absentia* of an executor, it would be shown, on the part of the defendant, that in every case which could be produced in support of that custom the executor had not qualified.

The jurisdiction of the ordinary relative to **12***] the appointment *of an administrator is determined by the act of the testator in appointing an executor. The administrator derives all his rights from the court of ordinary, and nothing from the will. (1 Com. Dig., 340; 1 Salk., 302 [Toler ex'r., 76, 98]; 2 Bac. Abr., 381, 386, 401; 2 Plowd., 271.)

The grant of letters of administration has, in some cases, been decided to be void, even after the refusal of the executor to take upon himself the execution of the will. (2 Bac. Abr., 386; Went., 145.)

The ordinary, in granting administration, is a ministerial, not a judicial officer. (Toler, 50, 66; Jac. Law Dict., Tit. executor; 12 Mod., 437.)

In the case under consideration, the executor had proved the will; and it did not appear to the ordinary that there were any goods and chattels unadministered. If this were the fact, the ordinary had no jurisdiction in the case. (2 Bac. Abr., 385; Griffith's collection of South Carolina laws, p. 35, 492; *Ober's administrator* v. ———, MS. report of a case decided in South Carolina.)

By the statute of 38 Geo. 3 (c. 87), to remedy the defect of the law in not giving to the ordinary the power of appointing an administrator *durante absentia* of an executor who had proved the will, it was evident that, previous to that statute, the ordinary possessed no such power. That statute was so explained in the case of *Taynton* v. *Hannay* (3 Bos. and Pul., 26; Toler, 104).

When the executor had taken upon himself the trust of executing the will, the goods were out of the jurisdiction of the ordinary. (Went., 39; 4 Burn's Eccl. Law.)

If the jurisdiction of the ordinary ceased upon the qualification of the executor, all his subsequent acts in relation to the business were void. (3 T. R., 130; Toller, 128.) The Supreme Court of the United States has decided this principle in cases analogous to the present. (4 Cranch, 241, *Rose* v. *Himely;* 3 Cranch 331, *Wise* v. *Withers.*) Where a court has no jurisdiction in regard to a particular subject, trespass will lie against a sheriff for executing its orders relative thereto.

*2. Admitting the administration granted [***13** to Lamotte to have been rightful, yet the execution against him, under which the land in question was sold, was absolutely void; because the thirty day rule, under which the plaintiff attempted to revive the judgment in this case, was admissible only where the judgment had expired by lapse of time merely; but was not competent to revive a suit or a judgment against the representative of a dead party, which could only be done by *scire facias*, and no *scire facias* having issued in this case to make Lamotte a party, the execution against him was absolutely void for want of a judgment whereon to ground it. (Griffith's collection of S. Carolina laws, 466, 7, sec. 7.)

Pinkney, Attorney-General, same side.

The principal if not the only point in controversy is, whether the court of ordinary had jurisdiction in the case now under consideration.

The ordinary in receiving probate of a will acts ministerially; and when the will is proved he is *functus officio*. The authority of the executor is derived from the will. The only power of the ordinary is to ascertain the existence of the will.

If administration be granted upon the supposition that no will exists, and a will afterwards appear, all the proceedings under the administration are void; the administration is a mere nullity. (Toler, 120, 121.)

If there be a will, administration cannot be granted until the executor has refused or neglected to appear on summons. (Toler, 93.)

If administration be granted *durante absentia* of the executor, it becomes void upon the return of the executor and probate of the will. After probate the ordinary has no further jurisdiction.

The reason of the thing is obvious. The will vests the testator's property in the executor. He has a right after probate to appoint an attorney. But according to the doctrine contended for by the plaintiff, the ordinary *may [***14** also appoint an attorney in the place of the executor. This would be a manifest inconsistency. The executor, after accepting the trust, is bound to administer, and is liable for the goods entrusted to him. See MS. report of the case of *Ford* v. *Travis*, in the Court of Appeals of South Carolina, in which the court decided unanimously that after probate of a will, the grant of administration is void although the executor is absent.

Harper, in reply.

If this case is against the plaintiff in error, it is a case of sheer law against justice. The plaintiff in error is a fair, *bona fide*, purchaser without notice, under the sanction of the decrees of the courts of the state where the land lies.

The principle contended for by the defendant is only true as to the general disposition of the estate. It does not apply to the temporary interference of the ordinary in particular cases the peculiar circumstances of which render such interference necessary; such as cases of administration *durante minori ætate, ad colligenda bona, &c.*

In the case of *Ford* v. *Travis*, cited by the counsel on the opposite side, the ordinary had granted unlimited administration for all purposes and forever; but in the case now before the court, the grant of administration is special and temporary, as appears by the recital in the letters themselves.

The grant of these letters was nothing more than the appointment of a curator. In England the ordinary has a general power to issue letters of administration *durante absentia*. The statutes of Edw. 3 and H. 8, it is true, did not give a direct authority to grant administration in any case where there was an executor; but a practice grew out of the equity of those statutes, to grant temporary administration during the inability of the executor to act; as *pendente lite*, *minori*, *ætate*, executor insane, &c. (2 P. Williams, 576, *Walker* v. *Wollaston*.)

The general power of the ordinary to grant **15***] administration *ceases on the probate of a will in which an executor is named; but not his power over the estate for special, temporary purposes. The case in *P. Williams*, just cited, in which case probate had been granted, states the reasons for this temporary interference. The reason for granting administration *durante absentia* is the same as for granting it *durante minori ætate*. The *degree* of the necessity makes no difference; it is sufficient that there is a necessity. It is said that the executor may appoint an attorney. True; but suppose he does not; suppose that, without so doing, he abandons the estate, and leaves the country. Would not this be a case for the interference of the ordinary in the temporary appointment of an administrator? The only inference that can be drawn from the statute of Geo. 3, c. 87, which has been cited on the other side, is, that the power of the ordinary to grant administration in such cases was doubted; not that it did not exist; and so is the case in 3 Bos. & Pul., 26, to be understood. The statute of Geo. 3 is only declaratory of the common law; it does not enact a new law.

Such, then, is the doctrine in England on this subject. In South Carolina it is the same. Until the year 1712, there is no trace of the existence of ordinaries in South Carolina. In that year an act was passed declaring the statutes of 13 Edw. 1, c. and 31 Ed. 3, c. 11, to be in force in that colony, and enacting that the powers mentioned in those acts as belonging to the ordinary in England, shall be exercised by the same kind of officer in South Carolina.

The act of 1744, directing the manner of returning inventories, speaks of ordinaries as then existing.

The act of 1789, directing the manner of grauting probate and administration, gives that power to the county courts in those counties where such courts were established, and, in the other counties, leaves it to the ordinaries.

The statute of H. 8 is not in force in South Carolina. The common law is.

16*] *The doctrine, therefore, relative to the subject under consideration is the same in South Carolina as in England; and the power of the ordinary is the same.

That it has been the practice of the ordiuary court to grant administration *durante absentia*, the defendant does not deny, but urges that it has never, until the present case, been granted after probate by the executor. Perhaps not; but the reason is that no such case has before occurred. If it had, there is no doubt that the ordinary court would have granted administration as it has now done. The courts of the same description in England would have done the same. If they had not, the legislature would have interfered.

2. The judgment of the ordinary is conclusive that he acted judicially, and upon a subject properly cognizable by his court. Therefore, even admitting that he erred in granting the letters of administration to Lamotte, yet Lamotte was administrator *de facto*, and his acts bound the estate of Salvadore until those letters should be revoked.

That the subject was one properly cognizable by the ordinary, cannot be denied. He had jurisdiction under the equity of the statutes already cited, to grant temporary administration. He had jurisdiction to ascertain whether or not there was a will of personal property; aud no prohibition would lie to his proceedings. In a contest between two persons of the same name, both claiming to be executor, he might decide which of the two was entitled to administer the estate. He was competent to put such a construction upon the statutes as he might think correct, and to ascertain his powers growing out of the equity of those statutes. His judgment, therefore, in the present case, unless reversed on appeal to the Court of Common Pleas of South Carolina, was conclusive in every other court where it might come incideutally in question. Yet this court is now called upon not only to declare the judgment of the ordiuary void, and to reversed the same, but to reverse, also, that of the Appellate Court by which his judgment has been confirmed.

3. The judgment on which the execution in this case *issued, was properly revived [***17** by a court of competent jurisdiction, and its judgment can be questioned only in an appellate court.

The judgment was revived by a thirty day rule. That rule was, in fact, a *scire facias*. The proceeding was conformable to the usual practice in South Carolina. The Court of Common Pleas of that state adjudged the execution to be awarded upon this revival. Can this court, under such circumstances, reverse that judgment? Suppose the judgment of the Court of Common Pleas had been founded on a *scire facias*, and that *scire facias* had been informal. Could this court, in such a case, reverse the judgment? We contend that it could not in either case. The court that ordered the execution to be awarded had jurisdiction so to do; and its decisiou is final.

The 9th section of the law of South Carolina, respecting the thirty day rule to revive judgments, &c., gives express authority to the courts of that state to issue execution without a *scire facias*. But it is objected that this act is applicable only to cases of lapse of time, not to cases of the death of the party. But this is matter of construction on which those courts were competent to decide.

The doctrine in the case of *Ford* v. *Travis*, so much relied upon by the defendant's counsel, is only that an unconditional, unlimited, administration, where the executor has previously obtained probate of the will, is void; not that a

temporary administration would have been so in a like case.

4. Admitting the execution to have been improperly issued, still the sale of the property under that execution was valid.

All acts under a judgment obtained by fraud are valid; *a fortiori*, if the judgment be founded on a mistake either of law or fact. (3 Cranch. 306, *Simms and Wise* v. *Slacum*.)

It is laid down in 2 Bac. Abr., 270 (Tit. Execution), that "if upon his judgment the plaint-**18*** iff takes out a **fieri facias*, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the term was sold, and not to the term itself; for by the writ the sheriff had authority to sell; and if the sale may be avoided afterwards, few would be willing to purchase under executions, which would render writs of execution of no effect." The following authorities go to establish the same point. (Roll. Ab., 778; Cro. Eliz., 278; Cro. Jac., 246; 8 Rep., 96, *Matthew Manning's* case; Id., 142, *Dr. Drury's* case; 1 Wils., 302, *Earl* v. *Brown*.) It is true that these cases all relate to sales of personal property; but there is no difference as it respects the sale of lands under a *fieri facias*, or what was equivalent thereto, as in the present case. These lands were sold as personal effects. (1 Haywood's N. Carolina Reports.)

Pinkney, contra, contended,

1. That the case in 3 Bos. & Pul. did not state that the statute of Geo. 3 was founded on a doubt, but upon a clear defect of jurisdiction. That no case could be found to sanction the grant of administration after probate in a case like the present. That the case of *Ford* v. *Travis* was decisive that no such administration was valid in South Carolina.

2. That the judgment of the ordinary was not conclusive that he had no jurisdiction in a case like that under consideration. That the Court of Appeals of South Carolina was of this opinion, and had therefore declared the judgment of the ordinary void. (2 Bac. Abr., 376.)

3. That the judgment on the rule to show cause was not conclusive; and this, besides the other reasons which have been already mentioned, because it was against a person not a representative of the testator.

4. That this was not the case of a sale to a third person, as in the authority cited from Bacon, and the other cases to the same point; but that the plaintiff claimed under Bordeaux, as a purchaser.

*That the statute of South Carolina, [***19** respecting the thirty day rule, was only applicable to cases of lapse of time, not to cases of the death of the party.

That as to the case in 1 Wils., 302, cited by the plaintiff's counsel, it did not appear that the court decided on the validity of the sale, nor that any person wished to disturb it.

Jones, on the same side.

As to the law respecting a void judgment, cited Vin. Ab., Tit. Error; also, Com. Dig. and Bac. Ab., same title.

Tuesday, February 15th. *Absent*—WASHINGTON, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The plaintiff in error, who was also plaintiff in the Circuit Court, brought a writ of trespass *quare clausum fregit*, in order to try his title to certain lands, lying in the District of South Carolina, which were in possession of the defendant.

The title of the plaintiff, which constituted the sole question in the cause, appeared on the trial to be as follows:

Joseph Salvadore, being seized of the lands in which the trespass is alleged to have been committed, departed this life some time in the year 1786, having first made his last will in writing, in which he named several executors, one of whom, Joseph Dacosta, made probate of the will, and took upon himself the burden of executing the same; after which, in the year 1789, he left the state of South Carolina, and resided in Georgia. In the year 1790, letters of administration on the goods of Salvadore, unadministered by Dacosta, his qualified executor, were granted to James Lamotte.

In August, 1786, a judgment was obtained by Daniel Bordeaux against Salvadore. In January, 1791, a thirty day rule, which, by an act of the state of South Carolina, was, in certain cases, substituted in the place *of a [***20** *scire facias*, was issued to revive this judgment against Lamotte as administrator of Salvadore. This rule being served and returned, the following indorsement was made on it: "15th March, 1791, made absolute subject to a future argument."

"*Fi. fa.* 16th April, 1791."

An execution issued on this judgment, under which the land was sold, and was conveyed by the sheriff to Peter Freneau by a deed dated the 6th day of June, 1791. On the 16th of July, 1796, a decree was rendered in the suit, *Pierce Butler* v. *Daniel Bordeaux and Peter Freneau*, directing the said Peter to convey to such person as Pierce Butler should appoint. In pursuance of this decree, Peter Freneau conveyed to Samuel Jackson, under whom the plaintiff claims by regular conveyances.

On the motion of the defendant, the Circuit Court instructed the jury that the letters of administration granted to James Lamotte were totally void; that therefore the judgment of Bordeaux was not revived against the estate of Salvadore; that the sale and conveyance by the sheriff passed no title to the purchaser; and that the evidence was not sufficient to maintain the plaintiff's action. The jury found a verdict for the defendant, and judgment was rendered in his favor. The plaintiff excepted to the opinion of the court, and has sued out a writ of error to the judgment.

The sole defect alleged in the title of the plaintiff being in that part of it which depends on the sale and conveyance of the sheriff to Peter Freneau, the validity of that sale is the principal if not the only question in the cause. In support of it the plaintiff contends,

1st. That the letters of administration, being *durante absentia* of the executor, were properly granted to James Lamotte.

2d. If the ordinary erred in granting these letters, still Lamotte was administrator *de facto;* and his acts bound the estate of Salvadore until those letters should be revoked.

*3d. That the judgment on which the [***21** execution issued was properly revived by a

court of competent jurisdiction and its judgment can be questioned only in an appellate court.

The negative of these propositions is maintained by the defendant in error.

That the appointment of an executor, and his acceptance of the office, constitute a complete legal owner of the personal estate of the deceased is admitted; but it is contended that these acts suspend without annihilating the power of the ordinary. So long as the executor is capable of exercising the authority with which he has been invested by the testator, it can be conferred on no other person; but when he becomes incapable, from any cause whatever, as by insanity or death, the power of appointing some person, who shall secure the estate from ruin, necessarily reverts to that tribunal which the law appoints for the general purpose of providing for the management of the property of dead persons. All cases of temporary administration, as during the minority of an executor, or during his absence previous to the probate of the will, are considered as exercises of the same power, though in a less degree, and as proving that the ordinary may, after the executor has qualified, if he shall absent himself so as, in the opinion of the ordinary, to disqualify him from performing his duty, appoint an administrator *de bonis non* with the will annexed, whose power shall continue until the return of the executor.

The court does not concur in this reasoning. In the cases stated at bar, and in all cases where temporary administration has been granted, unless under a special act of the legislature, the executor was, for the time, absolutely incapable of performing his duty. There existed an actual legal disability to perform the functions of his office. Until probate of the will, and until letters testamentary are obtained, the executor cannot obtain any judgment; because it cannot appear that he is executor.

There is, therefore, an absolute neeessity for appointing some person who, until probate, **22***] shall take care of *the estate. But this is not the case with an executor who, after taking out letters testamentary, absents himself from the state. He is still capable of performing, and he is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and, consequently, there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself.

This power does not appear ever to have been exercised by the ordinary in England anterior to the statute of 38 George 3d; and in South Carolina, the ordinary possesses no power which was uot possessed by the ordinary in England previous to that statute. The practice of the particular ordinary who acted in this case would not be sufficient to constitute the law, had it even never received judicial reprobation; but the case of *Ford* v. *Travis* puts an end to any doubt on this point.

The second point is one of more doubt and greater intricacy. That the ordinary erred in granting letters of administration to Lamotte, is thought very apparent; but the effect of these letters is less obvious. By the plaintiff it is contended, that they constituted Lamotte an administrator *de facto*, rendered his acts valid, so far as third persons are interested, and exempted them from question where they can be examined only incidentally. By the defendant it is contended, that they were granted by a person having no jurisdiction in the case, and are therefore an absolute nullity; that Lamotte was not, *de facto*, the administrator of Salvadore, and that his acts, as administrator, stand on no better or higher ground than the acts of any other person who should assume that character.

The well-known distinction between an erroneous act or judgment by a tribunal having cognizance of the subject-matter, and the act or judgment of a tribunal having uo cognizance of the subject, is not denied; but it is contended that the ordinary had jurisdiction in this case. The ordinary, in South Carolina, is the court in which wills are proved; in which letters testamentary and letters of administration are granted. He judges whether the applicant be entitled to administration or not, and rejects or admits the claim, according *to [***23** his opinion of the law. Whether his judgment be correct or not, still it is his judgment; and when exercised upon an application for administration, it is exercised on a subject cognizable in his court.

That he grants letters of administration in cases not expressly authorized by statute, and in which a will exists in which an executor is named, proves that he has jurisdiction in such cases; and if he grants administration in one of them improperly, the judgment is erroneous and voidable, but not void.

This argument has been very strongly urged, and there is great force in it. The difficulty of distinguishing those cases of administration in which a court having general testamentary jurisdiction may be said to have acted on a subject not within its cognizance, is perceived and felt. But the difficulty of marking the precise line of distinction, does not prove that no such line exists.

To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction.

24*] *The case of letters of administration granted on the estate of a person in full life, is not the only one which may serve for illustration; suppose administration to be granted on the estate of a deceased person whose executor is present, in the constant performance of his executorial duties. Is such an appointment void, or is it only voidable?

In the opinion of the court it would be an absolute nullity.

The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels, as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing; it conveys no right; and is a void act.

If the ordinary possesses no power to grant administration where an executor is present performing his duty, what difference can his absence make, provided that absence does not disqualify him from executing his trust? If all his powers as an executor remain, if he is still capable of appearing in courts of justice as the representative of the deceased, if he is still the legal owner of the chattels of the deceased, and still capable of disposing of them, it would seem that he is potentially present though personally absent. It is not easy to perceive any principle on which the ordinary can assert his power to take the estate out of the executor and vest it in an administrator. If he cannot do this then, the attempt to do it must be a void act. If the administrator *durante absentia* be only the agent of the executor, it still occurs that the executor can himself appoint, and is the proper person to appoint, his own agent. There is no necessity for the intrusion of the ordinary.

Let the case be supposed of a suit by the executor while actually resident abroad. Would he be incapable of sustaining the action? Would **25***] his absence be a good *plea in bar? If it would not, how can the grant of letters of administration to another take the property in the thing sued for out of the executor and place it in that other?

Letters testamentary, when once granted, are not revocable by the ordinary. He cannot annul them, or transfer the legal interest of the executor to any other person. His rights and his duties are beyond the reach of the ordinary. How, then, can this be effected by the grant of letters of administration?

The cases in which administration has been granted notwithstanding the existence of a will, appear to be cases in which it is not apparent that there is any person possessing right in the chattels of the testator, or cases in which that person is legally disqualified from acting.

Where administration is granted pending a dispute respecting a will, it is not certain that there is an executor, or that there is a will.

If it be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed has not taken upon himself, and could not take upon himself the trust reposed in him. He may, when of age, reject all the rights and powers conferred by the will; and, consequently, the interest is not yet a vested interest. The rights and powers of the ordinary remain until those of the executor commence.

So in the case of an absent executor who has not yet made probate of the will and qualified. Those letters testamentary which are indispensable to his character as executor, and which, during their existence, leave the ordinary without any further power over the subject, are not yet granted. The executor has as yet no evidence that he is executor. He is not yet able to act as one. He may never be able to act; for he may never take out letters testamentary. He may renounce the executorship. The ordinary, then, is not yet deprived of that power which he possesses to appoint a person to represent a dead man who has no representative. His *jurisdiction over the subject remains [***26** until he parts with it by issuing letters testamentary.

The difference between granting administration in cases where there is a qualified executor, capable, in law, of acting, and where he has not qualified, is such as, in reason, to justify the opinion that though, in the latter case, the ordinary may have jurisdiction, and his act, though erroneous, may be valid till repealed, yet, in the former case he can have no jurisdiction, and his act is in itself an absolute nullity.

If, under any circumstances, the ordinary could grant administration during the absence of an executor who has made probate of the will and is legally competent to act, then he would have jurisdiction of the subject, and would judge of those circumstances; but if, in no possible state of things, he could grant such administration, it would be difficult to conceive how he can have jurisdiction.

If we refer to authority, we can find no case and no *dictum* which admits the jurisdiction of the ordinary, where there is an existing executor capable of acting. In many cases it is stated that an administration granted where there is such an executor, is void. *Toller*, in his "Law of Executors" (page 120), says: "If there be an "executor, and administration be granted be- "fore probate, and refusal, it shall be void on "the wills being afterwards proved, although "the will were suppressed, or its existence were "unknown, or it were dubious who was ex- "ecutor, or he was concealed, or abroad at the "time of granting the administration." It is also void "if granted because the executor has become a bankrupt," or if granted "*durante* "*minoritate* where the infant had attained his "age of seventeen," until the statute of 38 G. 3. So "if granted by a bishop where the intestate "had *bona notabilia*, or by an archbishop of "effects in another province."

The case of *Ford* v. *Travis*, decided in South Carolina, is express to this point, and renders a further reference to English books unnecessary.

The counsel for the plaintiff admits this to be the law *where an absolute administra- [***27** tion is granted; but denies the law to be applicable to the grant of a temporary administration.

However correct this distinction may be in many cases, its application to that at bar is not admitted.

No temporary administration can be granted where there is an executor in being, capable of acting, and where the case will not justify the grant of a temporary administration, it would seem to be as completely out of the jurisdiction of the ordinary as the grant of an absolute administration, where that is not within his power.

The case, put by *Toller*, of administration *durante minoritate* where the executor is of the age of 17, seems full in point. This is a temporary administration, and the minority of the executor is a fact for the consideration of the ordinary. Yet if, in such a case, he grants administration, the act is void, because, in fact, it is not a case in which he can grant it.

The reasoning of the court in the case of *Ford* v. *Travis* appears applicable to this case. They say the executor having proved the will, "was in the nature of a trustee; he could neither abandon his trust nor be deprived of his interest in the estate of the deceased by any act of the ordinary. The ordinary, by proving the will and qualifying the executor, executed his power; and no law exists in this state authorizing him to resume it during the life-time of the qualified executor, notwithstanding he may be absent from the state. Letters of administration granted under such circumstances are void *ab initio*.

If the ordinary cannot resume his power so as to grant an absolute administration, he cannot resume it for a limited time. He cannot, by any act of his, devest the interest of the executor for an instant. The power may revert to him by operation of law, but cannot be assumed by any act of his own.

The grant of a temporary administration, as during the minority of an executor, is *ad usum* **28***] *et commodum *executoris*. But in this case the administration is, for the time, absolute, and makes the administrator the entire representative of the deceased. It would not be unworthy of remark, if the case depended on it, that though the application of Lamotte was for administration during the absence of the executor, yet the grant itself is without limitation.

But, in its very nature, the appointment of an administrator, during the absence of an executor under no disability, is essentially nothing more than the appointment of an agent for that executor. This, the ordinary has not the power to do. The executor alone can appoint his agents.

If the ordinary had no jurisdiction in the case, then the grant of administration was void *ab initio*, and all the acts of the grantee are void. (Toller, 128; 3 Term. Rep., 125.)

It is contended by the plaintiff, that could this administration even be considered as null, where that forms the direct question before the court, as it did in *Ford* v. *Travis*, yet that point cannot be examined where it is collateral and incidental.

The answer which has been given at bar to this argument is entirely satisfactory. The question has never been examined in a court of law sitting as an appellate court. The question has never been, whether the letters of administration shall be revoked or not, but whether they were originally void, so as not to warrant the particular act in support of which they were alleged.

But in this case the letters of administration come as directly before the court as in the case of *Ford* v. *Travis*. The conveyance from the sheriff to Freneau forms a part of the plaintiff's title; and the validity of that conveyance may depend on the question whether Lamotte was or was not the administrator of Salvadore. The question, therefore, must necessarily be decided; and a majority of the court is of opinion that administration was granted by a court having no jurisdiction in the particular case, and is therefore absolutely void.

*3d. It is contended on the part of the [***29** plaintiff, that the judgment on which the execution issued was properly revived by a court of competent jurisdiction, whose judgment is therefore conclusive until reversed.

The first objection made to this judgment of revivor is, that it was made without legal process. The thirty day rule is substituted for the *scire facias* only in cases where lapse of time prevents the plaintiff from suing out execution.

However this court might construe the law on an appeal from a judgment of revivor in such case, that question has been decided by a court of competent jurisdiction, and cannot be reviewed here.

The second objection is, that the letters of administration being a mere nullity, no party representing the estate of Salvadore was before the court, and consequently the judgment could not bind that estate.

This question is one of considerable difficulty. Had the judgment been revived against the executor himself, without the service of process, it would perhaps, while in force, have protected all proceedings under it. But this judgment is revived against Lamotte, who was not the representative of Salvadore. In the opinion of a majority of the court, an execution on this judgment could not legally be levied on the property of Salvadore; and if so, the title was not vested in the sheriff by the service of the execution, and could not be conveyed by him to the purchaser. Upon this point, the case cited from 1st Wilson, 302, is a strong one against the opinion of the court; but in that case, the execution, though irregular, was issued on a real judgment, and justified the sheriff in taking the effects of the deceased. On its face it was unexceptionable. It issued at an improper time; but in all other respects was correct. In this case the execution issued on a judgment which was itself a nullity; and it authorized the sheriff to take the effects, real and personal, of Joseph Salvadore in the hands of James Lamotte to be administered. Now, the property of Salvadore was not in the hands of Lamotte, but was in the hands of his executor.

*The case in Wilson, too, is so briefly, [***30** I might say obscurely, reported, as to leave the principle on which the court decided entirely uncertain. It does not appear that the object of the motion extended further than the restoration of the money. This was not an attempt to set aside the sale; and nothing appears in the case from which is to be conclusively inferred what the opinion of the court would have been on that question.

In the opinion of a majority of the court, there is no error in the judgment of the Circuit Court, and it is affirmed with costs.

Wednesday, February 16th. *Harper* observed that he understood the opinion of the court to be founded considerably on the form of the *fieri facias*, inasmuch as it directed the sale of the lands of Salvadore in the hands of Lamotte, when, in fact, there were no lands in the hands of Lamotte.

MARSHALL, *Ch. J.*

That was one ground of the opinion; but another was, that the sale was founded on a void judgment.

Harper, as to the first point, suggested to the court that the form of the *fieri facias* was against the lands as well as the goods.

Cited—14 Pet. 40, 169; 1 Abb. U. S. 178; 2 Gall. 162; 4 Dill. 389.

VAN NESS *v.* FORREST.

Absent—WASHINGTON, *J.*

A promissory note, given by one member of a commercial company to another member, for the use of the company, will maintain an action at law by the promisee in his own name, against the maker, notwithstanding both parties were partners in that company, and the money when recovered would belong to the company.

If the declaration be upon a joint note, and the defendant plead that the note is the separate note of one of the defendants, and was given to and accepted by the plaintiff in full satisfaction of the debt, this plea is bad upon special demurrer, because it amounts to the general issue.

ERROR to the Circuit Court for the District of Columbia.

The case as stated by MARSHALL, *Ch. J.*, in delivering the opinion of the court, was as follows:

31*] *The defendant in error, who was president of a commercial company consisting of four or five hundred members, sold certain merchandise, the property of the company, to Jehiel Crossfield, and took his note payable in twenty days to Joseph Forrest, president of the commercial company, for the purchase money. Default having been made in payment, Joseph Forrest instituted a suit against Jehiel Crossfield and John P. Van Ness, who was a dormant partner of Crossfield, and also a partner of the commercial company.

The declaration contains several counts. The first is on the promissory note, which is charged as the note of Crossfield and Van Ness, trading under the firm of Jehiel Crossfield. The second and third, for goods, wares and merchandise sold and delivered, the fourth for money had and received by the defendants, to the use of the plaintiff, and the fifth on an *insimul computassit*.

The defendant, Van Ness, pleads the general issue, on which plea issue is joined.

He also pleads in bar several special pleas, amounting in substance to this, that the several *assumpsits* in the declaration mentioned, were made for goods, wares, and merchandise belonging to the commercial company, consisting of many partners, and of which both the plaintiff and himself were members.

The third plea alleges, that the plaintiff did agree to accept and did accept the separate promissory note of the said Crossfield, in payment of all and singular the debt and debts, promises and assumptions in the plaintiff's said declaration above supposed; in pursuance and execution of which agreement aforesaid, the said defendant, Jehiel Crossfield, made the said promissory note in the plaintiff's said declaration mentioned, and delivered the same to the said plaintiff, on the day of the date of the said note, at the county aforesaid, and the plaintiff then and there accepted the same as payment, in pursuance of the aforesaid agreement.

To these several special pleas the plaintiff in the *court below demurred specially, and [***32** the defendant joined in demurrer.

On argument the demurrers, except to the third plea, were overruled, and the pleas sustained as to the 2d, 3d and 4th counts, but the demurrers were sustained as to the 1st and 5th counts of the declaration. The demurrer was also sustained as to the 3d plea, which was adjudged bad as to all the counts.

On the trial of the issues, Van Ness objected to the evidence offered by the plaintiff below, to support the first count, and his objection being overruled, excepted to the opinion of the court. This exception brings on the whole question made by the pleas on the point, that the goods for which the note was given were partnership goods belonging to a company of which both the plaintiff and defendant were members.

The jury found a verdict for the plaintiff below, on which judgment was rendered, and the cause is brought into this court by writ of error.

Jones, for the plaintiff in error, contended,

1st. That this action is not sustainable, it being brought by one partner against another. And 2d, That the separate note of Crossfield was a discharge of the original debt due from Crossfield and Van Ness.

1. An action does not lie by one partner against another, unless for a balance stated and acknowledged upon settlement of the partnership accounts.

The suit was as much for the use of Van Ness as of any other of the stockholders. The plaintiff was only a conventional president. The stockholders must all join in the action, and then Van Ness would be both plaintiff and defendant.

2. The plea states, that the plaintiff agreed to take the separate note of Crossfield in full satisfaction for the goods sold and delivered. This was decided by this court to be a good defense in the case of *Sheehy* v. *Mandeville* (6 Cranch, 253).

J. Law*, contra. **[*33

It is true that one partner cannot sue another on an implied promise, but he may upon an express promise. (2 T. R. 479, *Foster* v. *Allanson;* 1 East, 20, *Wright* v. *Hunter.*) After verdict, the promise shall be taken to be express. (4 Cranch, 224, *Grant* v. *Nailor.*)

The defendant cannot set up a trust to defeat the plaintiff's legal right to recover. If the trustee of a *feme sole* should bring an action against the husband, he could not defend himself by pleading that the money, if recovered, would be for the use of his wife, and that the wife could not sue him at law. The defendant cannot be permitted to look behind the legal

plaintiff for the purpose of setting up an inequitable defense. If this doctrine were to prevail, private banking companies could not recover money lent to stockholders.

The causes of demurrer assigned are, that the plea amounts to the general issue; and that the plea neither admits nor denies the promise laid in the declaration.

Jones, in reply.

The cases cited do not take this case out of the general principle, that one partner cannot sue another.

This is not an express promise of the defendant. It is only by implication that he is charged. It is a promise that the law raises upon the fact that he is a partner with him who expressly promised. In all the money counts, the promise is implied.

As to the objection that the plea amounts to the general issue. That point is settled also in the case of *Sheehy* v. *Mandeville*.

MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court as follows:

It is contended by the plaintiff in error,

1st. That this action is not sustainable, it being brought by one partner against another.

34*] *2nd. That the separate note of Crossfield discharges the original debt, due from Crossfield and Van Ness.

As the first error assigned by the plaintiff is, if it be really an error, appareut ou the bill of exceptions, as well as in the pleas, it is not necessary to examine the formality of the pleas respecting it.

It is alleged that, at law, one partner can sue another on a claim growing out of the partnership in no other case than for a general balance on a stated account.

The terms in which this proposition has been laid down are perhaps too general.

In the case at bar, the suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly sustainable on the note itself. Such suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company than if it had been given to a person not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money, in his own name, as a trustee for the company. Upon the record, and technically speaking, he is the sole plaintiff, and the court can perceive no reasonable or legal objection to his sustaining an action on the note. The principle that a company cannot sue its members, does not apply to the case; nor does the principle, that a partner cannot sue a partner on a partnership transaction, apply to any case where a note in writing is given for money, not to a firm, but to an individual member.

The third plea alleges, that the plaintiff in the court below agreed to accept the separate promissory note of Crossfield in payment, and that, in execution of this agreement, Crossfield made the note in the declaration mentioned, which was accepted in payment of the several assumptions stated in the declaration.

Now, the note, in the declaration mentioned, is a joint note, so that this plea in one place alleges it to be a joint note, and in another place to be a several note.

*It becomes unnecessary to inquire into [*35 the effect of this repugnancy, if it be one, because the plea, if to be understood as averring that the note, in the declaration mentioned, is a several and not a joint note, would amount to the general issue. The plea is no more, to the first count, than *non assumpsit*. For if the note was not the note of Van Ness, he had not made the *assumpsit* stated in the first count. This is ill upon a special demurrer, when assigned as cause of demurrer.

The plaintiff in error supposes the case of *Sheehy* v. *Mandeville & Jamesson*, reported in 6th Cranch, 253, to be a case in his favor, on this point. The court thinks otherwise. In that case, as in this, a note was given by one partner for a debt contracted by the firm. In that case, as in this, one count in the declaration was special, on the note, stating it to be a joint note, and other counts were general, on the original transactions. The defendant, whose name was not on the note, stated it to have been received in discharge of the open account. The court decided that the plea was good, not in bar of the special count on the note itself, but in bar of the general counts, for goods sold and delivered.

Upon the special count, the court was in favor of the plaintiff below, who was also plaintiff in error, and the judgment of the Circuit Court, which had been against him, was reversed. The case of *Sheehy* v. *Mandeville & Jamesson*, then, is not in favor of the plaintiff in error, so far as his third plea applies to the first count in this declaration.

This court is of opinion, that there is no error in the judgment of the Circuit Court either in sustaining the demurrers to the several pleas filed in that court to the first count in the declaration, or in admitting the note, in the declaration mentioned, to be given in evidence to the jury, on the trial of the issue of fact. This opinion renders it unnecessary to examine the decision of the Circuit Court, as it respects the pleas to the other counts, since, should their decision respecting the pleas to those counts even be deemed erroneous, their judgment will stand.

Judgment affirmed with costs, and damages, at the rate of 6 per cent. per annum, and costs.

Cited—1 Blatchf. 306.

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*THE BANK OF ALEXANDRIA [*36
v.
HERBERT.

Absent—WASHINGTON, *J.*

The trustee of an insolvent debtor in the District of Columbia, represents the creditors of the insolvent, and can take advantage of a defect in a mortgage, of which the insolvent himself could not.

THIS was an appeal from the Circuit Court for the District of Columbia, sitting in chancery at Alexandria.

A bill in chancery was brought by W. Herbert, Jr., trustee for the creditors of John Potts,

an insolvent debtor under the act of Congress for the relief of insolvent debtors within the District of Columbia, against the bank of Alexandria, to recover the proceeds of a tract of land, the property of Potts, which had been sold by consent and the money deposited in the bank. This land had been conveyed by Potts to Ludwell Lee in trust to secure the payment of money borrowed of the bank by Potts, but the deed of mortgage had not been recorded within the time limited by the law of Virginia, which governs this case, and which declares that all deeds of mortgage whatsoever, although good between the parties, shall be void as to creditors and subsequent purchasers without notice, unless they be recorded within eight months after their date.

Swann, for the appellants.

Although the deed to Lee would be void as to a subsequent purchaser for valuable consideration without notice, yet it is not void as to Herbert, who is the trustee of Potts under the insolvent law for the District of Columbia. (Laws U. S., vol. 6, p. 294.) A trustee under that law is like an assignee under a commission of bankruptcy in England. He stands merely in the place of the insolvent. He takes the estate as the insolvent held it. He is bound by the same equity, and liable to the same obligations. (Cooper's B. L., 128, 307; 2 Vez., 633; 1 Atk., 94, 162; 2 Vern., 564, 609, *Taylor* v. *Wheeler;* 1 Br. C. C., 269, *Russel* v. *Russel.*) The deed to Lee being good against Potts, is equally valid against Herbert.

37*] **Taylor*, contra.

No English authority can apply directly to this case. Potts remained in possession ten years after the deed to Lee, and until his insolvency and the execution of the deed to Herbert, when he delivered to Herbert the possession.

But the deed is void as to creditors as well as purchasers, and creditors are not affected by notice, although purchasers are. The fact that Herbert had notice does not appear; but if it did, he represents the creditors; and their rights are his. If there had been no deed to Herbert, the creditors might have obtained a decree in their own names to vacate the deed to Lee and compel a sale.

But if this cause depends upon the decisions under the bankrupt law, yet the assignee of a bankrupt represents the creditors, and can take advantage of defects which the bankrupt himself could not. (Cooper, 307.) In the case of *Taylor* v. *Wheeler* (2 Vern., 564), it does not appear that the creditors had a right to avail themselves of the defect in the mortgage. If Herbert represents the creditors, the fourth section of the statute of Virginia is conclusive. (1 P. P. Rev. Co., 157.) If he does not represent the creditors, then all the provisions of the insolvent law are of no avail. If the deed cannot be set aside by a bill in the name of the trustee, the judgment creditors may file a bill in their own names and set it aside.

Swann, in reply.

The assignee of a bankrupt also represents the creditors, but yet it has been decided (1 Atk., 94), that although creditors might vacate a deed, yet an assignee could not.

The case of *Taylor* v. *Wheeler* is very strong. The mortgage was void at law for want of a surrender of the copy-hold in due time, yet it was decreed that it should be made good against the assignee of the mortgageor, who, it was admitted, represented the creditors. But the chancellor said that the complainant also was *a creditor, and had trusted to this par- [***38** ticular fund, but the others were general creditors; and upon that distinction his decree seems to be founded. The reason of that case is precisely applicable to the present. The bank lent the money upon the credit of this very security.

February 16th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

In this case a bill was brought in the Circuit Court for the county of Alexandria, by William Herbert, Jr., trustee for the creditors of John Potts, an insolvent debtor, against the bank of Alexandria, to recover the proceeds of a tract of land, the property of Potts, which had been sold by consent, and the money deposited in bank.

This land had been conveyed by Potts to the bank to secure the payment of a sum of money borrowed by him, but the deed of mortgage had not been recorded until eight months after its date had elapsed. The law of Virginia, which governs this case, declares all deeds of mortgage whatsoever, though good between the parties, to be void as to creditors and subsequent purchasers without notice, unless they be recorded within eight months from the date.

The question is whether this mortgage can be set up in favor of the bank against the trustee for the creditors.

The Circuit Court decreed in favor of the trustee, and from that decree there is an appeal to this court.

For the appellant it is contended that the trustee may be assimilated to the assignees of a bankrupt, and he has adduced some cases from the books showing that in England a deed declared to be void in law has been supported against the assignees in favor of the particular creditor who holds a lien upon it.

The resemblance between the trustee for the estate of an insolvent debtor in the District of Columbia and the assignees of a bankrupt is admitted; yet a clear distinction exists between the cases cited at bar and *that before the [***39** court. In those cases the deed was declared void without any view to creditors. In this case the deed is declared void for the particular benefit of creditors. To set up this deed against the creditors would be to defeat the very object for which the law was made.

The counsel for the appellant is well apprised of this distinction, and though he claims for his clients the benefit of this deed against the trustee, he admits that it could not be sustained against the creditors suing in their own names.

In reason there can be no difference between this suit, which asserts the right of the creditors in the mode prescribed by law, and an assertion of that right in their own names. Nor does the law distinguish between them. The cases cited did not turn on any distinction between the rights of the assignee and the creditors, but on the preference which ought to be given to him who has trusted on the credit of the particular fund over those who have trusted the general fund.

The decree is affirmed with costs.

Cited—6 Otto, 489.

MARCARDIER
v.
THE CHESAPEAKE INSURANCE COMPANY.

Where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo including the memorandum articles.

Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter party is to be considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In such case, the general owner is also owner for the voyage. Consequently, if he be the master of the vessel, he is incapable of committing barratry.

ERROR to the Circuit Court for the District of Maryland.

The facts of this case were thus stated by STORY, *J.*, in delivering the opinion of the court.

This is an action on a policy of insurance, underwritten by the defendants, on the 29th of October, 1806, for $31,000, upon any kind of lawful goods on board the brig Betsey, whereof **40***] Alexander M'Dougal was then *master, on a voyage at and from New York to Nantes. M'Dougal was the general owner of the brig, and, on the 1st day of October, 1806, by a charter party of affreightment made with the plaintiff, granted, and to freight let, to the plaintiff, the said brig, excepting and reserving her cabin for the use of the master and mate and for accommodation of passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions, and cables, for the voyage from New York to Nantes; and M'Dougal, by the same instrument covenanted to man, victual, and navigate the brig at his own charge during the voyage, and to receive on board any shipment of goods, not contraband, which the plaintiff should tender at the side of the ship, or within reach of her tackles, at New York, and to stow and secure the same, and proceed therewith to Nantes, and there discharge the same. The passengers on board the brig were to be at the joint expense of the parties, and the passage money was to be equally divided between them. The other clauses in the charter party are not material to be stated, except that the plaintiff covenanted to pay the stipulated freight and demurrage. The cargo, put on board by the plaintiff, was of the invoice value of $29,889, of which $7,439 were in memorandum articles. The brig sailed on the voyage, under the command of M'Dougal, on the 9th of November, 1806, and during the voyage was compelled by stress of weather, and other accidents, to bear away for the West Indies, and arrived at the port of St. Johns, in Antigua, on the 22d day of December. There the master made application to the Vice-Admiralty for a survey, &c., and such proceedings were had upon his application, that the cargo was landed, and by a decretal order of the court, of the 31st of January, 1807, the same was ordered to be sold for the benefit of all concerned, reserving the question as to freight. Under this decree, the cargo was accordingly sold, and the sales completed before the 28th of March, 1807; and the net proceeds of the whole of the plaintiff's property amounted to $13,767. The net proceeds of the memorandum articles, included in the same sum, were $6,863.30. The whole proceeds were paid over to an agent appointed by M'Dougal, and the freight for the whole voyage was allowed him by the Admiralty, upon a report *of commissioners, to whom the [***41** question was referred. The brig was repaired at Antigua, within a reasonable time, at the expense of one-sixth only of her value, and capable of performing the voyage with the original cargo; but M'Dougal voluntarily abandoned the voyage at Antigua, for his own emolument and advantage. Of the cargo, 99 bags of coffee were spoiled and thrown overboard, and the residue greatly damaged by the perils of the seas; and the whole cargo, including the memorandum articles, sustained a damage, during the voyage, exceeding a moiety of its original value. On the 4th of February, 1807, and within a reasonable time after receiving information of the loss, the plaintiff abandoned the whole cargo to the underwriters.

The declaration contained two counts, for a total loss; 1st, by the perils of the seas, and 2d, by barratry of the master. At the trial, the court below, upon the facts and circumstances above stated, held that the plaintiff was not entitled to recover, as for a total loss of the cargo insured, including the memorandum articles; and the cause came up to this court, upon a bill of exceptions to that opinion.

Harper, for the plaintiff.

The great controversy between the parties in this case turns on the question, whether the loss of the cargo now under consideration was partial or total. It is contended, on the part of the plaintiff, that it was a total loss.

1st. By the dangers of the seas.

2d. By the barratry of the master.

By the dangers of the seas—

1st. Because the voyage was broken up and lost by the deterioration of the cargo, to more than half of its value.

2d. Because there may be a total loss of memorandum articles, by the loss of the voyage; although the articles themselves remain in existence, and of some value.

*By the barratry of the master— [***42**

1st. Because the acts imputed to him, amount to barratry, if he were in a situation to commit it.

2d. Because by the charter party the plaintiff became owner *pro hac vice*, and M'Dougal merely master, so as to be in a situation to commit barratry.

The question to be first considered may be stated as follows:

Whether, in case a cargo consists partly of memorandum articles (on which no partial loss can be recovered), a total loss is incurred by the breaking up of the voyage on account of such a deterioration of the whole cargo (including a deterioration of the memorandum articles), as reduces the value of the whole cargo more than one-half.

We hold the affirmative of the question.

But there are two cases which have been cou-

sidered as very strong in favor of the negative. These are:

1st. The case of *Wilson and another* v. *Smith* (3 Bnrr., 1550, eited also in Marsh., 1st Am. ed., 141). This was of a ship with a cargo of corn, which, having met with a storm, was obliged to run for the nearest port to refit, where she inenrred a considerable expense in repairs.

On her arrival at her port of destination, it was fonnd that the corn was damaged to more than half its value. Lord Mansfield deeided, that this loss, not being of the natnre of a general average, nor arising from the ship's being stranded, conld not be recovered on the policy; for that the words of the memorandum, "free from average, nnless general, or the ship be stranded," did not make a condition, but only an exeeption.

The answer to this ease is, that the vessel had arrived at the plaee of destination; the voyage therefore was not broken up, and so no total loss could be elaimed on the gronnd that the eargo was deteriorated more than half its valne. **43***] *2d. The other ease, and that whieh is chiefly relied upon by the defendants, is the ease of *Cocking* v. *Fraser* (Marsh., 1st Am. ed., 144).

Here the voyage was broken np; and it was decided by Lord Mansfield, and the other justices who sat in the eause, one of whom was Mr. Jnstice Bnller, that if the articles for which the insnrer is warranted to be free from average, except general, specifieally remain after the voyage, though by sea damage they are rendered of no valne, yet, if the ship has not been stranded, this is only a partial loss, for whieh the insurer is not liable.

The authority of this ease, it must be confessed, would go far to prevent the present plaintiff from reeovering as for a total loss, were it not for the observations made upon it by Lord Kenyon, in the case of *Burnett* v. *Kensington*, (7 T. R., 210.) (Also Marsh., 1st Am. ed., 151.) The opinion of the conrt in that case tends very mueh to invalidate its anthority.

The principle of *Cocking* v. *Fraser* is also overrnled in the ease of *M'Andrews* v. *Vaughan* (Marsh. 1st Am., ed. 150, and Park, 114), which goes to show that, where a cargo eonsists of memorandnm artieles, if the voyage be lost, the insured may reeover as for a total loss, though the eargo be not wholly destroyed. And there is, in faet, the same reason that the breaking up of a voyage, in case of memorandum articles, shonld eonstitute a total loss, as where the cargo eonsists of artieles not mentioned in the memorandum. The general doetrine now is, with regard to both descriptions of goods, that there may be a total loss by the breaking up of the voyage.

Dyson v. *Rowcroft* (3 Bos. & Pul., 474) is another ease against the principle laid down in *Cocking* v. *Fraser*. The opinion of the court herc was, that it is a total loss of memorandnm artieles, although they may remain in speeie, if they beeome so much damaged as to be no longer worth carrying to the port of destination.

The next question is, whether there was a **44***] total loss *by the barratry of the master, and this must be decided by ascertaining who was the owner of the vessel for the voyage; for it is agreed on all hands that if the master was in a situation to commit barratry, he was actually guilty of that offense.

A person may be owner for the voyage, who is not the general owner of the ship; and barratry may be eommitted against such person by the master, although the barratrons aet of the master may have been done with the consent of the actual general owner. (Cowp., 143, *Vallejo* v. *Wheeler*.) See the same also in (Marsh. 1st Am. ed., 454.)

In the case now before the court, Marcardier, the plaintiff, was owner of the vessel *pro hac vice*, althongh M'Dongal, the master, was the general owner. We eontend, therefore, that, according to the principles laid down in the case last eited, the master was in a situation to eommit barratry against the plaintiff; that he has actnally done so; and therefore that the plaintiff is entitled to recover as for a total loss.

Pinkney, eontra.

It has been contended for the plaintiff, that there may be a total loss by the breaking up of a voyage, if the goods on board be deteriorated more than half. No English authority to this effeet is recolleeted. The eourts in New York have so deeided, it is true; bnt the principle may be considered as arbitrary, and the deeision as loeal.

Aceording to MARSHALL (Eng. ed., vol. 2, p. 486), if the goods insured specifically remain, and are aetnally landed at the port of delivery, however damaged in the voyage, the injnry will amount bnt to a partial loss. Why, then, should the insured have a right to abandon as for a total loss at an intermediate port if the goods can be carrried, in the same or another ship, to the plaee of destination? All the authorities in favor of the right to abandon at an intermediate port, are cases where the voyage was broken up by the incapaeity of the ship to perform it. Bnt in the present case there was no sneh ineapaeity. The vessel *was [***45** repaired at Antigua within a reasonable time, at the expense of one-sixth of her value, and was eapable of performing the voyage, with a considerable part (at least one-third) of the original cargo. The case, therefore, is materially different from those eited on the part of the plaintiff. (Vid. Park's observations in the cases of *Cocking* v. *Fraser*, *and Dyson* v. *Rowcroft*, 1 Park, 6th Lon. ed., 152; also, 2 Marsh. Eng. ed., 586, *Manning* v. *Newnham*.)

It is the opinion of the best judges in cases of this nature, that the law of abandonment has already been carried far enough; bnt the counsel for the plaintiff would carry it to an extent hitherto unpreeedented.

With regard to memorandum articles, all the authorities go to show that there must be an actual total loss, in order to justify an abandonment. A technical total loss is not snffieient. The underwriters are not liable for mere deterioration, however great, of sueh articles. They refuse to have anything to do with it on aceount of the diffieulty of knowing the real cause of such deterioration. (1 Marsh., Eng. ed., 227), note to the ease of *Cocking* v. *Fraser*. As to memorandum articles, also, the intermediate port makes no difference.

In the case of *Dyson* v. *Rowcroft* (3 Bos. & Pul., 474) there was an actual total loss. The eourt, in that ease, do not mean to say that

memorandum articles may be subject to a technical total loss.

The alleged barratry is next to be considered. The question arising on this point is, as has been already stated, whether the master, under the circumstances of the case, could commit barratry. If he could, the facts seem to show that he was guilty of the offense. But we contend that the master was, in fact, the owner of the vessel for the voyage, as well as general owner, and therefore, since barratry is a fraud against the owner, he could not be guilty of that offense, inasmuch as a man cannot commit a fraud against himself. The charter-party, in this case, is of a peculiar construction; it sounds in covenant throughout; it is clearly not an assignment of the property to the plaintiff, *pro* **46*]** *hac vice:* *The master finds the crew, pays them, provides for them, and has the whole management of the vessel. He must, therefore, be considered as owner for the voyage. In *Vallejo* v. *Wheeler*, the charter-party is not set forth, but it is stated in the case that the freighter employed the master and crew, and paid the crew. The court said it would be different if it were not a general freighting. Here the plaintiff was not a general freighter. Loft, who also reports the case of *Vallejo* v. *Wheeler* (Loft, 641), says, that where the master employs and pays the crew, &c., the charter-party seems to be rather a covenant, and does not make the freighter owner for the voyage. (1 Johnson, 229, *M'Intire* v. *Bowne;* 8 Johnson, 272, *Hallet* v. *The Columbian Insurance Company;* 1 Cranch, 214, *Hooe & Co.* v. *Groverman.*)

Harper, in reply.

The question as to barratry is, who had the beneficial interest in the vessel during the voyage. There can be no doubt that the beneficial interest was in the plaintiff. It is of no importance, as it regards the ownership of the vessel, by whom the crew was furnished, provided for, &c.. The freighting of a vessel where the crew and other necessaries for the voyage are provided by the general owner, is merely like hiring a house ready furnished, instead of hiring it empty, where the temporary ownership is no less in the hirer in the former case than in the latter.

Thursday, Feb. 17. *Absent.* WASHINGTON, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

The plaintiff in this case contends, that there was a total loss, which authorized an abandonment by both of the perils stated in the declaration, viz.:

1st By the perils of the seas, and

2d. By barratry of the master.

And first, as to a total loss by the perils of the seas.

47*] *It seems now clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port, of necessity, short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. It has therefore been held, that if a cargo be damaged in the course of the voyage, and it appears that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. It does not, however, appear that the exact quantum of damage which shall authorize an abandonment as for a total loss, has ever become the direct subject of adjudication in the English courts. The celebrated treatise Le Guidon (ch. 7, art. 1), considers that a damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment. This rule has received some countenance from more recent elementary writers; and, from its public convenience and certainty, has been adopted as the governing principle in some of the most respectable commercial states in the Union; and perhaps is now so generally established as not easily to be shaken. (1 John. c., 141; 1 John. R., 335, 406; Marsh. Ins., 562; Note 92, Am. edit., 1810; Park, 194, 6 edition.)

But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed. And perhaps, even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not quite settled whether, *under the like cir- [*48* cumstances, it would authorize an abandonment for a total loss. (*Dyson* v. *Rowcroft*, 3 Bos. & Pul., 474; *Maggrath* v. *Church*, 1 Caines R., 242; *Cocking* v. *Frazer*, Marshall, 227; Park, 152, 6th edition.)

The case before the court is of a mixed character. It embraces articles of both descriptions; some within and others without the purview of the memorandum. If, in such a case, a deterioration exceeding a moiety in value be a proper case of technical total loss, it will follow that, in many cases, the underwriter will, indirectly, be rendered responsible for partial losses on the memorandum articles. Suppose, in such a case, the damage of the memorandum articles were 40 per cent., and to the other articles 10 per cent., in the whole amounting to half the value of the cargo, the underwriter would be responsible for a technical total loss, and thereby made to bear the whole damage, from which the memorandum meant to exempt him. Indeed, cases might arise in which the damage might exclusively fall on memorandum articles; and if it exceeded the moiety, in value, of the whole cargo, might load him with the burden of a partial loss, in manifest contravention of the intention of the parties. A construction which leads to such a consequence cannot be admitted unless it be unavoidable. And we are entirely satisfied that such a construction ought not to prevail. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the

memorandum articles; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioratiou of the cargo, at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. Upon this principle, on a cargo of a mixed character, no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the nou-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. The case is considered, as to the underwriter, the same as though the memorandum articles should exist in their original sound state. In this way, full effect is given to the contract of the parties. The under-
49*] writer *is uever made responsible for partial losses on memorandum articles, however great; and the technical total losses for which alone he can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures.

In the present case, the facts alleged by the plaintiff do not show a depreciation of a moiety in value, excludiug the memorandum articles. There is no evidence of the quantum of depreciation of any part of the cargo. The forced sales at Antigua could not, under the circumstances, constitute a medium by which to ascertain it. Admitting, therefore, the rule to be correct that the party had a right to abandon where the depreciation exceeds a moiety of the value, the plaintiff has not brought himself within that rule as applied to a cargo of a mixed character like the present. The court below were right, therefore, in deciding that there was uo total loss proved by the perils of the seas.

The next question is, whether there was a total loss by the barratry of the master. And this depends exclusively upon the consideration, who was the owner of the brig for the voyage; for it is conceded on all sides that the conduct of the master was barratrous, if he was in a situation to commit that offense. Barratry is an act committed by the master or mariners of a ship for some unlawful or frauduleut purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master who is owner for the voyage; because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage. and has the exclusive possession, command and navigation of the ship. Such is understood to have been the case of *Vallejo* v. *Wheeler*, (Cowp., 143.) But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with
50*] the character *or legal responsibility of ownership; such was the case of *Hove & Co.* v. *Groverman*, in this court (1 Cr. 214). In the first case the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner. On examining the charter party in the present case, there can be no doubt, from the terms and stipulations that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command and management of the vessel, and she was navigated at his expense during the voyage. The whole charter-party, except the introductory clause, sounds merely in covenant. The ownership was not devested by the covenant of affreightment, and, consequently, the master was incapable of committing barratry. There was, then, no total loss on the second count in the declaration.

The opinion of the Circuit Court on this exception must be sustained. But there are other exceptions on the record in which it is admitted by the parties that the Circuit Court erred. The points intended to be raised in these exceptions have, in effect, been decided by this court in *Caze and Richaud* v. *The Baltimore Insurance Company*, at February term, 1813. For the errors in these exceptions the judgment must be reversed, with directions to the Circuit Court to award a *venire facias de novo*.

Cited—1 Wheat. 228; 11 Wall. 601; 14 Wall. 611; 19 Wall. 643, 644; 3 Otto, 241; 3 Mason, 443; 2 Wood. & M., 165; 3 Sumn., 224, 577; 1 Cliff., 138; Olcott, 362; 2 Gall. 76; 1 Curt. 106; 1 Sumn. 568; Abb. Adm. 250; Newb. 314, 530; 2 Sumn. 595, 596; 4 Wash. 120; 3 Cliff. 399.

HALL *v.* LEIGH ET AL.

Absent—WASHINGTON, *J.*

If two joint owners of merchandise consign it to a merchant for sale, and inform him that each owns one moiety; and if they give separate and variant instructions, each for his own moiety, one of the consignors alone may maintain a separate action against the consignee for a violation of his separate instructions.

THIS case is so fully stated iu the opinion of the court that it is deemed unnecessary to add more than that *Harper* and *Pinkney*, for the plaintiff in error, did not argue the case, as there was no appearance for the defendants in error, but simply stated that they contended that the separate instructions of each owner severed the joint iuterest, and cited 1 Esp., 117 and Watson on Partnership, 233, 234.

*February 18th. LIVINGSTON, *J.*, de- [***51**
livered the opinion of the court as follows:

This cause comes here on a writ of error to the Circuit Court of the United States, for the District of Maryland.

This action was brought by the plaintiff, who was also plaintiff below, to recover the proceeds of one hundred bags of cotton which had been shipped to the defendants, aud by them sold on commission.

At the trial it appeared that the plaintiff, together with William Potts & Co., in 1807, made a joint shipment of two hundred bales of cotton to the address of the defendants, who resided at Liverpool, to make sale thereof for their joint benefit. This cotton belonged one-half to the plaintiff, and the other half to Wm. Potts & Co. The shipment was accompanied by two

letters to the defendants, the one written by the plaintiff bearing date 14th February, 1807, in which, after advising them of the shipment, he adds: "Mr. Potts has written you on the sub- "ject of his interest in this adventure: for my- "self I have to request that you will, after "covering me in cost and charges, make such "disposition of my one-half the shipment as "your own judgment may think best for my "interest."

The other letter was written by William Potts & Co., and is dated 5th February, 1807, in which they also advise the defendants of the shipment, which they say is "for account of Mr. Hall and ourselves each one half," and after directing what is to be done with their moiety, they observe that "under present cir- "cumstances, Mr. Hall will decline drawing on "his proportion, as he wishes you to avoid "selling at the present prices as long as possi- "ble; we refer you to him for more particular "directions."

In another letter of the 13th April, 1807, the plaintiff directed the defendants that, after effecting sales of his half of the cotton, on the terms of his first letter, "they should pass the net proceeds of his proportion to the credit of Messrs. W. Potts & Co., and furnish him 52*] *with sales and account current as soon as possible, to enable him to settle with those gentlemen here."

After the receipt of these letters the defendant, on the 5th June, 1807, sold one hundred bags of the cotton on account of William Potts & Co., at 17*d.* sterling per pound, and immediately advised them thereof.

The defendants afterwards, that is, on the 31st December, 1807, had the remaining one hundred bags of cotton, valued at 14*d.* sterling per pound, at which price they took it to themselves, and carried the amount to the credit of William Potts & Co., and on the 1st March following, sold them at a higher price. The plaintiff thinking the defendant guilty of a breach of orders, brought this action to recover damage, and on the preceding evidence, the Circuit Court was of opinion that he could not separately maintain an action against them, on which a verdict and judgment passed against him.

Although the purchase of this cotton was on the joint account of the plaintiff, and of William Potts & Co., yet as, in its shipment to the defendants, their distinct interests were not only disclosed, but as separate and variant instructions were given as to the disposal of it, and as, under these directions, the defendants acted throughout the whole of their agency in this business, it is not easy to perceive on what ground they now allege that they can be liable only in a joint action in the names of the present plaintiff, and of William Potts & Co. By their own conduct they have precluded themselves from every objection of this nature, for they have contracted, as to the one half of this property, with the plaintiff, and as to the other moiety, with William Potts & Co., and it will be seen by a recurrence to the testimony, not only that their engagements with these parties are distinct, but of different kinds. In selling the proportion of W. Potts & Co. they had a discretion, but over the other they had no right to sell for less than cost and charges. This court, therefore, is of opinion that the action was well brought, and that the judgment of the Circuit Court was erroneous and must be reversed.

Cited—3 Wood. & M. 321.

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*THE COMMON COUNCIL OF ALEXANDRIA [*53

v.

PRESTON.

Absent—WASHINGTON, *J.*, *and* JOHNSON, *J.*

A purchaser of real estate in Alexandria is not personally liable for arrears of taxes assessed before his purchase.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

This was a motion in the court below for judgment and execution against Preston (under the 11th section of the act of Congress of 25th of February, 1804, "to amend the charter of Alexandria," vol. 7, p. 48), for taxes due to the corporation for the years 1804, 5 and 6, on a lot of ground in Alexandria, which Preston purchased of Scott in the year 1807, after the taxes were due. The assessors' books were returned on the 1st of May in every year to the office of the clerk of the common council, where they remained subject to public inspection.

The court below being of opinion that the summary remedy by motion, judgment, and execution, was given only against the person who was proprietor at the time of the assessment of the taxes, dismissed the motion; and the common council brought their writ of error.

The 11th section of the act to amend the charter of Alexandria is as follows:

"Be it further enacted, That whenever taxes "upon real property, or other claims charged up- "on real property within the town, shall be due "and owing to the common council, and the "proprietor shall fail to discharge the same, "the said common council, after giving the "party reasonable notice when he resides in "town; sixty days' notice when he resides out "of the town and in the United States; and "after six months' publication in the newspa- "pers when he resides out of the United "States; shall be empowered to recover the "said taxes or debts, by motion in the court "of Alexandria; and, provided it shall appear "to the satisfaction *of the court that [*54 "such taxes or claims are justly due, judgment "shall be granted and an execution shall issue "thereupon, with the costs of suit, against the "goods and chattles of the defaulter, if any "can be found within the town; if not, that the "whole property, upon which the tax or claim "is due, shall, by order of the court, be leased "out at public auction for the shortest term of

"years that may be offered, on condition "that the lessee pay the arrearages, and also "the future taxes accruing during the term, "and be at liberty to remove all his improve- "ments at the expiration of the lease; provided "always that the common council may prose- "cute any other remedy, by action, for the re- "covery of the said taxes and claims which is "now possessed or allowed."

E. I. Lee, for the plaintiff in error.

The question arising upon this case is, whether the proprietor, for the time being, of a lot in Alexandria, is personally liable to a judgment and execution for arrearages of taxes assessed upon the lot before he became the proprietor thereof.

The act of Congress gives a remedy, by motion, judgment and execution, against the proprietor who shall fail to discharge the taxes. Preston was the proprietor at the time of the demand of payment, and has failed to pay. He is therefore within the express letter of the law. The "defaulter" also is the person who has failed to pay on demand; the person who was liable to pay when the demand was made upon him. Every proprietor of the land is liable for its taxes so long as he is proprietor. The claims, according to the words of the act, are charged upon the real property. They accompany the land into whose hands soever it may pass. The law was intended to give a remedy against any proprietor of the land. The taxes are placed on the same footing as other charges which are liens on the land. It is not a case of greater hardship than that of other liens on real estate. *Caveat emptor* is the rule where he has the means of knowledge. Here the assessors' books were always accessible. The purchaser is bound to take notice of the non-payment of the taxes. He purchases at his peril.

55*] **Swann*, contra.

The statute uses the definite article, "the proprietor." The question is, which proprietor? Scott or Preston? We say it means him who was proprietor when the tax was laid, and in whose name the land was assessed, and who was unquestionably liable in the first instance. He was "the proprietor," "the defaulter" contemplated by the legislature. If he was liable, did his liability cease when he sold the land? or is he still liable? There is nothing in the law to justify an idea that the legislature contemplated a succession of proprietors who should be successively liable; a succession of debtors; nor that they should be all liable at once; nor that the corporation should have its choice out of the several successive proprietors. It suggests the idea of one proprietor only, and of one debtor, or defaulter only; and if but one, it can be no other than him who was confessedly liable; him who was proprietor at the time of the assessment. The tax is a lien on the lot so far as to authorize the court to direct it to be leased out to anyone who will pay the taxes, in case the goods and chattels of the debtor cannot be found.

The books of the assessor and collector are not matter of record. The purchaser has no right to inspect them. The tax is a secret lien.

February 19th. *The court affirmed the judgment, without assigning their reasons.*

PLEASANTS
v.
THE MARYLAND INSURANCE COMPANY.

When a cargo is insured by diverse policies, in some of which the rate of exchange is fixed at which the prime cost of the cargo shall be valued; in ascertaining the amount of the interest of the insured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate of exchange, without regard to the rate of exchange by which the value may have been ascertained in the other policies.

ERROR to the Circuit Court for the District of Maryland, in an action upon a policy of insurance, dated on the 18th of May, 1810, on the cargo of the brig Elizabeth from St. Petersburgh or Cronstadt to Philadelphia, against all risks, for 6,000 dollars, "valuing *the [**56** invoice ruble at 46 cents." The invoice amounted to 95,565 71 rubles, equal, at 46 cents per ruble, to $43,960.23.

Before this policy was made the plaintiff had effected eight other policies in Philadelphia to the amount of 36,900 dollars. In the first seven of these policies there was no valuation of the ruble; but in the eighth it was valued at 40 cents. The defendants, at the time of executing this policy, had no knowledge of those affected in Philadelphia.

The vessel and cargo were captured by a Danish vessel and condemned. The plaintiff abandoned in due time.

The underwriters at Philadelphia paid. But on settlement of the seven first policies, in which the value of the ruble was not fixed, and which insured 29,900 dollars, the underwriters, in order to ascertain whether the plaintiff's interest in the cargo amounted to the sum insured by those policies, viz., 29,900 dollars, insisted upon fixing the value of the ruble at thirty-three and a third cents.

On settlement of the eighth policy, which valued the ruble at forty cents, and which insured 7,000 dollars, the calculation (in order to ascertain whether the plaintiff had still a sufficient interest left to entitle him to receive the 7,000 dollars insured by that policy) was made by converting the whole amount of the invoice into dollars at 40 cents per ruble, and deducting therefrom the 29,900 dollars received upon the seven preceding policies. By this mode of calculation it appears (according to the statement in the bill of exceptions which, however, does not seem to be accurate) that after the plaintiff had received the 29,900 dollars insured by the seven first policies, and the $7,000 insured by the eighth policy, his remaining interest to be covered by the ninth policy, was only 1,481 71 rubles, equal, at 46 cents per ruble, to 682 dollars, 58 cents.

But if, on settlement of this last policy, the plaintiff is entitled to have the value of his interest in the cargo ascertained by converting the whole amount of the invoice *into [**57** dollars, at the rate of 46 cents per ruble, and deducting therefrom the 36,900 dollars covered by the eight prior policies, then his remaining interest to be covered by this policy would be more than the 6,000 dollars insured thereby.

The only question saved by the bill of exceptions at the trial below, was whether the

plaintiff should recover according to the first or according to the latter mode of calculation.

The plaintiff contended for the latter, but the court overruled him, and directed the jury that he was only entitled to recover according to the former; they found a verdict accordingly; whereupon the plaintiff brought his writ of error.

The point was now submitted to the court without argument, by *Harper* for the plaintiff in error, and *Jones* and *Pinkney* for defendant.

February 21st. *All the Judges being present,*

JOHNSON, *J.*, delivered the opinion of the court as follows:

This is the case of an insuranee on a voyage from St. Petersburgh or Cronstadt to Philadelphia, effected in the year 1810. The vessel was captured and the assured abandoned. The only difficulty arises on the principles upon which the loss shall be adjusted.

Besides this policy, eight others were effected in Philadelphia. In seven of them no valuation was attached to the ruble. In the eighth it was valued at 40 cents, and on this, which was the ninth in order, at 46 cents. In settling the seven first the ruble was estimated at thirty-three and a third cents, which was the received value at Philadelphia. On the eighth it was settled at the stipulated value of 40 cents. The value of goods laden on board the ship was proved to be 95,565 rubles. The sums paid on the eight first policies corresponded to the adjusted value of 94,084 rubles, leaving a balance of only 1,481, equal, at 46 cents, to about 682 dollars unpaid. But if the whole **58*** amount of *the cargo be brought into dollars at 46 cents to the ruble, and the sum in dollars actually paid on the other policies be deducted, there will still remain more unpaid than would exhaust the whole sum underwritten on the ninth policy.

On the part of the defendant it is contended that the compensation paid to the plaintiff on the other policies is absolute and complete as to the corresponding amount in rubles, leaving only 1,481 unpaid. On the other hand, the plaintiff contends that the compensation was only relative, and cannot effect his rights as between himself and this defendant. And of this opinion is the majority of the court.

The object to be attained is, to secure to the assured a fair indemnity under all the advantages which he has purchased of the insurers.

The intention of the parties, in attaching a fixed value to the ruble, appears in the order for insurance, to wit, "to distinguish between the paper and specie ruble."

It is very well known that the ruble is the money of account in Russia. It was originally a coin corresponding in value to the American dollar. But by the forced circulation of a paper representative of the ruble, dependent on nothing but mere national faith or national force for its value, the silver ruble has nominally doubled or trebled itself in value. The astonishing and rapid fluctuation in its value appears from the evidence in this case, in which it is stated that in the year 1810 it varied from forty-eight to twenty-five cents.

To secure the assured against the effects of this fluctuation, was the object of the parties in attaching a specific value to the ruble; and as the whole cargo would be affected in value by this cause, and the policy was upon the cargo generally, we are of opinion that no other principle in calculating the loss would afford him the indemnity stipulated for in the policy.

The principle contended for by the defendant is subject to this obvious objection that it is not reciprocal. *Had the adjustment [***59** of the value of the ruble in the other cases exceeded forty-six cents that adjustment would not in any respect have resulted to his benefit.

There is one difficulty of which the court are fully aware, which is, that the interest assigned in the abandonment if estimated in rubles will be inversely as the rate at which the ruble is estimated, so that he who pays most would acquire least. But in this case the objection does not arise; as the plaintiff by a compromise with the underwriters on some of the other policies has reserved a sufficient interest in the subject of abandonment to meet the just claims of these underwriters. And in no case would this consideration create a difficulty as between the parties to a policy. Among the underwriters alone in the distribution of the proceeds of the thing abandoned would it be necessary to determine on the correct rule to be applied in such a case.

Had the policy which is the subject of this suit been a valued policy, and declared the value of the whole cargo to be $43,929—the actual amount at the stipulated valuation of the ruble—the same objection would have presented itself, but certainly would not have availed to prevent a recovery.

The judgment below must therefore be reversed and the case remanded.

M'CALL ET AL.
v.
THE MARINE INSURANCE COMPANY.

If a policy insures against "unlawful arrests, restraints and detainments of all kings, princes," &c., the qualification, "unlawful," extends in its operation as well to "restraints and detainments" as to "arrests;" and in such case, a detainment by a force lawfully blockading a port is not a peril insured against by a policy containing a warranty of neutrality.

ERROR to the Circuit Court for the District of Maryland.

This was an action on a policy underwritten by the defendants, upon all kinds of lawful goods and merchandise, on board the ship Cordelia, on a voyage from the island of Teneriffe, to Surabaya, and at and from *thence [***60** to Philadelphia, warranted American property. The ship sailed on the voyage on the 5th of April, 1811, having on board a cargo of lawful goods, the property of the plaintiffs, of the value of 15,000 dollars, and pursued the voyage until the 18th of July following, when, being in a place called Madura Bay, within about twelve hours' sail of Surabaya, she was boarded by an officer of a British frigate, forming one of a squadron, then actually blockading the port of Surabaya, and all the other ports of the islands of Java and Madura. The frigate took

possession of the Cordelia, and conducted her to the admiral commanding the blockading squadron, who, on the next day, dismissed the Cordelia, after indorsing her papers, and warning the master not to enter the port of Surabaya, or any other port in the island of Java, or of the island of Madura, on pain of capture. On the same day, the Cordelia made another attempt to enter Surabaya, but was chased by the same British frigate, and taken possession of a second time. After being detained two days, the Cordelia was again released, and the master was ordered to depart instantly from the coast of Java, and the neighborhood of Surabaya, upon penalty of capture, and impressment of his men. The master, finding it impracticable to pursue his voyage further, resolved to return to Philadelphia, where he arrived on the 19th of November, 1811. At the time of sailing on the voyage from Teneriffe, the blockade of Java was unknown to the parties. The plaintiffs abandoned to the defendants, immediately after the arrival of the Cordelia at Philadelphia, which gave them the first knowledge of the occurrences. The defendants refused to accept the abandonment.

The policy contained the usual risks, except that the word "unlawful," was printed before "arrests," so that the clause stood, "unlawful arrests, restraints, and detainments of all kings, princes, or people of what nation, condition or quality soever." The declaration alleges, that the ship and cargo were, during the voyage, "by persons acting under the authority of the British government, and by a certain ship of war belonging to that government, unlawfully seized, restrained, and detained," and thereby become totally lost.

The Circuit Court directed the jury, that, on **61*]** this *state of facts, the plaintiffs were not in law entitled to recover; to which the plaintiffs excepted and brought this writ of error.

Harper, for the plaintiffs.

Insisted that this direction was erroneous, because the voyage was broken up, and lost.

1st. By men of war.

2d. By detention of princes; the blockade having prevented the accomplishment of the voyage.

That the plaintiffs had therefore a right to abandon, and were entitled to recover for a total loss.

In support of his argument, he cited the case of *Barker* v. *Blakes* (9 East, 280), cited also in 2 Marshall, 835, Appendix.

Jones, contra.

This case is very distinguishable from that of *Barker* v. *Blakes*.

1st. In that case, the voyage was interrupted as to the ultimate and only port of destination. Here, there was an interruption as to an intermediate port only, which cannot, we contend, constitute a total loss. The adventure from Teneriffe to Philadelphia might have been as profitable as the accomplishment of the whole voyage.

Another distinction between the two cases arises from the different phraseology employed in the respective policies. The English policy employs general words, so as to include any detention of princes, &c. Here, the policy is limited to unlawful detention of princes, &c. Unless, therefore, this detention can be shown to be unlawful, the case is not within the policy; and it is clear, that it was not unlawful, unless the blockade was so. But this is not contended; the blockade was maintained by an adequate force, and was in every respect conformable to the law of nations.

*Again, in the case of *Barker* v. *Blakes*, [***62** the blockade of Havre was not considered as the cause of the destruction of the voyage; the detention in Bristol was the only ground of loss. Here, on the contrary, the blockade is the sole ground of abandonment.

The abandonment itself, in the case now before the court, is liable to objection. An abandonment, to be valid, ought to be made during the impediment that causes the loss. But in this case the abandonment was not made till long after the impediment had ceased.

Pinkney, same side.

It was contended by the defendants in the court below, that they were not liable for the loss in this case.

1st. Because, under the words of the policy, that loss did not arise from any peril insured against.

2d. Because the plaintiffs had violated their warranty of neutrality.

3d. Because, at the time when the abandonment was made the property was not under the restraint of princes.

The same grounds of defense are now relied upon.

And, first, as to the words of the policy. This instrument insures against "unlawful arrests, restraints and detainments of all kings," &c. The word "unlawful" is that which the defendants consider as taking the present case out of the policy. This word is not inserted in the English policies, but has been introduced into those of the Marine Insurance Company and some other American offices. Some meaning must be given to the term, and that can be no other than the most usual meaning; so that unless it can be made to appear that the detainment in this case was unlawful, the defendants cannot be considered as liable. But, as has been said before, the blockade, which was the cause of the detainment, was lawful; the detainment itself was therefore lawful under the acknowledged law of nations.

*2d. As to the warranty of neutrality. [***63** When the voyage was undertaken, and the policy underwritten, neither party knew that the port of destination was blockaded; but the underwriters protected themselves by a warranty of neutrality, and the assured consented to give it.

The import of the warranty is that the voyage shall be performed in a neutral manner; and, consequently, that if the vessel should find the port blockaded, she will discontinue the voyage. She does find it blockaded; and not only physical force, but the law of nations and the warranty oblige her to forbear the completion of the voyage. She nevertheless attempts to enter the port, and that, too, after being warned off by the admiral commanding the blockading squadron. Has the assured in such a case a right to set up the compliance with his own warranty as the foundation of a total loss, or of any loss? With such a warranty in the policy, can the underwriter be considered as en-

gaging that, if the port of destination should be found blockaded, the voyage shall be completed? If such is his engagement, then he stipulates that the vessel shall violate the warranty; because without a violation of it, she cannot reach her port of destination, if she finds it blockaded. It is plain that his undertaking is only for a neutral voyage; and, therefore, that, the moment it becomes unneutral, the policy is discharged by force of the warranty acting upon the whole contract.

Cases upon the British orders in council are far less strong than this; for they made no blockade acknowledged by the law of nations. Physical force was there everything; and neutral duties were not affected by them. But here, the neutral obligations of the vessel turn her back, and intercept her path, and extract the case out of the policy.

3d. Here was no restraint of princes. Restraint must be physical; and an abandonment, to be of any avail, must be made during such restraint. In the present case the physical restraint continued but one day; all afterwards was mere moral restraint, arising from the threat of capture and confiscation as prize of war. But *an apprehension, though just and reasonable, is not sufficient to justify an abandonment. (3 Bos. and Pul., 392, *Hadkinson* v. *Robinson;* 5 Esp. Ca., 50; 1 Campbell, *Black* v. *Hagen.*) See, also, the case of

(6 Mass. T. R., 118), where the court decided that apprehension alone would not justify an abandonment; and, also, that if the master, after being once warned off, had made another attempt to enter the blockaded port, it would have been barratry.

Harper, in reply.

1st. With regard to the wording of the policy. It is unnecessary to examine what effect the term "unlawful" may have upon the subsequent words, inasmuch as the declaration states the loss to have been occasioned by men of war, with which the word "unlawful" had no connection. But if such examination be made, it will appear that this term applies only to the word "arrests," which, in the original printed form of the policy, was separated from the following part of the sentence by a comma, and was therefore the only word qualified by the preceding term "unlawful." The pointing of the sentence was the act of the parties, and, as such, material, and as much a part of the contract as the words themselves.

2d. As to the violation of the warranty of neutrality. The loss was complete before the second attempt to enter the blockaded port; and therefore could not have happened by reason of that attempt; consequently, the right of the plaintiffs to recover could not be affected by that, or any other act of the master, subsequent to the original loss, however inconsistent with neutrality that act might be.

3d. With regard to the time of abandoning. The plaintiffs abandoned immediately after the arrival of the Cordelia at Philadelphia, which gave them the first information of the loss. To have expected them to abandon before they knew anything of the loss would have been absolutely inconsistent with reason.

The cases cited from Bos. and Pul. and the Mass. T. R. are essentially different from the present, inasmuch *as in those cases there was no physical force to prevent the prosecution of the voyage. (Park., 226, 6th Ed., *Blacketshager* v. *The London Assurance Co.*)

Monday, February 21st. *Present—All the Judges.*

STORY, *J.*, after stating the facts of the case, delivered the opinion of the court as follows:

The court below, at the trial, held that the plaintiff, under the circumstances, was not entitled to abandon as for a total loss; and the correctness of that opinion remains for the decision of this court.

Whether the turning away of a ship from the port of destination in consequence of a blockade, be, in any case, a good cause for abandonment, so as to entitle the assured to recover from the underwriter as for a total loss by the breaking up of the voyage; and, if so, whether the doctrine could apply to a policy with a warranty of neutrality, the legal effect of such warranty being to compel the party to abandon the voyage, if it cannot be pursued consistent with neutrality, are questions of great importance, upon which the court do not think it necessary to express any opinion, because this cause may well be decided upon an independent ground.

The loss of the voyage, in the case at bar, was occasioned (if at all) by the arrest and restraint of the British blockading squadron. The right to blockade an enemy's port with a competent force is a right secured to every belligerent by the law of nations. No neutral can, after knowledge of such blockade, lawfully enter, or attempt to enter, the blockaded port. It would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation. In such a case, therefore, the arrest and restraint of neutral ships attempting to enter the port is a lawful arrest and restraint by the blockading squadron. It would follow, therefore, from this consideration, that the arrest and restraint, on account of which a recovery is now sought, is not a risk within the policy against which the underwriter has engaged to indemnify the plaintiff.

*But it is contended by the counsel for [*66 the plaintiff, in order to escape from this conclusion, that the word "unlawful" in the policy, is confined in its operation to arrests, and does not extend to "restraints and detainments." To this construction the court cannot assent. The grammatical order of the words and the coherence of the sentence require a different construction. It is not against every "unlawful arrest" that the underwriter undertakes to indemnify, but against "unlawful arrests, &c., of all kings, princes, and people," which have always been held to mean the arrests of kings, princes, or people, in their sovereign and national capacity, and not as individuals. The necessary connection of the sentence, therefore, requires that "arrests, restraints and detainments," should be coupled together; and, if so, the qualification of unlawful must be annexed to them all. The intent of the parties, also, urges to the same conclusion; for every arrest is a restraint and detainment; and it would be strange if the party could, under the allegation of a restraint, recover a loss from which the underwriter is expressly exempted by an unambiguous exception in the policy.

On the whole, the court are of opinion that the judgment of the Circuit Court must be affirmed.

SMITH AND OTHERS *v.* EDRINGTON.

Present—All the Judges.

Under the statute of Virginia respecting wills, it is necessary, in order that lands acquired after the date of the will may pass by the will, that the intention of the testator should clearly appear upon the face of the will.

THIS was an appeal from the Circuit Court for the District of Virginia, sitting in chancery.

The bill sought to charge the lands of Christopher Edrington in the hands of his son and heir at law, W. P. Edrington, with a debt due by his father, Christopher Edrington, to the complainants, by simple contract.

It was contended, that the lands passed by the will of Christopher Edrington to his son, W. P. Edrington, charged with the payment of
67*] the debts of the testator, *although the lands were acquired by the testator after the date of the will.

The will expressed a desire that all the just debts of the testator should be paid by his executors as soon as the means in their power should permit. It also authorized his executors to dispose of and convey any of his property that might be necessary for payment of his debts; and afterwards it has these expressions: "Should my son, Wm. P. Edrington, to whom "I bequeath the whole of my property, after "the payment of my debts, and provisions "above made, die under the age of 21 years, I "then give," &c. The testator then proceeds to make certain pecuniary bequests, in the event of his son's so dying, and concludes by disposing of the residue of his property.

At the date of the will the testator had no lands. Those which the bill sought to charge were purchased a short time before his death.

By an act of the legislature of Virginia, in force at the date of the will (1 Rev. Co. P. P. 160), it is enacted, "that every person aged 21 "years and upwards, being of sound mind, and "not a married woman, shall have power, at "his will and pleasure, by last will and testa- "ment in writing, to devise all the estate, right, "title and interest in possession, reversion, or "remainder, which he hath, or at the time of "his death shall have, of, in, or to lands," &c.

The court below dismissed so much of the complainant's bill as sought to charge the lands in the hands of the heir, and they appealed to this court.

E. I. Lee, for the appellants.

The only question in this case is, whether the lands passed by this will to the devisee, W. P. Edrington. For if they did, he took them subject to the debts of his father, by the terms of the will.

By the statute they would pass, if such was the intention of the testator.

68*] *That such was his intention is to be inferred from the following facts which appear in the case.

It is evident from the will that he meant to dispose of his whole estate; and that his just debts should be paid at all events. He bequeaths to his son his whole property, after payment of his debts, and certain specific legacies. In the summer of 1803 or 1804, the testator offered to convey this land in payment of his debt to the complainants, which shows that he looked to the land as a fund for that purpose, and that he did not mean to cheat his creditors by converting his personal estate into lands.

The intention of the testator is to be collected not only from the words of his will but from his acts. (1 Wash., 96, *Kennon* v. *M'Roberts;* Id., 266, *Shermer* v. *Shermer.*)

Taylor, contra.

Under the statute of Hen. 8 (of wills) it has always been holden in England that no after-purchased lands can pass by a will. This will must have the same construction as if the devise had been to a stranger instead of the heir at law. It must have been the intention of the testator, at the time, to devise what he had, not what he had not. It does not appear that he even contemplated a purchase of lands. Under the first part of his will it is clear that he alludes only to personal estate.

In the case of *Hamersly* v. (3 Call., 289), it is said by the Court of Appeals of Virginia, that the intention to devise after-acquired lands must appear by expressions applicable to that kind of property.

February 23d. WASHINGTON, *J.*, delivered the opinion of the court as follows:

This was a bill filed on the equity side of the Circuit Court for the District of Virginia by the appellants, in order to charge the real estate of Christopher Edrington in the hands of his son and heir at law, William P. Edrington, with the payment of a debt due to the appellants *by Christopher Edrington, the [***69** father. The appeal being taken from that part of the decree of the Circuit Court which dismissed the bill so far as it seeks to subject the real estate in the hands of Wm. P. Edrington to the payment of the appellant's demand, the only question now to be considered is, whether the will of Christopher Edrington can be so construed as to charge his real estate with the payment of his debts?

The clauses of the will relied upon by the appellant's counsel for this purpose, are that which expresses the desire of the testator that all his just debts should be paid by his executors, &c., so soon as the means in their power should permit; also another, which authorizes his executors to dispose of, and convey, any of his property that might be necessary for payment of his debts; and a third, which is still stronger, and is expressed as follows: "Should my son, Wm. P. Edrington, to whom I bequeath the whole of my property, after the payment of my debts and provisions above made, die under the age of 21 years, I then give," &c. The testator then proceeds to make certain pecuniary bequests in the event of his son's so dying, and concludes by disposing of the then residue of his property.

At the time that this will was made it is admitted that the testator was not possessed of or entitled to any estate in land, but that afterwards, and a short time previous to his death,

he purchased the tract of land which this bill seeks to charge. By an act of the legislature of Virginia, passed in the year 1785, and long before the date of this will, it is declared "that any person aged 21 years and upwards, being of sound mind, and not a married woman, shall have power, at his will and pleasure, by last will and testament in writing, to devise all the estate, right, title, and interest, in possession, reversion, or remainder, which he hath, or at the time of his death shall have, of, in, or to lands," &c. The circumstance, therefore, that the land in question was acquired after the execution of the will, presents no difficulty in this case, if it appears that it was the intention of the testator to devise it to his son; because if it passes at all under the will, it may readily be admitted that the devisee took it subject to the payment of the testator's debts; the parts **70*** of the will above recited being *strong to impose such a charge. But although a testator may, under the above law, dispose by will of after-purchased lands, it is nevertheless necessary that his intention to make such a disposition should clearly appear upon the face of the will. The rule in England, as well as in Virginia, at the time this law was passed was, that a will, as to land, speaks at the date of it, and, as to personal estate, at the time of the testator's death. The law created no new or different rule of construction, but merely gave a power to the testator to devise lands which he might possess, or be entitled to, at the time of his death, if it should be his pleasure to do so. The presumption is, that the testator means to confine his bequests to land to which he is then entitled; and this presumption can only be overruled by words clearly showing a contrary intention.

In this will there are no expressions which indicate an intention to devise, or in any manner to charge, lands which the testator might afterwards acquire. It does not appear that the testator contemplated, at the time he made his will, the purchase of any land, and the words, "estate" and "property," to be found in it, may be fully satisfied by applying them to the personal property of which he was possessed.

It is therefore the opinion of the court that there is no error in the decree of the Circuit Court, and that the same ought to be affirmed with costs.

Cited—16 How. 284.

BEALE
v.
THOMPSON AND MARIS.

Absent—WASHINGTON, *J.*, *and* JOHNSON, *J.*

It is a fatal objection to a deposition taken under the judiciary act of 1789, section 30, that it was opened out of court.

ERROR to the Circuit Court for the District of Columbia.

On the trial in the court below, the defendant, Beale, offered in evidence the deposition of Tunis Craven, taken before the judge of the District Court of the United States, for the District of New Hampshire, under the 30th sec. of the judiciary act of Sep. 24th, 1789 (vol. 1, p. 68), which, after prescribing the mode of taking *depositions, directs that "the de- [*71 "positions so taken shall be retained by such "magistrate until he deliver the same with his "own hand into the court for which they are "taken; or shall, together with a certificate of "the reasons aforesaid of their being taken, "and of the notice, if any, given to the adverse "party, be, by him, the said magistrate, sealed "up and directed to such court, and remain "under his seal until opened in court."

The deposition was sealed up by the judge, but directed to the clerk of the court, and he, supposing it to be a letter respecting his official business, opened it out of court.

The court below rejected the deposition; which being stated in a bill of exceptions, the defendant, Beale, brought his writ of error.

The question respecting the informality of opening the deposition out of court, was not argued in this court, there being another objection to it, which the counsel deemed more important, viz., that the deponent was the drawer of the note upon which the suit was brought against the defendant, Beale, as indorser; the purport of the deposition being to show that Beale had not due notice of the non-payment of the note by the deponent.

Law & Jones, for the plaintiff in error.

Morsell, for the defendants in error.

Feb. 23d. STORY, *J.*, delivered the opinion of the court as follows:

The single point in this case is whether the Circuit Court of the District of Columbia, erred in rejecting the deposition of Tunis Craven.

Independent of all other grounds, the court are of opinion that the fact of the depositions not having been opened in court is a fatal objection.

The statute of 24th September, 1789 (ch. 20, sec. 30), is express on this head.

The judgment of the Circuit Court must be affirmed.

Cited—1 Brown, 444; 4 McLean, 241.

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*CLEMENTSON *v.* WILLIAMS. [*72

Absent—WASHINGTON, *J.*

An acknowledgement of the original justice of a claim is not sufficient to take the case out of the statute of limitations; the acknowledgment must go to the fact that it is still due.

The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away. *Quære*, whether an acknowledgment by one partner, after dissolution of the partnership, is sufficient to take a case out of the statute of limitations.

ERROR to the Circuit Court for the District of Columbia, sitting at Alexandria.

The facts of the case are thus stated by the *Chief Justice*, in delivering the opinion of the court:

The plaintiff instituted a suit against James

Williams and John Clarke, merchants and partners trading under the firm of John Clarke & Co. The writ was executed on Williams only, who pleaded *non assumpsit* and the act of limitations, on which pleas issues were joined. The jury found that the defendant did not assume, and judgment was rendered in his favor.

At the trial the plaintiff gave evidence tending to prove the partnership, and also to prove dealings of Clarke & Co. with the plaintiff. He then offered a witness who proved that he presented, in December preceding the trial, to John Clarke a certain account against the said John Clarke & Co., in favor of the plaintiff; and that said Clarke stated that the said account was due, and that he supposed it had been paid by the defendant, but had not paid it himself, and did not know of its being ever paid. And the witness to whom the said Clarke made the said acknowledgement produces in court the identical account so presented to said Clarke and acknowledged by him as aforesaid, which account is in the words and figures following, to wit: "an account," &c. "And the plaintiff's counsel offered the contents of said account, and the acknowledgment of said Clarke, in evidence under the issue joined upon the plea of the statute of limitations, but the court decided that the said evidence so offered by the plaintiff of the contents of the said account, and of the acknowledgment of the same by the said Clarke, was not admissible evidence in this cause, and refused to admit the same." To this opinion the plaintiff excepted, and from the judgment of the Circuit Court he has appealed to this court.

73*] **Taylor*, for the plaintiff in error.

The only question is, whether the acknowledgment of one partner, after the dissolution of the partnership, takes the case out of the statute of limitations.

We contend that it does, and rely on the following cases: Doug., 651, *Whitcomb* v. *Whiting;* 2 H. Bl., 340, *Jackson* v. *Fairbanks*, and 2 Johnson, 667, *Smith* v. ———.

F. S. Key, contra.

Although the opinion of the court may be supported upon other grounds, yet it may also be supported upon the point raised, viz., that the acknowledgment of one partner, after dissolution of the copartnership, cannot be received to take the case out of the statute. It can only be evidence of a new promise, and one partner cannot, after dissolution, bind the other. No acknowledgment of the debt by one partner, after dissolution, can be given in evidence on the general issue to fix the debt upon the other partner. The cases in Douglass and H. Blackstone are different. The joint concern was not dissolved. The authority in Johnson was only a *dictum;* the case was decided upon other evidence.

Such evidence would be extremely dangerous. No man could be safe if, after dissolution of the partnership, his partner could continue to bind him forever. At all events it is necessary that the plaintiff should first prove the orignal debt by other evidence.

Jones, in reply.

If the opposite doctrine be correct, then, even if each of the partners should acknowledge the debt, the evidence would not support a joint action.

The acknowledgment is not considered as a new promise, but simply as rebutting the presumption of payment arising from the length of time, and thereby taking the case out of the reason of the statute.

Feb. 19th. MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

*It is contended by the plaintiff in error that, after the dissolution of the partnership, the acknowledgment of one partner is evidence to revive the original cause of action against both, and that the acknowledgment made in this case by Clarke is sufficient for that purpose. [***74**

It has been frequently decided that an acknowledgment of a debt, barred by the statute of limitations, takes the case out of that statute, and revives the original cause of action. So far as decisions have gone on this point, principles may be considered as settled, and the court will not lightly unsettle them. But they have gone full as far as they ought to be carried, and this court is not inclined to extend them. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.

In this case there is no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not, then, sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due.

In the case at bar, the acknowledgment of John Clarke is that he had not discharged the account presented to him, but he does not say that it was not discharged. His partner may have paid it without the knowledge of Clarke, and, consequently, the declaration of Clarke that he had not himself paid it, and that he did not know whether his partner had paid it or not, is no proof that the debt remains due, and therefore is not such an acknowledgment as will take the case out of the statute of limitations.

There is no error, and the judgment is affirmed with costs.

Cited—11 Wheat. 314; 12 Wheat. 567; 1 Pet. 361; 6 Pet. 91; 13 Wall. 256; 2 Cranch, C. C. 120, 429; 4 Cranch, 532; 2 McLean, 90; 2 Curt. 485.

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*GRACIE [***75**

v.

THE MARINE INSURANCE COMPANY OF BALTIMORE.

Absent—WASHINGTON, *J.*

A policy on goods to be safely landed at Leghorn is discharged by landing them at the lazaretto; that being the usage of the trade.

Quære, whether ransom can be recovered where there is a warranty against particular average.

ERROR to the Circuit Court for the District of Maryland.

The facts of the case, as stated by MARSHALL, *Ch. J.*, in delivering the opinion of the court, were as follows:

This case arises on a policy of insurance bearing date the 19th of June, 1807, for $20,000 on the cargo of the ship Spartan, "at and from Baltimore to Leghorn," the risk to commence on the loading, and to continue "until the said goods shall be safely landed at Leghorn aforesaid."

The policy contained, in the printed part, the usual stipulation that the assured, in case of loss, shall labor, &c., for the preservation and recovery of the goods, to the expense of which the assurers would contribute according to the rate of the sum insured; in the policy is inserted, in writing, the words "warranted free from particular average."

The vessel sailed from Baltimore in June, 1807, and on the 15th of August arrived in the port of Leghorn.

According to the laws and usages of the place, ships arriving at that port, and their cargoes, were obliged to perform a quarantine of thirty days before admission of the cargo, or of any person on board, into the city; the ships performing it in the port, the cargoes in a certain lazaretto ereeted for that purpose on the shore of the port about half a mile from the city. Some specified articles were excepted from this rule, but the cargo of the Spartan did not come within the exception. On the arrival in port of a vessel liable to quarantine, the offi- [*76
cers *of government took possession of the cargo, and removed it in public lighters to the lazaretto. Freight was earned upon the depositing of the cargo in the lazaretto, but payment of it, though often made before, could not be enforced until after the expiration of the quarantine, and until payment, the lien for the freight continued on the goods. The duties also accrued in the lazaretto, and until they were paid the goods could not be removed thence into the city.

The goods remained in the custody of the officers of government until the expiration of the quarantine, during the continuance of which neither the master of the ship nor the consignees had any power to interfere with, or even see them, but under a permit from the local authorities; such permits were commonly allowed the consignees, who might take samples, and sell by those samples, while the goods were performing quarantine.

After quarantine was performed, and an order from the master obtained, the goods were received at the lazaretto by the owner or consignee, and transported at his risk and expense into the city. This transportation was most usually made by water; but there was a road along which light goods might be, and frequently were, carried. Even when goods were sold during the quarantine, they were removed at the risk and charge of the vendors.

In conformity with these regulations, the cargo of the Spartan was placed in the lazaretto. While it remained there, performing quarantine, a body of French troops took possession of the city, seized the lazaretto, sequestered the goods there deposited, and refused to give them up until a ransom, amounting to 53 per cent. on their estimated value, should be paid for them. This ransom the owners or consignees were compelled to pay in order to obtain restitution of their goods. This action is brought to recover it from the underwriters.

Judgment was rendered in the Circuit Court for the defendants, which judgment is now brought before this court by a writ of error.

Harper, for the plaintiff in error, con- [*77
tended,

1st. That the landing at the lazaretto was not a landing in safety at Leghorn, within the meaning of the policy.

2d. That the plaintiff is not prevented, by the warranty against particular average, from recovering the amount of the ransom paid.

1. The goods were not landed in safety at Leghorn. They were landed at the lazaretto, which is no part of the city of Leghorn. The landing contemplated by the policy was at the city—the place where the goods were to find a market; and not merely a landing at the port. The voyage as to the ship might terminate at the port, but the goods were to go to the city, and be landed in safety. After having performed quarantine at the lazaretto, they were to be reshipped into lighters and carried to the city.

But if the landing at the Lazaretto be a landing at Leghorn, yet they were not landed in safety within the meaning of the policy. It is natural to suppose that the parties meant such a landing as would put the cargo into the possession and under the control of the consignee. But while it was at the lazaretto, it was subject to the orders of the master, not of the consignee. It was still liable for freight, and although it is said to be part of the usage of the trade that the freight is earned by the delivery at the lazaretto, yet it is not payable until the termination of the quarantine. The lazaretto is a mere substitute for the ship as a place in which to perform the quarantine. If it had remained on board the vessel it would unquestionably have been at the risk of the underwriters. The landing was for their benefit inasmuch as the goods were safer on shore than in the ship.

The seizure was a detention of princes, and until the goods were ransomed they were lost. (1 Marshall, 264, 176, *Waples* v. *Eames;* Id., 269, 181, *Pelly* v. *Roy. Ex. Assur.*)

2. Notwithstanding the warranty against particular *average, the plaintiff may re- [*78
cover upon the clause of the policy authorizing him to labor and travel for the preservation of the property, to the expense whereof the underwriters promise to contribute according to the rate of the sum insured. The ransom was an expense incurred to save the residue and prevent a total loss, for which the underwriters would have been liable.

Jones and *Pinkney*, contra.

1. The voyage was ended by the landing of the goods at the lazaretto. The policy is satisfied if they are landed at the port of Leghorn. When the name of a place is used in a policy it means the port, although Leghorn is a city, yet the port is also called Leghorn. When a place is named as the terminus of the voyage, it means the usual place to which ships come to unlade. It does not always mean the *caput portus*. It

sometimes means the house of general receipt. Doubtful expressions are to be construed in favor of the underwriters. (1 Burr., 348, 349, *Tierney* v. *Etherington*, cited by Lord Mansfield in the *Bank Saul* case of *Pelly* v. *Roy. Ex. Assur.*; 1 Marshall, 250, 251, Hargrave's Law Tracts, 46; Halc's Treatise *de portubus Maris*, ch. 2, p. 56.) The termination of the voyage, in fact and in law. is the landing of the goods at the usual place of landing, at the ultimatc port of destination according to the usage of that trade. The usage of the tradc is all important. The parties are bound to know it. It forms part of their contract. It may control and modify a warranty, and illustrate thc termination of the voyage. The case states that the freight was earned by delivery at the lazaretto—the duties had accrued to the Etrurian government—the transportation from thence to the city would have becn at the risk and expense of the consignee or the owner. It was also a placc where the goods might bc sold by samples. All these circumstanccs show that the voyage was cndcd. The general rule is that if the insured undertakes to transport the goods, the underwriters are discharged. (1 Marshall, 165, 249, *Sparrow* v. *Caruthers;* Id., 166, 253, *Rucker* v. *Lond. Assur.;* Id., 167, 254, *Hurry* v. *Roy. Ex. Assur.*) The lien for the freight depends either upon the agreement of the parties on the municipal law of the place; it does not affect the **79***] question respecting the *termination of the voyage. In the cases of *Tierney* v. *Etherington* and *Pelly* v. *Roy. Ex. Assur.*, the voyage confessedly was not terminated. The government of Leghorn receives the cargo at the lazaretto as the agent of the owner or consignee and holds it for his benefit; it is cntered on the books of the lazaretto in thc name of the ship, the master and the consignee, if known.

The policy was never construed to undertake that the consignee should have the unlimited control over the cargo after it was landed. But in this case it was under his control; not absolute, but modified by the municipal government of the place. The government had a right so to modify it. Thus, in London, somc goods must be dcposited in the King's warehouse. So also in France, the Emperor took it into his hcad to turn merchant and monopolize all the tobacco, and ordered it to be stored in his warehouses. In all countries the power of the consignee is in a certain degree modified. He had a power to take samples and sell by them.

It is said also that the goods were to bc landed at the placc of market. But if the place of market means the place where the goods may be sold, and wherc thcy are under the control of the consignee, the lazaretto was that place. The lazaretto was an appendage to Leghorn, as the *Piræum* was to Athens. Suppose the voyage had been from Carthagc to Athens, landing at the *Piræum* would havc terminated the voyage. So would a voyage from the West Indies to London terminate at the Wcst India dock; yet somcthing must be prcviously done by a consignee at the dock before he can have the complete control over the goods in the warehouses of the dock company. So, in the port of Baltimore, some goods must be delivered at the lazaretto. And if a cargo should be delivered at Fell's Point (which is out of the city) under a policy on a voyage to Baltimore, the policy would be discharged. The cargo would have been brought to its market.

In the case of *Waples* v. *Eames*, the ship was not 24 hours moored in good safety. There was no opportunity to unlade. But here the goods were actually unladen. *In the [***80** *Bank Saul* case there was no question whether the voyage was ended. Thc ship was *in itinere.* Thc only question was whether, by the usage of the trade, the goods might be unladen for safc keeping while the vessel was repairing.

2. It was only a partial loss, which is excepted from the policy by the manuscript warranty against particular average; which means partial loss.

Although it would have been a total loss if abandonment had been offered while the goods wcre detained, yct as no such offer was made, it is now only a partial loss.

Those parts of the policy which are in manuscript are to be particularly rcgarded, as they control the printed form. (1 Marshall, 229, 305; Park, 4, 5, 60; 4 East, 130.)

Ransom is only a partial loss. It was never considered as coming under thc clause of laboring and traveling for the interest of all concerned. If it can come under that clause, then that clause is so far repealed by the express manuscript warranty that the underwriters shall not be liable for a partial loss. If the French general had taken a part of the goods, there could have been no question that the underwriters would not have been liable; the ransom represents the part which might have been so taken. The clause respecting the expenses of labor and travel was first introduced in 1741, to remove a doubt whether thc insured could so labor and travel without lósing his right to abandon; but he is not bound to labor and travel, nor to ransom. (1 Marshall, 234, 488; 3 Burr., 1734; Doug., 610.)

But if the underwriters arc liable under that clause of thc policy, they are only liable in thc proportion which the loss bears to the amount saved.

Harper, in reply.

1. Thc first point dcpcnds upon the usage of the trade. We say that the usage merely substitutes the lazaretto for the ship; like the cases of the storc ship at Gibraltar, *and the [***81** *Bank Saul* at Canton. The principlc of all thcse cases is substitution. The goods were not in the power of the consignee. He could only make an executory contract. He had no more power over the goods than if they had been upon the ocean.

The lien for the freight continues until the end of the quarantine, when it is to bc paid, and not before, because the master has not until then done all that the contract requires.

2. It is said that the excception of partial loss operates upon evcry part of thc policy; not merely upon its general provisions, but upon every particular provision, howevcr contradictory it may be to that exception. But the two clauses—viz., the engagement to pay for labor and travel, and the warranty against partial losses—may stand together. The latter means warranted free from all partial losses except such as arise from labor and travel for the preservation of the goods. The blanks in thc printed form of the clause respecting labor and travel wcre filled in manuscript, as well as the

warranty against particular average, and therefore are to be equally regarded. That circumstance also shows that the parties intended that both clauses should stand, and have effect. The ransom was as much the means of saving the underwriters from a total loss as if it had been strictly labor and travel.

February 19th. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court as follows:

The plaintiff in error contends,

1st. That the placing of the goods in the lazaretto was not "a landing in safety at Leghorn," and a termination of the voyage.

2d. If the loss happened during the continuance of the risk, the plaintiff is not prevented from recovering, by the warranty in the policy against particular average.

In support of his first point he contends that "Leghorn," in the policy, means the city, and not the port, of Leghorn.

82*] *2d. That the lazaretto being substituted for the ship for the greater safety of the goods, their situation, as it respects all parties while performing quarantine in the lazaretto, is precisely the same as if performing quarantine in the ship. This argument is supposed to be much strengthened by the facts that freight cannot be demanded until quarantine is performed, and that the lien for the freight continues after the landing of the goods.

3d. That a landing in safety must be such a landing as places the goods at the disposal of the owner or consignee.

However true it may be in general that when we speak of Leghorn we speak of the city which bears that name, it does not follow that the same meaning is attached to the word when used in a policy. The insurance is "at and from Baltimore to Leghorn." Now, if, as is admitted, Baltimore means the port of Baltimore, it would seem not unreasonable to suppose that, in the same instrument, Leghorn means the port of Leghorn—the place which is the ultimate destination of the vessel on board which the goods are laden. The voyage is understood to be terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours.

But it will be conceded that the termination of the voyage as to the ship does not necessarily terminate the risk on the goods. This risk may continue when the voyage as to the ship is ended. Its duration depends on the intention of the parties, and this intention must be found in their contract.

This brings us to consider the argument that the goods, while performing quarantine in the lazaretto, remain at the risk of the insurer in like manner as if performing quarantine in the ship.

The words of the policy being "beginning the adventure on the said lawful goods and merchandises from and immediately following the lading thereof on board of said vessel at Baltimore aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at Leghorn aforesaid." The risk continues until the goods be safely **83***] landed, although the *voyage as to the ship might be terminated previous to their landing.

In ordinary cases, where the government does not interfere between the parties, this risk would continue until the goods should be landed in safety at the usual place, and at the disposal of the consignee. If it were usual to receive goods at the lazaretto or at any other place on the shore of the port, it would be the duty of the owner or consignee to receive them there, and a landing at such place, it is admitted, would be a landing at Leghorn.

If, on the other hand, the goods while performing quarantine remained on board the ship, and could not be landed, it is not to be doubted that they would remain at the risk of the insurer. How, then, it is asked, can the substitution of the lazaretto for the ship alter this risk? A substitution made, not by the act of the parties, but of the government of the country? A substitution which does not alter the rights of the parties since it leaves the lien of the master for his freight unimpaired, and gives no power over the goods to the owner or consignee? A substitution beneficial to the insurer since it diminishes the risk on the goods?

Whatever might be the effect of this reasoning if the establishment of the lazaretto and the laws of quarantine had been of so recent a date as not to have been in the contemplation of the parties to the contract, as to which the court gives no opinion, this cause may well be decided upon the usage found in this case—a usage of ancient date and of general notoriety. It existed and was known to exist when this contract was formed. When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the lazaretto, and that the landing would be made under the direction and control of the local authority. This, then, must be considered as the landing contemplated in the policy. It is the landing which terminates the risk. Had the parties intended to continue the risk during the continuance of the goods in the lazaretto, they would have inserted, in the policy, words manifesting that intention. Instead of terminating the adventure on the landing, a *fact which [***84** they knew must take place at the Lazaretto thirty days before the goods could be delivered to the owner or consignee, they would have continued it till the goods should be landed in safety and should perform their quarantine.

The court is of opinion that under this policy the goods in the lazaretto were not at the risk of the underwriters, and consequently that there is no error in the judgment of the circuit court.

It is affirmed with costs.

GRACIE
v.
THE MARY'D INS. COMP'Y.

This case differs from that against the Marine Insurance Company of Baltimore only in one particular. A part of the cargo remained on board the ship until the arrival of the French troops, when the departure of the vessel was prohibited by the general and the ransom made.

This circumstance does not, in the opinion of the court, vary the case; because, omitting all other considerations, the loss, within the risk, being on only a part of the cargo, is a partial

loss, and is affected by the warranty against particular average loss.

This judgment is also to be affirmed with costs.

Cited—3 Cliff. 326; Abb. Adm. 211.

RICHARDS AND OTHERS,
ASSIGNEES OF M'KEAN, A BANKRUPT,
v.
THE MARYLAND INSURANCE COMPANY.

Absent—WASHINGTON, *J.*

Upon the death of an assignee under the bankrupt law of the United States, the right of action, for a debt due to the bankrupt, vested in the executor of the assignee.

If an executor do not cause himself to be made party to a suit brought in the life-time, and in the name of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the statute of limitations.

Quære, whether the commissioners of bankrupt had a right to appoint a second assignee in case of the death of the first?

At common law, no action could be renewed by journey's accounts, in a case of voluntary abandonment.

ERROR to the Circuit Court for the District of Maryland, in an action of covenant on a **85***] policy of insurance *under seal. The defendants pleaded the Marylaud statute of limitation of 12 years (1715, ch. 23, § 6), which enacts, "that uo specialty whatsoever shall be "good aud pleadable, or admitted in evidence "against any person or persons of this prov- "iuce, after the principal debtor aud creditor "have been both dead 12 years, or the debt or "thing in action above 12 years' standing," with a saving of 5 years in cases of infancy, &c.

The replication to this plea stated in substance the following facts: That the cause of action accrued on the 1st of May, 1797. That M'Kean was declared a bankrupt, and on the 19th of March, 1801, his estate was duly assigned to Thomas Allibone, who, on the 6th of October, 1806, instituted a suit on the policy and died ou the 1st of August, 1809, whereby the suit was abated. That on the 11th of January, 1810, the plaintiffs were, by the comuissioners, appointed assignees in pursuance of the choice of the creditors regularly convened for that purpose, and brought the present action at the next term after the death of Allibone, the former assignee. To this replication there was a general demurrer.

The judgment of the court below, upon the demurrer, was in favor of the defendants; and the plaintiffs brought their writ of error.

Harper, for the plaintiffs in error, made four points.

1. That an assignee, under the commission of bankruptcy, had no interest in the effects of the bankrupt which could vest in his executors or administrators, but was a mere trustee or agent of the commissioners.

2. That the commissioners had power, upon the death of an assignee, to appoint another in his stead, and so *toties quoties*.

3. That under the equity of the statute of limitations the plaintiffs had a right to bring a fresh suit upon the abatement of the first.

4. That there was a good continuance of the suit by journey's accounts.

*1. The bankrupt law gave no estate [***86** to the assignee. He had no interest in the effects of the bankrupt; the object of the law was merely to appoint a curator of the estate, with an authority like that of an administrator. It was a mere personal agency which terminated by the death of the assignee. It was the intention of the law that this agent should have the confidence of the creditors; but that inteution would be defeated if the executor or admiuistrator of the assignee should bccome the agent. (Vide Baukrupt law of the United States, vol. 5, p. 50, § 6, 7 and 8.)

2. The commissioners, under the equity of the 6th and 8th scctions, had power to appoint a new assignee or assignees in case of the death of the assignee for the time being. Their power was like that of the ordinary in granting letters of administration. No express authority is given to the ordinary to grant letters *de bonis non*, yet his authority to do it was never disputed. The iutention of the baukrupt law was that there should always be an assignee until the estate should be settled. The general power to appoint, implies an authority to keep the office always full. The plaintiffs, therefore, had power to maiutain this action.

3. The act of limitations does not apply to this case. (2 Salk., 421, *Cary and Ux.* v. *Stephenson.*) The priuciple of that case was that the plaintiffs had done all in their power, aud, therefore, the statute of limitation was not a bar. To make the statute apply there must be negligence on the part of the plaiutiff' and injury to the defendant by the delay. If an administrator comuence the action within a year after the granting of letters of administration, the statute is no bar, unless it began to run in the life of the iutestate. So in the case of an executor of an executor. (Buller N. P., 150; Esp. N. P., 150.) These cases all depeud on the same general principle—the cquity of the statute. If there be no negligence on the part of the plaintiff aud no injury to the defendant, the easc is within that equity.

4. This uew action is a good continuation of the old suit by journey's accounts. (6 Co., 10, *Spencer's* case). A new action by Journey's accounts may be had where the former actiou abates by the fault of the clerk, &c., but *not if it be abated by his own default. [***87** The doctriue applies as well to personal as to real actions. (1 Ld. Ray., 283, *Elstob* v. *Thorowgood.*) The principle of that case is that where the second plaintiff derives his authority from the saine source as the first, he may have the action by Journey's account.

Pinkney, contra.

The argument divides itself into two parts.

1. The construction of the act of Congress.

2. The effect of the act of limitations.

1. Under the bankrupt law the commissioners had no power to appoint a new assignee in case of the death of the first assignee. Their power in this respect was limited to the case of a removal of the assignee by the creditors. Much is said about the equity of the statute, but this court is authorized *jus dicere, non jus dare.* The 6th section provides for the appointment

of an assignee. The 7th authorizes the commissioners to appoint a temporary assignee without the consent of the creditors, and the 8th section provides for the removal of an assignee, and the appointment of another in his place. If the court can extend the equity of the statute to the case of the death of an assignee, it must be by a very liberal construction.

By the 18th section the estate and effects of the bankrupt are to be conveyed to the assignee, his heirs, executors, administrators and assigns forever. The 50th section conveys the same idea. The estate descends to the heir of the assignee, clothed with the trust, and he has all the rights and is subject to all the responsibilities and duties of the original assignee.

But if the court can, by equity, extend the power of the commissioners to the appointment of a new assignee in case of death, then, under the 9th section of the act, the new assignee might have been substituted for the old, and the action would not have abated by the death, but might have been prosecuted to judgment by the new assignee. So that if the suit was **88***] abated, it was through *his negligence, or voluntary act; and no plaintiff, who is in default, can have the benefit of the equity of the statute by journey's accounts.

2. As to the Maryland statute of limitations. It differs from the English statute of 21 Jac., which contains no limitation of actions upon specialties, judgments or recognizances. The same rule of equitable construction, therefore, cannot apply to both. But even if the same rule of construction could be applied to the Maryland statute, yet it does not contain the same clause upon which the equity arises in England.

The object of the statute was to prevent injury to defendants by the loss of evidence. If the statute once begins to run nothing will stop its course but an effectual suit. If a promise be made to a *feme sole*, and the day after the cause of action accrues, she marry, the statute continues to run notwithstanding the coverture; so in case of *non compos*, absence, &c. (4 Bac. Ab., 479, note; 1 Bac. Ab., 413.)

But it is only the equity of the 4th section of the English statute that could have aided the plaintiffs. That section allows a new action to be brought within a year, in three cases. 1. Where judgment has been reversed by writ of error. 2. Where judgment has been arrested; and, 3. Where an outlawry has been reversed. (4 Bac. Ab., 471, Gwillim's edition, § 4.) The courts have said that abatement is within the same reason, but they have not said that other representatives than those mentioned in the 4th section may bring a new action, (except in the case in Lord Raymond, which has been overruled in that respect. (1 Ld. Ray., 284.)

The Maryland statute does not contain a section similar to the 4th section of the 21st James.

Harper. But that section of the English statute has been always in use in Maryland in that respect, and is in daily practice in their courts; and, therefore, and by force of the bill of rights and constitution of Maryland, has been adopted as part of the law of the land.

89*] *Pinkney.* The statute of James is not in force in Maryland in respect to those cases for which the statute of Maryland provides. This statute professes to provide a limitation for all actions, and to enumerate all cases in which exceptions should be made. With the English statute before them, and while exercised in selecting such parts of it as they thought proper, the legislature cannot be presumed to have been so negligent as to omit the 4th section if they intended to adopt it.

But if it be in force in Maryland, this court will not push the equity of it farther than has been done in the courts in England. They have never permitted such a representative as these plaintiffs are to bring a new action, nor any one to bring a new action where the benefit of the former one has been lost by negligence or voluntary abandonment; which we say was the case here, for the action might certainly have been continued and maintained by either the executor of Allibone or by the new assignees. In the case cited from 2 Salk., 421, *Cary* v. *Stephenson*, the cause of action arose after the death of the intestate and before the letters of administration were granted. For if the statute had begun to run in the life of the intestate, it would have continued to run although no administration had been granted.

The next case is *Carver* v. *James*, or *Carver* v. *James, or Karver* v. *James*, as it is differently called in several books. (Buller, N. P., 150; Esp. N. P., 150; Wille's Rep., 255.) In that case the action was brought by the executor, and the equity of the 4th section of 21 Jac. extends only to the party himself, his heirs, executors and administrators, and not to any other representative. The case cited from 1 Ld. Ray., 283, supports the same doctrine. Both plaintiffs were executors of the original creditor. The court decided the case upon the doctrine of journey's accounts and the equity of the 4th section of the statute of James. The case put by the court, by way of illustration, is precisely in point. If the first plaintiff had been administrator (instead of executor) *durante minoritate*, the executor, when of age, could not have continued the suit by journey's accounts, nor would he have been aided by the equity of the statute, because he was not the legal representative of the *former plaint- [***90** iff. There is no case in which an assignee has been decided to be within the equity of that section of the statute. Although both assignees may derive their authority from the same source, yet the one is not the legal representative of the other. The opinion in the case of *Elstob* v. *Thorowgood* (Ld. Raymond, 283) is expressly retracted in the case of *Kinsey* v. *Heyward* (1 Ld. Ray., 432), where the same court say "that in no "case can a writ of journey's accounts be, "but by the same plaintiffs, or some of them, "who were plaintiffs in the former writ; and "that to say that the general executor, and the "executor *durante minoritate*, were as one per- "son in the office, is to strain the point too far; "for it must be the same plaintiff, not only by "representation, but by name; for the second "writ is a continuance of the first, which can- "not be but by the same person, not in repre- "sentation only, or in respect of their office, "but strictly and truly the same person."

Jones, same side.

Even if the doctrine of journey's accounts could apply, the plaintiffs were too late. In journey's accounts the writ is said to be grant-

ed *per dietas computatas*, which originally meant as many days journeys as the plaintiff was distant from the Court of Chancery, where he was obliged to go to get a new writ, accounting 20 miles for a day's journey, and it was originally necessary to show the number of days in the replication that by computation it might appear that he was within the time allowed. This was afterwards settled by a general rule to be 30 days. In this replication the plaintiff has replied simply the facts, and says nothing of the *dietas computatas*. The new writ, by journey's accounts, operates a continuance of the old suit, and in the judgment the plaintiff recovers the costs of both writs, and, therefore, it must be brought by the same plaintiff. (8 Co. 10, *Spencer's* case; 2 Inst., 288; 2 Com. Dig., 433, Tit. costs.) In none of the cases decided upon the equity of the statute of James has the plaintiff prevailed upon appeal. They are little better than *obiter dicta*.

Harper, in reply.

The opposite counsel almost admit our con-
91 *] struction *of the bankrupt law. The authority of the assignee is like that of an administrator. The power of the commissioners is like that of the ordinary.

Although the writ was abated, yet the plaintiffs might renew the suit. They were not in default by not continuing the old writ, for if they might have continued it, they were not obliged so to do. Thus in Maryland an executor may be made a party in the place of his testator; but if he does not come in and the suit is thereby abated, he may bring a new suit. The right of the plaintiffs to continue the old suit, under the 9th section of the bankrupt law, was doubtful. They preferred a safe, plain, clear, undeniable remedy. Their having done so ought not to exclude them from the equity of the statute of limitations.

It is well known to every lawyer in Maryland that the 4th section of the statute of James had been used and practiced in the courts of that state, and it has, therefore, become the law of the land by force of the bill of rights.

The case of *Kinsey* v. *Heyward* was not reversed on its merits; the doctrine of the Court of Common Pleas, that the plaintiff was within the equity of the 4th section of the statute of James, was not denied by the King's beneh. Nor was the case of *Carver* v. *James* reversed upon the merits. The doctrine, therefore, was in effect affirmed by implieation; because they would not have assigned other causes of reversal if the principle of the case itself was erroneous.

February 25th. JOHNSON, *J.*, delivered the opinion of the court as follows:

This is an action of covenant brought on a policy of insurance under seal. The facts as made out in the pleadings are these: The cause of action accrued on the 1st May, 1797. M'Kean was declared a bankrupt, and on the 19th Mareh, 1801, his estate was assigned to Thomas Allibone. On the 6th of October, 1806, the assignee instituted a suit on this policy and died on the 1st of August, 1809.

On the 11th of January, 1810, the plaintiffs
92 *] were *appointed assignees in pursuance of the choice of the creditors regularly convened for that purpose, and brought the present action to the term next after the death of the assignee.

The plea is the statute of limitations. To this is filed a speeial replicatiou, setting forth the above facts with a view to sustain an exception from the operation of the statute. The case comes up on a demurrer to the replication, and for the defendant there were two points made at bar. 1st. That the action is not maiutainable at all by the present plaintiffs, because the bankrupt act makes no provision for the appointment of a new assignee upon the demise of the first. 2d. That the right of action vests in his personal representative and could be maintained by him; that the abatement by the death of the first assignee was a voluutary abandonment of the suit, and put the case of the plaintiffs out of the reason of the exceptions from the operation of the statute. In support of the action it was conteuded, that the former suit abated by the death of the first assignee; that the right did not vest in his executors, because it was a mere trust or agency; that the right of substituting the new assignees in the action is securcd only in the case of removal by the creditors; that this case is without the statute of limitations upon an equitable construction of that statute; and lastly, that this action is a good continuance of the former, by journey's account.

We are of opinion that the plea of the statute of limitations must be sustained. On the first point made by the defendaut, the court would be understood to give no opinion. Being satisfied that the plaintiff has not brought himself within auy one of the exceptions which havc bcen admitted to the statute of limitations, and feeling no inclination to multiply those exceptions, they dispose of the case upon the second ground alone. The cases which, though literally within the words of the statute, havc been held to be without its spirit, are those only in which circumstances intervened, which rendered it impossible or inconsistent with known and established principles, that a cause of action could be revived by the renewal of the contract, or enforced by a suit at law within the time prescribed. The object *of the law is to [*93
secure the individual from the machinations of dishonesty, when attempted under the advantages attendant upon lapse of time, loss of papers, and death of witnesses. But when cases present themselves in which no *laches* can be imputed to the plaintiffs, but great injusticc would be done by applying to such cases the effect of the statute, the conclusion of reason and of the law is that such cases were not in the mind of the legislature when enacting that law. Such are the eases of a want of parties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place. But in no case of a voluntary abandonment of an action has an exception to the statute of limitations been supported. And such, we are of opinion, is the case before us. Whether it was or was not a case in which the bankrupt law authorizes the appointmeut of the present assignee we deem immaterial. The ease is certainly not within the express letter of the statute, and it is only under its equitable, and perhaps its proper construction, that the appointment of the new assignees (the present plaintiffs) can be supported. But the same equity

which would support this appointment, would support the substitution of the new assignees for the former in the existing action. We are, however, of opinion, that the first assignee was not a mere naked agent or attorney for the creditors. The words of the bankrupt act (sect. 13) are, that the debts assigned to him shall be vested in him, as if they had been contracts made with himself originally. Now, one necessary incident to such a contract would be, that the right of action would vest in his personal representative, and the act of Congress saves the suit from abatement by authorizing the substitution of the executor or administrators instead of the deceased plaintiff. The same answer applies to the antiquated doctrine of continuance by journey's account. The fact is, that the mode of continuing a suit in the name of the executor or administrator provided for by statute is a complete substitute for the continuance by journey's account. But even at common law, such a continuance or connection of suit was allowed in no case of voluntary abandonment, and if the benefit of it was intended to be asserted, it was necessary to claim it in the form of renewing the action.

Judgment affirmed with costs.

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*CROWELL AND OTHERS *v.* M'FADON. 94*]

Absent—WASHINGTON, *J.*

Under the 11th sect. of the embargo act of 25th of April, 1808, the collector was justified in detaining a vessel by his honest opinion that there was an intention to violate or evade the provisions of the embargo laws. It was not necessary for him to show that his suspicion was reasonable.

ERROR to the Supreme Judicial Court of the commonwealth of Massachusetts.

The case, as stated by DUVALL, *J.*, in delivering the opinion of the court, was as follows:

An action of trover for 650 barrels of flour, of the cargo of the schooner Union, was brought by John M'Fadon against Joseph Otis and the appellants, in the Court of Common Pleas for Suffolk County, in the commonwealth of Massachusetts, where a trial was had and judgment rendered in favor of the defendants. From this decision there was an appeal to the Supreme Judicial Court of that state, in which the cause was again tried and a verdict and judgment rendered for the plaintiff for $3,716.30 and costs. Joseph Otis died whilst the suit was depending in the Supreme Judicial Court.

The following are the principal facts appearing on the record in this case: The schooner Union, Benjamin Hawes, commander, with a cargo of 650 barrels of flour and five tons of logwood shipped by John M'Fadon, of Baltimore, was cleared at that port for Machias, in Massachusetts, late in the month of April, in the year 1808. She had originally cleared for Passamaquoddy, on the 26th of April, before the collector had received notice of the act of the 25th of the same month which authorized him to detain the vessel. The destination was changed to Machias, and a clearance obtained accordingly. But the original destination of the flour on board—for Eastport—remained on the face of the manifest. The flour was shipped for account and risk of Josiah Dana, of Machias, and in his absence Jonathan Bartlett, of Eastport, or his assigns. The Union sailed from Baltimore the last of April, and meeting with head winds, the commander put into Hyannis in the district of Barnstable. She was soon afterwards boarded by Joseph Crowell, one of the inspectors of the revenue in that district, who, on inspecting her papers, thought proper to submit them *to the examination of Joseph Otis, [*95 the collector. The collector, upon a consideration of the circumstances before stated, was of opinion that it was the intention of the concerned to violate or evade the provisions of the embargo laws, and therefore detained the vessel by virtue of the authority vested in him by the 6th and 11th sections of the act of the 25th of April, 1808, (vol. 9, p. 68), until the decision of the President of the United States could be had thereon. The President, after due inquiry, approved and confirmed the conduct of the collector. The vessel remained in this situation until the 25th of July, when she was taken to Gage's Wharf by Joseph Hawes, inspector of the port, and her cargo was landed and stored, with the assent of the agent of the owners, and the vessel discharged. On the fourth of October following, the collector offered to deliver the flour to the agent on payment of the expense of storing.

The collector detained the Union under the 6th and 11th sections of the act of the 25th of April, 1808. The 6th section provides "that no ship or vessel having any cargo whatever on board, shall, during the continuance of the act laying an embargo on all ships and vessels in the ports and harbors of the United States, be allowed to depart from any port of the United States for any other port or district of the United States adjacent to the territories, colonies or provinces of a foreign nation; nor shall any clearance be furnished to any ship or vessel bound as aforesaid without special permission of the President of the United States." The 11th section provides that the collectors of the customs be and they are respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinion the intention is to violate or evade any of the provisions of the acts laying an embargo until the decision of the President of the United States be had thereupon.

With this evidence the cause came on to be heard in the Supreme Judicial Court of Massachusetts, and at the trial the judge charged and instructed the jury that, under the circumstances proved by the defendant, neither the said collector or any person by his order, by virtue of the act aforesaid, had any right to intermeddle with or unlade the cargo of the said schooner, and that *such unlading was [*96 an unlawful act and a conversion of the cargo by the defendants; and with this direction the jury found a verdict for the plaintiff to the amount before mentioned. To this opinion an exception was taken and the cause was removed to this court by a writ of error in pursuance of

the 25th section of the act to establish the judicial courts of the United States.

Pinkney (late Attorney-General of the United States), for the plaintiff in error,

Contended, that as the landing and storing the cargo was by consent of the agent of the owner, the only question was, whether the collector was justified in detaining the vessel by his honest suspicion that the intention was to violate or evade the provisions of the embargo laws.

Upon this point he insisted that it was not incumbent on the collector to show that he had reasonable grounds of suspicion. It was sufficient if he satisfied the jury that, in his honest opinion, there was such an intention.

Harper, contra,

Contended, that the question was not whether the detention was justifiable, but whether the unlading was justifiable. If the landing was by the consent of the agent of the owner, it was a consent forced upon him by the detention of the vessel.

But Congress could not mean to subject the vessel to the arbitrary opinion of the collector. The detention was not lawful unless the circumstances justified the suspicion. The collector must at least show probable cause. The facts of the case did not authorize the suspicion.

Pinkney, in reply.

The question is still the same. As the unlading was with the assent of the agent of the owner, it was a lawful act if the detention was lawful. The law did not mean to make the collector responsible for the sound exercise of his discretion. He was to have no guide but **97***] *his own honest opinion. It is not like the case of capture as prize of war, where the officer acts at his peril, and must exercise a sound discretion and must have reasonable grounds of suspicion. But here it is put upon the opinion of the collector, and he is bound to act upon that opinion. If he fails to do so, he is liable for a misdemeanor in his office. If he honestly errs in his suspicion he is excused. Whether it be his honest opinion is a matter for the decision of the jury.

This cause was argued at last term by the *Attorney-General & Jones* for the plaintiffs in error, and by *Amory & P. B. Key* for the defendants in error.

Pinkney, Attorney-General,

Suggested a doubt whether an action for damages for a seizure on navigable waters was not as much a cause of admiralty and maritime jurisdiction as if the proceedings were *in rem*.

Amory and Key,

Contended, that the 11th section of the act of 25th April, 1808, only gave authority to the collector of the district who was to grant the clearance, to detain the vessel, and that the collector of another district had no right to stop the vessel passing through an intermediate district. The law gave no right to seize, but merely to detain, which shows that the authority is given only to the collector within whose official control the vessel is. The collector to whom application is to be made for a clearance is the only person to whom the discretion is entrusted. He has the best means of information, and if suspicion should be excited, it is there only that the owner can furnish the means of removing it. The opposite construction of the law would give to collectors at the mouths of our bays the whole control of our commerce, and would subject it to much vexation. The whole trade of the Chesapeake would be subject to the control of the collector of Norfolk.

Jones, in reply,

Contended, that the law authorized any collector of *any district to stop and detain [**98** any vessel which might be passing through his district, if he really suspected her of an intention to violate the provisions of the embargo laws.

Feb. 28th. DUVALL, *J.*,[1] after stating the facts of the case, delivered the opinion of the court as follows:

"This court is unanimously of opinion that the direction of the judge of the Supreme Judicial Court of Massachusetts was erroneous. The law of Congress under which the collector acted is clear and explicit. The collector was bound by law to seize and detain the Union, on her arrival in this district, if, in his opinion, it was the intention to violate or evade any of the provisions of the embargo laws, and his conduct was approved and confirmed by the President. The landing and storing the cargo, whether to preserve it from injury or to secure it from ruin (which, in this case, was done with the consent of the agent of the owner), was a necessary consequence of the detention. The law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly exercises it, as he must do in the execution of his duty, he cannot be punished for it.

The judgment of the court below is reversed with costs.

Approved—9 Cranch. 356.

BEATTY'S ADMINISTRATORS.
v.
BURNES'S ADMINISTRATORS.

Absent—WASHINGTON, *J.*

The Maryland statute of limitations of three years is a good bar to an action of *assumpsit* for money had and received, brought to try a title to lands in the city of Washington, under the 5th sect. of the act of Maryland, of Nov. 1791, ch. 45.

Quære, whether, by the Maryland act of cession of the District of Columbia to the United States, the state conveyed to the United States the vacant and unappropriated lands in the district.

ERROR to the Circuit Court for the District of Columbia, sitting at Washington.

*The case as stated by STORY, *J.*, in de- [**99** livering the opinion of the court, was as follows:

This is an action for money had and received, brought by the plaintiffs as administrators of Charles Beatty, deceased, against the defendant as administrator of David Burnes, deceased. The declaration alleges the promise to have been made in the life-time of the respective in-

1—JUDGE LIVINGSTON was absent when this opinion was delivered. JUDGE STORY gave no opinion, having some impression that he was, at a former period, retained as counsel in the cause, although he did not remember arguing it.

testates. The defendant has pleaded the general issue, and the statute of limitations of Maryland.

Upon the trial in the Circuit Court for the District of Columbia, the plaintiffs sought to support their action under the 5th section of the statute of Maryland, of Nov., 1791, ch. 45, concerning the territory of Columbia, and the city of Washington; that section is as follows:

"And be it enacted, That all the squares, "lots, pieces and parcels of land within the "said city, which have been or shall be appro- "priated for the use of the United States, and "also the streets, shall remain, and be for "the use of the United States; and all the lots "and parcels which have been or shall be sold "to raise money as a donation as aforesaid, "shall remain and be to the purchasers ac- "cording to the terms and conditions of their "respective purchases."

"And purchases and leases from private per- "sons claiming to be proprietors and having, "or those under whom they claim having, "been in possession of the lands purchased or "leased, in their own right, five whole years "next before the passing of this act, shall be "good and effectual for the estate, and on the "terms and conditions of such purchases and "leases respectively, without impeachment, and "against any contrary title now existing; but "if any person hath made a conveyance, or "shall make a conveyance or lease, of any "lands within the limits of the said city, not "having right and title to do so, the person, "who might be entitled to recover the land un- "der a contrary title now existing, may, either "by way of ejectment against the tenant, or in "an action for money had and received for his "use against the bargainor or lessor, his heirs, ex- "ecutors, administrators or devisees, as the case "may require, recover all money received by **100*] "him *for the squares, pieces or parcels "appropriated for the use of the United States, "as well as for lots or parcels sold, and rents "received by the person not having title as "aforesaid, with interest from the time of the "receipt; and on such recovery in ejectment "where the land is in lease, the tenant shall "thereafter hold under, and pay the rent re- "served to the person making title to and re- "covering the land, but the possession, *bona "fide* acquired, in none of the said cases shall "be changed."

The plaintiffs offered evidence, that on the 16th of April, 1792, Charles Beatty, the intestate, returned into the land-office for the western shore of Maryland, a certificate of survey dated on the 3d of April, 1792, and then paid the usual caution money for the land described in said certificate. On the 23d May, 1792, a *caveat* against the issuing of a patent for the lands on said certificate was filed by David Burnes, the intestate, which *caveat* was discontinued on the 23d of May, 1801, by virtue of a certain act of the state of Maryland. On the same day a patent issued from the land-office to Charles Beatty for the land described in said certificate, which land is within the limits of the city of Washington, and was taken up by Beatty as a vacancy; but Beatty never had actual possession thereof, nor ever claimed to make division thereof with the city commissioners as an original proprietor pursuant to the statute of Maryland, 1791, ch. 45. In fact the same land had been held and claimed by David Burnes in his own right, for more than five years before the passing of the statute aforesaid, as included in the lines of a grant made as early as 1720. The plaintiff offered evidence, however, that the land included in Beatty's patent was without the lines of the land to which Burnes was, under his grant, really entitled, and that it was vacant land of the state of Maryland. The warrant, under which Beatty's patent was obtained, was (before the location within the limits of Washington), in part, located upon and applied to other lands of the state of Maryland, not within the said city, or the county in which it was situate while belonging to Maryland. Burnes, in his life-time, and before the statute of 1791, ch. 45, made a conveyance of the land in controversy as an original proprietor to certain trustees for the purposes named in that *statute, and received of the city com- [**101 missioners on account of parts of the same land appropriated to city purposes, the sum of $7,343.82, in various sums paid between October, 1792, and June, 1796; and also received $1,000 on account of other parts of said land which he sold and conveyed to individuals. Burnes died in May, 1799, and administration of his estate was granted in Prince George's County, in the same year to his widow, who died in January, 1807. In April, 1803, administration of his estate was granted to the defendant, by the Orphan's Court of Washington County, in the District of Columbia. Beatty died some time before May, 1805, and in that month administration of his estate was granted to the plaintiffs. The present action is brought to recover the money so received by Burnes, upon the ground that it was the proceeds of the sale and disposition of land included in Beatty's patent. No demand or claim was ever made by Beatty on Burnes or his administrators, in his life-time, for the same money, although both parties from the year 1791 until their respective deaths lived within the limits of the District of Columbia and within two miles of each other; nor did the plaintiffs ever make any demand or claim upon the defendant until February, 1810. Under these circumstances the court below were of opinion that the plaintiffs could not sustain the action, and upon that direction the jury found a verdict for the defendant.

F. S. Key, for the plaintiffs in error.

Two questions arise in this case.

1st. Whether the plaintiffs have a good cause of action under the patent to Beatty, if not barred by the statute of limitations; and,

2d. Whether the statute of limitations is a bar to the action.

1. As to the title of Beatty. The *caveat* by Burnes was pending when Congress assumed the jurisdiction over the District of Columbia, which was on the 27th of February, 1801. The patent did not issue until the 23d May, 1801, but according to the law of Maryland, adopted *as the law of that part of the District [**102 of Columbia in which the land lies, the title has relation to the return of the certificate of survey and payment of the purchase money to the state, if the original warrant of survey was general; but if it was a special warrant, the title relates to the date of the warrant. That is to say, in either case the title relates to that act of the party which appropriates and locates

a particular tract of land under a warrant of survey. Beatty had two warrants. The first was a special warrant for 80 acres, and was dated the 22d of April, 1791, before the statute of Maryland of 1791, which ceded the territory of Columbia to the United States. The other warrant was for 6 acres, and was dated the 26th of March, 1792. A special warrant contains the name of the county in which it is to be executed, and also such a location, or description of the land intended to be surveyed, as the party directs. It binds and secures the land, therein described, from the operation of other warrants, but it may be located anywhere else. A common warrant is for the number of acres required, "not formerly surveyed for, nor cultivated by any person," and is directed to any surveyor legally required. (Kilty's Landholder's Assistant, 468.)

Beatty's title relates (if not to the date of the first warrant) to the date of the return of the certificate of survey, and payment of the purchase money, which was on the 16th of April, 1792.

Nothing but the form of a grant was necessary to complete the title before Congress assumed the jurisdiction.

But it is contended, that the state of Maryland, by the 2d section of the act of Nov., 1791, ch. 45, ceded to the United States the land in question. That section is as follows: "Be it enacted," &c., "that all that part of "the said territory called Columbia, which "lies within the limits of this state, shall be, "and the same is hereby acknowledged to be, "forever ceded and relinquished to the Con"gress and government of the United States, "in full and absolute right and exclusive juris"diction, as well of soil as of persons resid"ing, or to reside, thereon, pursuant to the
103*] "tenor and effect of *the eighth sec"tion of the first article of the constitution of "government of the United States; provided "that nothing herein contained shall be so con"strued to vest in the United States any right "of property in the soil, as to affect the rights "of individuals therein, otherwise than the same "shall or may be transferred by such individu"als to the United States; and provided also "that the jurisdiction of the laws of this state, "over the persons and property of individuals "residing within the limits of the cession afore"said, shall not cease or determine until Con"gress shall by law provide for the government "thereof, under their jurisdiction, in manner "provided by the article of the constitution "before recited."

This section did not transfer to the United States the vacant lands in the District of Columbia.

The 8th section of the 1st article of the constitution of the United States only gave Congress power "to exercise exclusive legislation over "such district (not exceeding 10 miles square) "as may, by cession of particular states, and "the acceptance of Congress, become the seat "of the government of the United States." It did not authorize Congress to accept the right of soil. The act of Maryland does not use the words of conveyance of soil. They purport only a cession of jurisdiction. "Ceded and relinquished" are not words of grant. If they conveyed the soil they conveyed the persons also, for the same words are applied to them as to the soil. The legislature of Maryland were not competent to convey the soil, and it is doubtful whether they could transfer the jurisdiction. A title to vacant lands in this part of the district could only be attained by the regular proceedings in the land-office of Maryland.

2. As to the statute of limitations.

The action of *assumpsit* given by the 5th section of the act of Nov., 1791, c. 45, is not to be considered as within the clause of the statute of limitations applicable to *assumpsits*. It purports to be a substitute for an action of ejectment, which is limited to 20, not to 3 years. It is evident that the object of the legislature was merely to protect the possession, not to take away the right. *It is therefore natu- [*104
ral to suppose that they intended that every person who could maintain ejectment should be entitled to maintain this action of *assumpsit* which was given in lieu of it, and only given that the judgment might affect the vendor and not the vendee: and that the plaintiff should recover the price and not the land itself. The statute applied to conveyances and sales, then, already made, as well as to conveyances and sales thereafter to be made. Suppose a sale made more than three years before the statute. The legislature did not surely intend to give a barred remedy in the place of an effective one. An action of debt given by statute for an escape is not barred by the statute of limitations.

But this is a case of trust, and trusts are not within the statute of limitations. Burnes received the money for the use of Beatty. In a case of trust, the statute does not begin to run till a demand is made. On this point there is a case of money received by an attorney for his client; and another of fees received for a judge by his clerk. We could not prevent Burnes from receiving the money. The law, therefore, makes him our trustee.

Jones, contra.

It is said that the legislature of Maryland was not competent to convey the soil, and that Congress had no power to accept it.

Exclusive legislation comprehends all the rights over the territory and inhabitants which the state of Maryland had. If, therefore, the authority rested upon those words alone, the right to accept a cession of the soil would be implied. The constitution of the United States requires a cession of territory before Congress could exercise exclusive legislation. The constitution of Maryland does not limit the mode in which the state shall grant its vacant lands. It is competent to do it by a legislative act as well as by the intervention of the land-office. But the constitution of the United States is paramount to the constitution of Maryland as to the cession of the district of ten miles square. It authorizes particular states to cede as well as Congress to accept.

*The 2d section of the act of Mary- [*105
land, 1791, c. 45, has sufficient words to pass the right of soil as well as of jurisdiction. It declares "that all that part of the territory called Columbia, which lies within the limits of this state shall be, and the same is hereby acknowledged to be, forever ceded and relinquished to the Congress and government of the United States, in full and absolute right" "of soil," and "full and absolute" "exclusive jurisdic-

tion" "of persons residing," &c., with a proviso that the right of soil should not so vest in the United States as to affect the rights of individuals therein. This implies an intention that the right of soil should vest in the United States wherever the rights of individuals should not be affected thereby. It is not only clear, therefore, that the state was competent to convey, and has used sufficient words of conveyance; but it is equally clear that it was its intention to convey, and that it has conveyed to the United States all its lands which were vacant at the date of the act, (19th December, 1791). It follows, therefore, that on the 3d of April, 1792, the date of the survey, the state of Maryland had no vacant lands in the District of Columbia, liable to be surveyed under the warrant.

The act of 1791 gives the action only to a person whose title then existed, (19th Dec., 1791). Beatty's title relates back no farther than the 16th of April, 1792, the date of the return of the certificate of survey, and the payment of the money to the state.

2. As to the statute of limitations. We admit that when a statute gives an entire new cause of action, it may not be barred by the act of limitations. But this statute only gives a new form of remedy upon an old cause of action. The declaration does not purport to be founded on the statute. It contains only a general count for money had and received to the plaintiff's use.

As to a trust not being within the act of limitations, the cases on that point are all in equity. But here there was no trust. The parties were adverse claimants.

F. S. Key, in reply.

1. The state of Maryland had sovereign rights, **106***] *and private rights. She meant to grant only her sovereign rights. She presumed that all the soil had been granted to individuals, and that there was no vacant land in the district. The terms she used are appropriate to a transfer of jurisdiction only.

The 3d section of the act of 1791, is conclusive that she did not mean to convey her private rights. By that section the lots in Carrollsburgh and Hamburgh (small villages included within the lines of the city of Washington), which were the property of the state, were subjected to the same terms of trust as the other lots in the city. That is to say, one half thereof was to be re-conveyed to the state, and the other half to be sold for the use of the public.

The constitution of Maryland speaks of the land-office, and thereby continues all the rules and laws of that office. No lands could pass from the state but through the forms of the land-office.

Beatty's title relates back at least as far as the 16th of April, 1792. But the special warrant was prior to the act of 1791, and the proviso of that statute saves all the rights of individuals, so that if Beatty had a right to locate his warrant in the city before the date of the act, that act did not deprive him of that right. He had a contrary title then existing. But if he had not, the state had, and he claims as her assignee.

The statute did not mean to exclude the heirs and assigns of those who then had title from the benefit of the remedy provided.

2. As to the statute of limitations. Burnes received the money as trustee. When he received it he knew of Beatty's claim. (1 Saund, 37, 383; 4 Bac. Ab., 472.)

Pinkney, as *amicus curiæ*,

Stated that he had never heard of the relation of title being carried farther back than to the certificate of survey; even on a special warrant; for, although special, it may be located anywhere.

*March 1st. *Absent*—JOHNSON, *J.* [***107** and LIVINGSTON, *J.*

Story, *J.*, after stating the case, delivered the opinion of the court as follows:

It is contended by the plaintiffs in error that the direction of the Circuit Court was erroneous. 1. Because the plaintiff's intestate had a good and valid title to the land surveyed under his patent, and was, therefore, entitled, under the 5th section of the Maryland statute of 1791, to the money received by the defendant's intestate therefor. 2. That this right was not barred by the statute of limitations.

In support of the first point the plaintiffs contend that the land belonging to the state did not, by the cession of the territorial jurisdiction, under the statute of 1791, pass to the United States, and was consequently liable to be appropriated by individuals under warrants pursuant to the laws of Maryland. That until 1801 the jurisdiction of Maryland continued over the whole ceded territory; and titles, therefore, might legally be acquired therein according to the public laws; and the patent of Beatty, being obtained in pursuance of those laws, gave him a complete and valid title.

On the other hand the defendant denies each of these positions, and further contends, that the plaintiffs are without the purview of the 5th section of the act of 1791, because that section extends only to titles then existing, and Beatty's title did not commence until April, 1792.

It is not necessary to consider the correctness of the positions urged by the respective parties as to this point, because we are of opinion that the case may well be decided upon the second point.

The action for money had and received is clearly embraced by the statute of limitations; and it is incumbent upon the plaintiffs to show that the present case forms an exception to its operation.

It is contended that the present suit, being a statute remedy, is not within the purview of the statute of limitations. *But we know [***108** of no difference in this particular between a common law and statute right. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute; and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it. Upon any other construction it would follow that the case would be without any limitation at all; for it would be quite impossible, upon any acknowledged principles, when a right had assumed the shape of a claim *in personam*, to attach to it a limitation which exclusively applied to the reality. Now, the statute of limitations has been emphatically declared a statute of repose, and and we should not feel at liberty to break in upon its general construction by allowing an exception which has not acquired the complete sanction of authority.

It is further contended, that by the operation of the act of 1791, (ch. 45), Burnes must be considered as a mere trustee of Beatty, and trusts are not within the statute of limitations. We are of a different opinion. The land in controversy was claimed by Burnes in his own right, and adversely to the plaintiffs' intestate. The money was received by him for his own use and in his own right as an original proprietor. He never admitted or acknowledged the title of the plaintiff, and no claim or demand was ever made upon him in his life-time. So far, then, from being received in trust, it was expressly received under a peremptory denial of any trust or right in the opposite party. Nor was the statute meant to make the adverse possessor without title a trustee for the party having title. It only substituted the action of *assumpsit* for the ordinary legal remedy by ejectment; and the adverse possessor of the land could no more be deemed a trustee of the money than he could be deemed a trustee of the land itself, for the benefit of the rightful owner, against whom he held by an adverse title.

The court are therefore of opinion that the statute of limitations is a good bar, and, therefore, that the judgment must be affirmed.

109*] *HARFORD,

CLAIMANT OF 480 PIECES OF COTTON BAGGING,

v.

THE UNITED STATES.

Absent—JOHNSON, *J.*

The penalty of the 50th sec. of the collection law of 2d March, 1799, which requires a permit for the landing of goods imported, applies to goods the importation of which was prohibited by law.

THIS was an appeal from the Circuit Court for the District of South Carolina.

The case was submitted without argument.

STORY, *J.*, delivered the opinion of the court as follows:

The principal question in this case is, whether goods and merchandise, the importation of which into the United States was prohibited by the act of 18th of April, 1806, (vol. 8, p. 80), were within the purview of the 50th section of the collection act of 2d of March, 1799, (vol. 4, p. 360), so that the unlading of them without a permit, &c., was an offense subjecting them to forfeiture.

It has been contended on behalf of the claimant that they were not within the purview of the 50th section, because that section applies only to goods, wares and merchandise, the importation of which is lawful. To this construction the court cannot yield assent. The language of the 50th section is, that "no goods, wares or merchandise, &c., shall be unladen, &c., without a permit;" it is therefore broad enough to cover all goods, whether lawful or unlawful. The case, being then within the letter, can be extracted from forfeiture only by showing that it is not within the spirit of the section. To us it seems clear that the case is within the policy and mischief of the collection act, since the necessity of a permit is some check upon unlawful importations, and is one reason why it is required. The act of 1806 does not profess to repeal the 50th section of the collection act as to the prohibited goods, and a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and *nn- [***110** avoidable. No such manifest repugnance appears to the court. The provisions may well stand together and, indeed, serve as mutual aids.

In fact the very point now presented was decided by this court in the case of *Locke, claimant,* v. *The United States,* at February term, 1813.

The judgment of the Circuit Court is affirmed with costs.

Cited—8 Otto, 400; 4 Mason, 190.

ARMITZ BROWN

v.

THE UNITED STATES.

British property found in the United States, on land, at the commencement of hostilities with Great Britain, cannot be condemned as enemy's property, without a legislative act authorizing its confiscation. The act of the legislature, declaring war, is not such an act. Timber, floated into a salt water creek where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water, and prevented from floating away at high water by booms, is to be considered as landed.

THIS was an appeal from the sentence of the Circuit Court of Massachusetts, which condemned 550 tons of pine timber, claimed by Armitz Brown, the appellant.

D. Davis, for the appellant.

This is an appeal from the Circuit Court of Massachusetts, in which court the property, consisting of about 550 tons of pine timber, twelve thousand staves, and eighteen tons of lathwood, were condemned. The libel states, that this cargo was loaded on board the Emulous, at Savannah, April 9th, 1812; that the cargo belonged to British subjects; that the ship departed for Plymouth, in England, April 18th, in the same year, and put into New Bedford for repairs; and that the cargo was there unladen, and remained there until seized by Delano, as well on his own behalf as on behalf of the United States. As to some of the allegations in the libel, there is no evidence whatever to support them; the ship never departed for Plymouth, never put into New Bedford for repairs. The facts are these:

The property in question was the cargo of the American ship Emulous, and was seized as enemy's property, about the 5th of April, A. D. 1813, nearly a year after the same had been discharged from the ship. From the transcript in the case, it appears that the Emulous was owned by John Delano and others, citizens of the United States; that, in February, 1812, the owners, by their *agent, chartered the [***111** ship to Elijah Brown, as agent for Christopher Ide, Brothers & Co., and James Brown, British merchants; that, by the charter-party the ship was to proceed from Charleston, S. C., where she then lay, to Savannah, and there take on

board a cargo of lumber, at a certain freight stipulated in the charter-party, and proceed with the same to Plymouth, in England, to unload there, or at any other of His Britannic Majesty's dock-yards in England. The ship proceeded to Savannah, took on board the cargo mention ed in the libel, and was there stopped by the embargo of the 4th of April, 1812. On the 25th of the same month of April, it was agreed between the master of the ship and the agent of the shippers, that the ship should proceed to New Bedford, where she was owned, with the cargo, and remain there, without prejudice to the charter-party; which agreement is indorsed upon the back of the charter-party. The ship accordingly proceeded to New Bedford, and remained there until the latter part of May following, when the cargo was finally unladed and discharged from the ship. The staves and lathwood were landed and put on a wharf. The timber was put into a salt water creek, which is not navigable, but where the tide ebbs and flows, and where the timber remained for safe keeping until the time of the seizure. The timber was secured in this creek by booms extended across the entrance thereof, and fastened by stakes driven into the flats. On the 7th of November, 1812, the property was sold to the claimant by E. Brown, the agent, in pursuance of the authority which he had for that purpose as agent of the shippers, and in pursuance of the advice of Delano, who afterwards seized it in the manner and for the purposes stated in the libel. This sale, the appellant contends, was made *bona fide* for a valuable consideration, which has since been paid, and after notice thereof given to Delano, in whose possession the property then was. The seizure was not made until five months after the property had been sold to the present claimant, and nearly twelve months after it was discharged from the ship. The claimant, it is admitted, is a citizen of the United States. E. Brown, the agent, by whom the property was sold, is a citizen of the United States, and James Brown, one of the owners of the cargo, is also a citizen of the United States, but resides in London and carries on trade and commerce in that city.

112*] *Upon these facts, the principal point which will be contended for by the counsel for the claimants is, that this property was lawfully acquired, before the declaration of war by the United States against Great Britain; and that, it being found here at the time of the breaking out of the war, under the faith of the government, it is not, by the modern law of nations, nor by any law of the United States, liable to confiscation.

This question ought not to be decided upon the rigorous principles, and the ancient practice of the law of nations; but according to the mitigated law of war, sanctioned by modern usage in civilized nations. For, when the government of the United States was organized and finally established, it was not only its true policy, but its duty, "to receive the law of nations in its modern state of purity and refinement." (Per Judge Wilson in the case of *Ware* v. *Hylton*, 3 Dall., 281.) It is contended by the counsel for the claimant in this case, that the principle and the usage adopted and sanctioned by the modern law of nations is this, "that enemy's property found in this country at the breaking out of a war, is not liable to confiscation." A different practice, said to have prevailed in Great Britain with regard to property in this situation, found afloat in their ports and harbors, will be hereafter considered.

The rule of the law of nations applicable to this case, is found in Vattel, p. 477. His words are: "The sovereign declaring war can neither "detain the persons nor the property of those "subjects of the enemy who are within his do- "minions at the time of the declaration. They "came into his country under the public faith. "By permitting them to enter and reside in his "territories, he tacitly promised them full lib- "erty and security for their return. He is "therefore bound to allow them a reasonable "time for withdrawing with their effects; and "if they stay beyond the time prescribed, he "has a right to treat them as enemies, though as "enemies unarmed. But if they are detained "by an insurmountable impediment, as by sick- "ness, he must necessarily and for the same "reason grant them a sufficient extension of "the term." In order to show the humane and liberal spirit with which the above rule is adopted by sovereigns *in modern times, [***113** the same author adds: "At present, so far from "being wanting in this duty, sovereigns carry "their attention to humanity still further; so "that foreigners who are subjects of the state "against which war is declared, are frequently "allowed full time for the settlement of their "affairs."

Are not these just and equitable rules of the modern law of nations of authority in the judicial courts of the United States? Upon what principle or policy are they to be rejected, and those of an age dark, and even barbarous in comparison with the present, adopted in their stead? Does it comport with the interest and character of this government to reject principles and usages calculated to ameliorate and mitigate the state of war and to promote the interest of commerce, which, it appears, have been cheerfully adopted by all the monarchies of Europe? The contract which was entered into by the agents of the parties in this case, was made upon the presumption that, in case of war, the property would be safe. This presumption arose from the uniform practice, in similar cases, in all countries upon which the law of nations is binding.

It has been suggested that this rule in Vattel is applicable only to such persons as may happen to be in the country at the time of the declaration of war. Such, indeed, is the letter of the rule. But when there is the same reason, there is the same law; and no good reason can be assigned why the property of an absent owner should not be protected, as well as that of those who may happen to be resident in the country declaring war. In addition to this, it may be observed, that the owners of this property were, in law, present during the whole negotiation relative to this cargo, by their agent, E. Brown, by whom it was purchased, and who had the whole care and charge of it at the time that war was declared.

If the correctness or authority of Vattel should be questioned, he will be found to be supported by other writers of high character.

In Chitty's law of Nations, p. 67, it is thus written: "In strict justice, the right of seizure

114*] "can take effect *only on those posses-
"sions of the belligerent, which have come to
"the hands of his adversary after the declara-
"tion of war." And again, in p. 80: "Such
"appears to be, at present, the law and practice
"of civilized nations with respect to hostile
"property found within their dominions at the
"breaking out of war." These opinions are not only fairly collected from modern writers upon the law of nations, but are entitled to particular respect as coming from a man of high character for his professional talents, and legal science; and who has done and written more to improve and reduce to system the common law of England than any other writer upon that subject for the last thirty years.

The principles and practice of the modern law of nations here advocated, will also be found conformable to the common law. In *Magna Charta*, that venerable foundation of English law and liberty, it is provided, that merchant strangers in the realm of England at the beginning of a war, shall be protected from harm in body and goods, until it shall be made known to the high authorities of the nation, how British merchants should be treated in the enemy's country, and they were to be dealt with according to such treatment. (*Magna Charta*, chap. 30.) These provisions are commented upon, and emphatically eulogized by Montesquieu, 2d vol., p. 12.

Of similar character were the provisions of an ancient English statute, passed 27 Edw. 3, Stat. 2, chap. 17, in which it is enacted, "that
"in case of war, merchants shall not be sent
"suddenly out of the kingdom, but may go
"out of the kingdom freely, with their goods,
"within forty days, and shall not be in any-
"thing hindered or disturbed in their passage,
"or to make profit of their merchandise if
"they wish to sell them; or, if in default of
"wind or ship, or any other adverse cause,
"they cannot go, they shall have other forty
"days, within which time they shall pass with
"their merchandise, or sell the same as before."

It is respectfully contended, that no act or measure of the American government has ever indicated a disposition adverse to those humane and liberal provisions and usages of the common law, and of the law of nations. On the contrary, so far as the disposition and policy of

115*] *the government may be discerned by implication, it has manifested its entire acquiescence in, and its readiness to adopt them upon all proper occasions. The spirit and disposition of the government upon this subject, is apparent from the provisions in (I believe it may be said) every treaty which has been entered into since the establishment of the government. Articles for the protection and removal of the property of enemies found in this country at the breaking out of a war, are found in our treaties with France, Spain, Holland, Sweden, Prussia, Morocco, England and Algiers. It will not be contended that the provisions of these treaties, especially that with England, can be binding, when the treaties themselves are not in force; but the uniform practice of those governments, in agreeing to these provisions, is evidence of the highest nature that the government of the United States have adopted, and mean to adhere to, the modern law of nations in this respect; that it approves the liberality of the modern usages, and rejects, and, I hope I may add, abhors the rigorous rules and contracted principles of the ancient jurists; that the spirit of the government, and the character of its policy, is to cherish and carry into practice every principle and every custom and usage which is found favorable to commerce, and which will mitigate the evils incident to a state of war.

In the proceedings and measures of the government since the war, there can be found no expression of its will, that property in the situation of this cargo, should be confiscated or claimed for the use of the government; on the contrary, there are indications of another and more benign complexion. By the act of July 6th, 1812, sect. 6, the President was authorized, within six months from the date of the act, "to give passports for the safe transpor-
"tation of any ship or property belonging to
"British subjects, then within the limits of the
"United States." Nothing, therefore, can be more clear than that it was not the wish or intention of government to claim or confiscate property belonging to the enemy, then in the United States. If such had been its policy, instead of the liberal provisions of this statute, provision would have been made in this statute, or in the act declaring war, not only expressive *of the public will upon this subject, [***116**

but expressly declaring British property then within the United States liable to confiscation.

By the provisions of this statute, it is apparent that if this property had been on board a British ship, or if a British ship had been found in which to transport it, it would have come directly within the authority of the President, as to its safe transportation. Surely, then, it could never have been the intention of Congress to have it confiscated upon the ground that it had been lawfully on board an American ship, in the regular course of trade, was there arrested by the embargo, and then, for the convenience of all parties, discharged from the ship, and placed in a proper situation for safe-keeping, to abide the events of the embargo and the war.

The court will also notice, that, previous to the expiration of the six months allowed by the act of Congress, above quoted, for the exportation of British property, this cargo had been sold with the knowledge and approbation of the libelant. This transfer, having been made *bona fide*, conferred other and new rights upon a third party, viz., the present claimant. The principle quoted and relied upon, that that transfer was void upon the ground that it was made by an alien enemy in time of war, was probably never contemplated or known by the parties to the contract; and this may furnish a satisfactory, though perhaps not strictly a legal reason, why this property was not exported under the President's passport. At any rate, if the court should be satisfied that this property is not liable to confiscation, either by the law of nations or by any act of Congress, they will not trouble themselves about the effect of the transfer, but leave the parties interested to settle that matter among themselves.

Before the court will condemn this property, they will search for some proof of a decided intention, on the part of the government, that such property should be confiscated. It ap-

pears that all the acts of Congress, so far as they can be interpreted with reference to this question, manifest a contrary spirit. The act **117*]** declaring *war, speaks no language adverse to the claim of the appellant. The prize act of the 26th of June, 1812, does not even glance at property in this situation. Will the court assume the power, by implication, to condemn the property; and this, too, against the most explicit declarations of the public will, so far as they can be collected from measures of an analogous nature? Why is this case singled out? Why do not the district attorneys enter the warehouses in the numerous seaports, and hunt for booty of this description? Such a proceeding would be as legal and as liberal as the present, though probably attended with serious mischief to the country, if retaliatory proceedings and measures should be adopted by the enemy; for it is a well-known fact that the amount of American property in England at the commencement of the war was immensely greater than that of English property in America at the same period.

It was stated, in the argument below, that the question relative to the confiscation of debts, or choses in actions, is illustrative of that which relates to the confiscation of goods. The modern usage and law of nations, and of our own country, relative to the confiscation of debts, are equally favorable to the claimant in this case.

In the first place, it is distinctly denied that there exists any power to confiscate the private debts of the enemy, excepting by a positive act of Congress. What figure would the attorney of the United States make, with a libel in the judicial courts, praying for a confiscation of a private debt? The exclusive right of this kind of confiscation, and even of goods, is in the legislature—per Chase, Justice, in the case of *Ware* v. *Hylton*, (3 Dal. 281). The question which has been discussed by the writers upon the law of nations is, whether it be lawful for the sovereign thus to confiscate. And although it is admitted that he may do it, yet, "in re-"gard to the safety of commerce, all the sov-"ereigns of Europe have departed from this "rigor; and as this custom has been general-"ly received, he who would act contrary to "it would injure the public faith; for stran-"gers trusted his subjects upon the presump-"tion that the general custom would pre-**118*]** "vail." (Vattel, lib. 3, *ch. 5, sect. 77.) The laws and customs of the United States ought to be so expounded as to conform to the modern law of nations, which is adverse to the confiscating of debts. Indeed, the confiscation of debts has become disreputable; and it has been feelingly observed by a late learned judge of this court, that "not a "single confiscation of this kind stained the "code of any European power engaged in the "war which our revolution produced." (3 Dall., 281.)

It will be admitted that the question relative to the confiscation of debts, or choses in action, is illustrative of the question relative to the confiscation of the private property of an enemy, found here under the faith of government at the breaking out of the war. Indeed, the law and practice is, and ought to be, the same in both cases; and until a law of Congress shall be produced confiscating property of this description, the judicial courts will not only proceed to do it with great reluctance, but will never assume an authority of that kind unless furnished with it by a legislative act, any more than in the confiscation of a private debt. In addition to all this, it seems to be now perfectly settled by the modern law and practice of nations, that debts are never to be confiscated; that it has become a disgraceful act in any government that does it; that these debts are suspended, and the right to recover them necessarily taken away by the war; but that upon the return of peace, the debts are revived, and the right to recover them perfectly restored.

The condemnation of this property is demanded upon the ground that the embargo of the 4th of April, 1812, arrested and detained it until the act of Congress took place declaring war; and that that act had a retroactive effect, and justifies the condemnation of this property. But to this it is answered: The embargo of the 4th of April was not a hostile, but a civil embargo; and no such construction was ever given to an embargo, not of a hostile character. That this embargo was not of this character is most manifest from this, that express provision was made for the departure of any foreign ships or vessels, either in ballast or with the goods, wares and merchandise, on board of such foreign ship or vessel when notified of the act. It was, therefore, the *being laden on board a vessel [***119** of the United States that prevented the departure of this property. If it had been on board a foreign, even a British, ship, it would not have been detained. That it was actually laden on board, at the time of the notice of the embargo, manifestly appears from the record. This, it is conceived, is a sufficient answer to the claim of the government to this property, upon the ground that it was stopped by the embargo, and liable to confiscation by the retroactive operation of the act of Congress declaring war. The authorities in support of the principles here contended for, respecting the difference between hostile and civil embargoes, must be familiar to the court, and need not be cited.

But the practice of the British government is relied upon as a rule by which the court are to be governed in the present case. It is admitted that the English courts of admiralty have condemned vessels detained in port by an embargo, and found there at the breaking out of hostilities; but it is explicitly denied that they have ever condemned property found on land, in that situation. (1 Rob., 228.)

If, however, the English courts of admiralty have done wrong, and proceeded against the modern law of nations in these cases, this honorable court will not, for that reason, adopt so unjust a practice. The condemnation of property, arrested in the ports of Great Britain by an embargo, to which a hostile character is afterwards given by a subsequent declaration of war, appears to be a departure from the modern usages of nations, and cannot be justified by or reconciled with the spirit of those usages. But as they have never condemned property in this situation, except such as has been found not only afloat, but in vessels detained in their ports by an embargo, their decisions can form no precedent in this case; for the property

which is the subject of this prosecution was either on land, or in such a situation as that it could not be the subject upon which an embargo could operate; or, in other words, the staves and lathwood were literally on the land; and the pine timber so discharged from the ship and so deposited as to be entitled to the same protection as if actually landed and stored.

120*] *The rule adopted in the English Court of Admiralty, as laid down in 2 Rob., 211, is this: "All vessels detained in port, and found there at the breaking out of hostilities, are condemned, *jure coronæ*, to the king; and all coming in after hostilities, not voluntarily by revolt, but ignorant of the war, are condemned as droits of admiralty. This rule, both in its import and application, has been adopted, it is conceived, only in cases of vessels and their cargoes found in the ports of Great Britain. There can be no reason for their application in this country to property found on the land, or to property, although waterborne yet, in the same situation, in reason and in fact, as if found literally on land.

Of this description is the property in question. By referring to the record, particularly the depositions of E. Brown and of Silas Allen, the condition of this property, from the time it was discharged from the ship to the time it was seized by Delano, may be learned, from whence it will appear that the allegation in the libel, that the property was on the high seas, is wholly without foundation. The staves and lathwood were landed on a wharf. With respect to these, there can be no doubt. The timber was discharged from the ship in the month of May, previous to the declaration of war; it is of such description that it did not admit of being stored; it would have been injured by lying on the land; and the only place proper to keep it in was the one selected, a creek, or small cove, where the tide ebbs and flows, but which was not navigable even for boats or scows; for it seems it was necessary to clear it out to admit a scow into it. Moreover, it was necessary to secure the entrance of this creek by booms or timber laid across its mouth, fastened by piles or stakes driven into the flats. This timber was thus secured and stored in the usual way in which property of this description is managed; and was, to all intents and purposes, as much lodged and impounded in this place, under a bailment, and in civil hands (1 Rob., p. 228), as if it had been in a ship-yard. It must, therefore, be a great stretch of power, and prerogative, to extend the reason of the practice of Great Britain in condemning property found in its harbors and on board vessels, to property in the situation of that in question; and unless the practice of Great Britain has extended to the

121*] seizure *and condemnation of enemies' property found on land at the time of breaking out of hostilities, no sanction can be derived from her practice in favor of the confiscation of this property.

The case was submitted by the Attorney-General upon the argument contained in the opinion of the Honorable Judge Story, in the Circuit Court, which came up in the transcript of the record.

Wednesday, March 2d. *Present—All the Judges.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The material facts in this case are these:

The Emulous, owned by John Delano and others, citizens of the United States, was chartered to a company carrying on trade in Great Britain, one of whom was an American citizen, for the purpose of carrying a cargo from Savannah to Plymouth. After the cargo was put on board, the vessel was stopped in port by the embargo of the 4th of April, 1812. On the 25th of the same month it was agreed between the master of the ship and the agent of the shippers, that she should proceed with her cargo to New Bedford, where her owners resided, and remain there without prejudice to the charter-party. In pursuance of this agreement, the Emulous proceeded to New Bedford, where she continued until after the declaration of war. In October or November the ship was unloaded and the cargo, except the pine timber, was landed. The pine timber was floated up a salt water creek, where, at low tide, the ends of the timber rested on the mud, where it was secured from floating out with the tide by impediments fastened in the entrance of the creek. On the 7th of November, 1812, the cargo was sold by the agent of the owners, who is an American citizen, to the claimant, who is also an American citizen. On the 19th of April, a libel was filed by the attorney for the United States, in the District Court of Massachusetts, against the said cargo, as well on behalf of the United States of America as for and in behalf of John Delano and of all other persons concerned. It does not appear *that this seizure was [*

122 made under any instructions from the President of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer who represents the government, must imply that sanction.

On the contrary, it is admitted that the seizure was made by an individual, and the libel filed at his instance by the District Attorney, who acted from his own impressions of what appertained to his duty. The property was claimed by Armitz Brown under the purchase made in the preceding November.

The District Court dismissed the libel. The Circuit Court reversed this sentence, and condemned the pine timber as enemy property forfeited to the United States. From the sentence of the Circuit Court the claimant appealed to this court.

The material question made at bar is this: Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the Emulous having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to re-land the cargo in some port of the United states, the re-landing having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found

on land at the commencement of hostilities. It will therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever **123***] found, is conceded. The mitigations *of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

The questions to be decided by the court are:

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask,

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy **124***] on land, which *were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will; and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. What, then, is this operation?

Even Bynkershoek, who maintains the broad principle, that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenseless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more "in fact than in law." He adds to the observations on this subject, "let it not, however, "be supposed that it is only true of actions, that "they are not condemned *ipso jure*, for other "things also belonging to the enemy may be "concealed and escape condemnation."

Vattel says, that "the sovereign can neither "detain the persons nor the property of those "subjects of the enemy who are within his dominions at the time of the declaration."

It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the *enemy in the sovereign, his pres- [***125** ence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says: "But, in strict justice, that right "can take effect only on those possessions of a "belligerent which have come to the hands "of his adversary after the declaration of hostilities."

The modern rule, then, would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

If we look to the constitution itself, we find this general reasoning much strengthened by the words of that instrument.

That the declaration of war has only the effect **126***] of *placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. "Congress shall have power" "to declare war, grant letters of marque and "reprisal, and make rules concerning captures "on land and water."

It would be restraining this clause within narrower limits than the words themselves import to say that the power to make rules concerning captures on land and water is to be confined to captures which are exterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of Congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the President very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

The "act for the safe keeping and accommodation of prisoners of war" is of the same character.

The act prohibiting trade with the enemy contains this clause:

"And be it further enacted, That the Presi- "dent of the United States be, and he is here- "by authorized to give, at any time within six **127***] "months after the passage *of this act, "passports for the safe transportation of any "ship or other property belonging to British "subjects, and which is now within the limits "of the United States."

The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the President is manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there in the act of Congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President of the United States to use the whole land and naval force of the United States to carry the war into effect, and "to issue to private armed vessels "of the United States, commissions or letters "of marque and general reprisal against the "vessels, goods and effects of the government "of the united kingdom of Great Britain and "Ireland, and the subjects thereof."

That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

*The "act concerning letters of [***128** marque, prizes and prize goods," certainly contains nothing to authorize this seizure.

There being no other act of Congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained.

One view, however, has been taken of this subject, which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of *our citizens. Like all [***129** other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the court, that the power of

confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.

The court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

STORY, *J.*

In this case, I have the misfortune to differ in opinion from my brethren; and as the grounds of the decree were fully stated in an opinion delivered in the court below, I shall make no apology for reading it in this place.

"This is a prize allegation filed by the District Attorney, in behalf of the United States, and of John Delano, against 550 tons of pine timber, part of the cargo of the American ship Emulous, which was seized as enemies' property, about the 5th day of April, 1813, after the same had been discharged from said ship, and while afloat in a creek or dock at New Bedford, where the tide ebbs and flows.

From the evidence in this case, it appears that the ship Emulous is owned by the said John Delano, John Johnson, Levi Jenny, and Joshua Delano, of New Bedford, and citizens of the United States. On the 3d day of February, 1812, the owners, by their agents, entered into a charter-party with Elijah Brown as agent of Messrs. Christopher Idle, Brother & Co. and James Brown, of London, merchants, for said ship, to proceed from the port of Charleston, South Carolina (where the ship then lay), to Savannah, in Georgia, and there take on board a cargo of timber and staves, at **130***] a certain *freight stipulated in the charter-party, and proceed with the same to Plymouth, in England, "for orders to unload there or at any other of His Majesty's dock-yards in England." The ship accordingly proceeded to Savannah, took on board the agreed cargo, and was there stopped by the embargo laid by Congress on the 4th of April, 1812. On the 25th of the same April, it was agreed between Mr. E. Brown and the master of the ship, that she should proceed with the cargo to, and lay at New Bedford, without prejudice to the charter-party. The ship accordingly proceeded for New Bedford, and arrived there in the latter part of May, 1812, where, it seems, the cargo was finally—but the particular time is not stated—unloaded by the owners of the ship, the staves put into a warehouse, and the timber into a salt water creek or dock, where it has ever since remained, water-borne, under the custody of said John Delano, by whom the subsequent seizure was made, for his own benefit and the benefit of the United States. On the 7th November, 1812, Mr. Elijah Brown, as agent for the British owners (one of whom, James Brown, is his brother), sold the whole cargo to the present claimant, Mr. Armitz Brown (who it should seem is also his brother) for 2,433 dollars and 67 cents, payable in nine months, for which the claimant gave his note accordingly. The master of the ship, Capt. Allen, swears that, at the time of entering into the charter-party, Mr. Elijah Brown stated to him that the British owners had contracted with the British government to furnish a large quantity of timber to be delivered in some of His Majesty's dock-yards.

Besides the claim of Mr. Brown, there is a claim interposed by the owners of the ship Emulous, praying for an allowance to them of their expenses and charges in the premises.

A preliminary exception has been taken to the libel for a supposed incongruity in blending the rights of the United States and of the informer in the manner of a *qui tam* action at the common law.

I do not think this exception is entitled to much consideration. It is, at most, but an irregularity which cannot affect the nature of the proceedings, or oust the jurisdiction of this court. If the informer cannot legally take any *interest, the United States have still a [***131** right, if their title is otherwise well founded, to claim a condemnation. Nor would a proceeding of this nature be deemed a fatal irregularity in courts having jurisdiction of seizures, whose proceedings are governed by much more rigid rules than those of the admiralty. It is a principle clearly settled at the common law, that any person might seize unaccustomed goods to the use of himself and the king, and thereupon inform of the seizure; and if, in the exchequer, the informer be not entitled to any part, the whole shall, on such information, be adjudged to the king. For this doctrine we have the authority of Lord Hale. (Harg. Law Tracts, 227.) And the solemn judgment of the court, in *Roe* v. *Roe* (Hardr., 185); and *Malden* v. *Bartlett* (Parker, 105). The same rule most undoubtedly exists in the prize court, and, as I apprehend, applies with greater latitude. All property captured belongs originally to the crown; and individuals can acquire a title thereto in no other manner than by grant from the crown. (*The Elsebe*, 5 Rob., 173; 11 East, 619; *The Maria Francoise*, 6 Rob., 282.) This, however, does not preclude the right to seize; on the contrary, it is an indisputable principle in the English prize courts, that a subject may seize hostile property for the use of the crown, wherever it is found; and it rests in the discretion of the crown whether it will or will not ratify and consummate the seizure by proceeding to condemnation. But to the prize court it is a matter of pure indifference whether the seizure proceeded originally from the crown or has been adopted by it; and whether the crown would take *jure coronæ*, by its transcendent prerogative, or *jure admiralitatis*, as a flower annexed by its grant to the office of Lord High Admiral. The cases of captures by non-commissioned vessels, by commanders on foreign stations, anterior to war, by private individuals in port or on the coasts, and by naval commanders on shore on unauthorized expeditions, are all very strong illustrations of the principle. (*The Aquila*, 1 Rob., 37; *The Twee Gesuster*, 2 Rob., 284, note; *The Rebeckah*, 1 Rob., 227; *The Gertruyda*, 2 Rob., 211; *The Melomane*, 5 Rob., 41; *The Charlotte*, 4 Rob., 282; *The Richmond*, 5 Rob., 325; *Thorshaven*, 1 Edw., 102; Hale in Harg. Law Tracts, ch. 28, p. 245.) And in cases where private captors seek condemnation to themselves, it is the settled course of the court, on failure of their title, to decree con-

132*] demnation *to the crown or the admiralty, as the circumstances require. (*The Walsingham Packet*, 2 Rob., 77; *The Etrusco*, 4 Rob., 262, note; and the cases cited *supra*.) Nor can I consider these principles of the British courts a departure from the law of nations. The authority of Puffendorf and Vattel are introduced to show that private subjects are not at liberty to seize the property of enemies without the commission of the sovereign, and if they do they are considered as pirates. But when attentively considered, it strikes me that, taking the full scope of these authors, they will not be found to support so broad a position. (Puff. B. 8, ch. 6, § 21; Vattel, B. 3, ch. 15, § 223, 224, 225, 226, 227.) Vattel himself admits (§ 234) that the declaration of war, which enjoins the subjects at large to attack the enemy's subjects, implies a general order; and that to commit hostilities on our enemy without an order from our sovereign after the war, is not a violation so much of the law of nations as of the public law applicable to the sovereignty of our own nation (§ 225). And he explicitly states (§ 226) that, by the law of nations, when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorized by the state of war. All that he contends for is, that though, by the declaration, all the subjects in general are ordered to attack the enemy, yet that by custom this is usually restrained to persons acting under commission; and that the general order does not invite the subjects to undertake any offensive expedition without a commission or particular order (§ 227); and that if they do, they are not usually treated by the enemy in a manner as favorable as other prisoners of war (§ 226). And Vattel (§ 227) explicitly declares, that the declaration of war "authorizes, indeed, and even obliges every subject, of whatever rank, to secure the persons and things belonging to the enemy, when they fall into his hands." And he then goes on to state cases in which the authority of the sovereign may be presumed (§ 228). The whole doctrine of Vattel, fairly considered, amounts to no more than this, that the subject is not required, by the mere declaration of war, to originate predatory expeditions against the enemy; that he is not authorized to wage war contrary to the will of his own sovereign; and that, though the ordinary declaration of war imports a general authority to attack the enemy and his **133***] *property, yet custom has so far restrained its meaning that it is in general confined to persons acting under the particular or constructive commission of the sovereign. If, therefore, the subject do undertake a predatory expedition, it is an infringement of the public law of his own country, whose sovereignty he thus invades, but it is not a violation of the law of nations of which the enemy has a right to complain. But if the property of the enemy fall into the hands of a subject, he is bound to secure it.

For every purpose applicable to the present case, it does not seem necessary to controvert these positions; and, whatever may be the correctness of the others, I am perfectly satisfied that the position is well founded, that no subject can legally commit hostilities, or capture property of an enemy, when, either expressly or constructively, the sovereign has prohibited it. But suppose he does, I would ask if the sovereign may not ratify his proceedings; and thus, by a retroactive operation, give validity to them? Of this there seems to me no legal doubt. The subject seizes at his peril, and the sovereign decides, in the last resort, whether he will approve or disapprove of the act. (Thorshaven, 1 Edw., 102.) The authority of Puffendorf is still less in favor of the position of the claimant's counsel. In the section cited (book 8, ch. 6, sec. 21), Puffendorf considers the question to whom property captured in war belongs; a question also examined by Vattel in the 229th section of the book and chapter above referred to. In the course of that discussion, Puffendorf observes, "that it may be very justly questioned, whether everything taken in war, by private hostilities, and by the bravery of private subjects that have no commission to warrant them, belongeth to them that take it. For this is also a part of the war, to appoint what persons are to act in a hostile manner against the enemy, and how far; and, in consequence, no private person hath power to make devastations in an enemy's country or to carry off spoil or plunder without permission from his sovereign; and the sovereign is to decide how far private men, when they are permitted, are to use that liberty of plunder; and whether they are to be the sole proprietors in the booty or only to share a part of it; so that all a private adventurer in war can pretend to, is no more than *what[***134** his sovereign will please to allow him; for to be a soldier and to act offensively, a man must be commissioned by public authority."

As to the point upon which Puffendorf here expresses his doubts, I suppose that no person, at this day, entertains any doubts. It is now clear, as I have already stated, that all captures in war enure to the sovereign, and can become private property only by his grant. But is there anything in Puffendorf to authorize the doctrine that the subject so seizing property of the enemy is guilty of a very enormous crime—of the odious crime of piracy? And is there, in this language, anything to show that the sovereign may not adopt the acts of his subjects, in such a case, and give them the effect of full and perfect ratification? It has not been pretended, that I recollect, that Grotius supports the position contended for. To me it seems pretty clear that his opinions lean rather the other way, viz., to support the indiscriminate right of captors to all property captured by them. (Grotius, lib. 3, ch. 6, sec. 2, sec. 10, sec., 12.) Bynkershoek has not discussed the question in direct terms. In one place (Bynk. Pub. Juris, ch. 3,) he says, that he is not guilty of any crime, by the laws of war, who invades a hostile shore in hopes of getting booty. It is true that, in another place (Id., ch. 20,) he admits, in conformity to his doctrine elsewhere (Id., ch. 17), that if an uncommissioned cruiser should sail for the purpose of making hostile captures, she might be dealt with as a pirate, if she made any captures except in self-defense. But this he expressly grounds upon the municipal edicts of his own country in relation to captures made by its own subjects. And he says, every declaration of war not only permits but expressly orders all subjects to injure the enemy by every possible means; not only

to avert the danger of capture, but to capture and strip the enemy of all his property. And, looking to the general scope of his observations (Id., ch. 3, 4, and ch. 16 and 17); I think it may, not unfairly, be argued that, independent of particular edicts, the subjects of hostile nations might lawfully seize each other's property wherever found; at least, he states nothing from which it can be inferred that the sovereign might not avail himself of property captured from the enemy by uncommissioned **135***] subjects. On *the whole, I hold that the true doctrine of the law of nations, found in foreign jurists, is, that private citizens cannot acquire to themselves a title to hostile property unless it is seized under the commission of their sovereign; and that, if they depredate upon the enemy, they act upon their peril, and may be liable to punishment, unless their acts are adopted by their sovereign. That, in modern times, the mere declaration of war is not supposed to clothe the citizens with authority to capture hostile property, but that they may lawfully seize hostile property in their own defense, and are bound to secure, for the use of the sovereign, all hostile property which falls into their hands. If the principles of British prize law go further, I am free to say that I consider them as the law of this country.

I have been led into this discussion of the doctrine of foreign jurists, farther than I originally intended; because the practice of this court in prize proceedings must, as I have already intimated, be governed by the rules of admiralty law disclosed in English reports, in preference to the mere *dicta* of elementary writers. I thought it my duty, however, to notice these authorities, because they seem generally relied on by the claimant's counsel. In my judgment, the libel is well and properly brought; at least for all the purposes of justice between the parties before the court; and I overrule the exception taken to its sufficiency.

Having disposed of this objection, I come now to consider the objection made by the United States against the sufficiency of the claim of Mr. Brown; and I am entirely satisfied that his claim must be rejected. It is a well-known rule of the prize court, that the *onus probandi* lies on the claimant; he must make out a good and sufficient title before he can call upon the captors to show any ground for the capture. (*The Walsingham packet*, 2 Rob., 77.) If, therefore, the claimant make no title, or trace it only by illegal transactions, his claim must be rejected, and the court left to dispose of the cause, as the other parties may establish their rights. In the present case, Mr. Brown claims a title by virtue of a contract and sale made by alien enemies since the war. I say by alien enemies; for it is of no importance what the character of the agent is; the **136***] transaction *must have the same legal construction as though made by the aliens themselves. Now, admitting that this sale was not colorable, but *bona fide*, which, however, I am not, at present, disposed to believe, still it was a contract made with enemies, pending a known war, and therefore invalid. No principle of national or municipal law is better settled than that all contracts with an enemy, made during war, are utterly void. This principle has grown hoary under the reverend respect of centuries; (19 Edw., 4, 6, cited Theol. Dig. lib. 1, ch. 6, sec. 21; *Ex parte Bonsmaker*, 13 Ves., Jun., 71; *Briston* v. *Towers*, 6 T. R., 45,) and cannot now be shaken without uprooting the very foundations of national law. (Bynk. Quæst. Pub. Juris, ch. 3.)

I therefore altogether reject the claim interposed by Mr. Brown. What, then, is to be done with the property? It is contended, on the part of the United States, that it ought to be condemned to the United States, with a recompense, in the nature of salvage, to be awarded to Mr. Delano. On the part of the claimant's counsel (who, under the circumstances, must be considered as arguing as *amicus curiæ* to inform the conscience of the court) it is contended, 1st. That this court, as a court of prize, has no proper jurisdiction over the cause. 2d. That if it have jurisdiction, it cannot award condemnation to the United States, for several reasons. 1st. Because, by the law of nations, as now understood no government can lawfully confiscate the debts, credits, or visible property of alien enemies, which have been contracted or come into the country during peace. 2d. Because, if the law of nations does not, the common law does afford such immunity from confiscation to property situated like the present. 3d. Because, if the right to confiscate exist, it can be exercised only by a positive act of Congress, who have not yet legislated to this extent. 4th. Because, if the last position be not fully accurate, yet, at all events, this process, being a high prerogative power, ought not to be exercised, except by express instructions from the President, which are not shown in this case.

Some of these questions are of vast importance and most extensive operation; and I am exceedingly obliged to the gentlemen who have argued them with so *much ability and [***137** learning, for the light which they have thrown upon a path so intricate and obscure. I have given these questions as much consideration as the state of my health and the brevity of time would allow; and I shall now give them a distinct and separate discussion, that I may at least disclose the sources of my errors, if any, and enable those who unite higher powers of discernment with more extensive knowledge, to give a more exact and just opinion.

And first. As to the jurisdiction of this court in matters of prize.

This depends partly on the prize act of 26th June, 1812, ch. 107, § 6, and partly on the true extent and meaning of the admiralty and maritime jurisdiction conferred on the courts of the United States. The act of 26th June, 1812, ch. 107, provides that in all cases of captured vessels, goods and effects which shall be brought within the jurisdiction of the United States, the District Court shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction. The act of 18th June, 1812, ch. 102, declaring war, authorizes the President to issue letters of marque and reprisal to private armed ships against the vessels, goods and effects of the British government and its subjects; and to use the whole land and naval force of the United States to carry the war into effect. In neither of these acts is there any limitation as to the places where captures may be made on the land

or on the seas; and, of course, it would seem that the right of the courts to adjudicate respecting captures would be co-extensive with such captures, wherever made, unless the jurisdiction conferred is manifestly confined by the former act to captures made by private armed vessels. It is not, however, necessary closely to sift this point, as it may now be considered as settled law, that the courts of the United States, under the judicial act of 30th September, 1789, ch. 20, have, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all causes of prize as the admiralty in England. (*Glass et al.* v. *the sloop Betsey et. al.* 3 Dall., 6; *Talbot* v. *Janson*, 3 Dall., 133; *Penhallow et al.* v. *Doane's administrators*, 3 Dall., 54; *Jennings* v. *Carson*, 4 Cranch, 2.) Over what captures, **138***] *theu, has the admiralty jurisdiction as a prize court? This is a question of considerable intricacy, and has not as yet, to my knowledge, been fully settled. It has been doubted whether the admiralty has an inherent jurisdiction of prize, or obtains it by virtue of the commission usually issued on the breaking out of war. That the exercise of the jurisdiction is of very high antiquity and beyond the time of memory, seems to be incontestible. It is found recognized in various articles of the black book of the admiralty, in public treaties and proclamations of a very early date, and in the most venerable relics of ancient jurisprudeuce. (See Rob. Coll. Marit. Intro. p. 6, 7; Id. Instructions, 3 H. 8, p. 10, art. 18, &c.; Id. p. 12, note letter; Edw. 3, A. D., 1343; Treaty Henry 7 and Charles 8, A. D., 1497; Rob. Coll. Marit. p. 83 and p. 98, art. 8; Rob. Coll. Mar. p. 189, note; Roughton, art. 19, 20, &c., &c., passim.) In *Lindo* v. *Rodney* (Doug. 613, note), Lord Mansfield, in discussing the subject, admits the immemorial antiquity of the prize jurisdiction of the admiralty; but leaves it uncertain whether it was coeval with the instance jurisdiction, and whether it is constituted by special commission, or ouly called into exercise thereby. After the doubts of so eminent a judge, it would not become me to express a decided opinion. But taking the fact that, in the earliest times, the jurisdiction is found in the possession of the admiralty, independent of any known special commission; that, in other countries, and especially in France, upon whose ancient prize ordinances the administration of prize law seems, in a great measure, to have been modeled (Vide Ordin. of France, A. D. 1400, Rob. Coll. Marit. p. 75; Ordin. of France, A. D. 1584; Id. p. 105; Treaty Henry 7 and Charles 8; Id, p. 83, and Rob. note, Id. 105), the jurisdictiou has uniformly belonged to the admiralty; there seems very strong reason to presume that it always constituted an ordinary and not an extraordinary branch of the admiralty powers; and so I apprehend it was considered by the Supreme Court of the United States, in *Glass et al.* v. *the Betsey* (3 Dall. 6).

However this question may be, as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, as to which I give no opinion, it is very **139***] clear that its jurisdiction is not *confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject matter. The words of the prize commission contain authority to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that are and shall be taken. The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens and rivers, but also of all captures made on land, where the same have been made by a naval force, or by cooperation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications. (*Key* and *Hubbard* v. *Pearse*, cited iu *Le Caux* v. *Eden*, Doug., 606; *Lindo* v. *Rodney*, Doug., 613, note; *the capture of the Cape of Good Hope*, 2 Rob., 274; *the Stella del Norte*, 5 Rob., 349; *the island of Trinidad*, 5 Rob., 92; *Thorshaven*, 1 Edw., 102; *the capture of Chrinsurah*, 1 Deten., 179; *the Rebeckah* 1 Rob., 227; *the Gertruyda*, 2 Rob., 211; the *Maria Francoise*, 6 Rob., 282.)

Such, then, being the acknowledged extent of the prize jurisdiction of the admiralty, it is, at least in as ample an extent, conferred on the courts of the United States. For the determination, therefore, of the case before the court, it is not necessary to claim a more ample jurisdiction; for the capture or seizure, though made in port, was made while the property was water-borne. Had it been landed and remained on land, it would have deserved consideration whether it could have been proceeded against as prize, under the admiralty jurisdiction, or whether, if liable to seizure and condemnation in our courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points I give no opinion. (See the case of *the Oester Eems* cited in the Two Friends, 1 Rob., 284, note; Hale de Portubus Maris, &c. in Harg. Law Tracts, ch. 28, p. 245, &c.; Parker Rep., 267.)

Having disposed of the question as to the jurisdiction of this court, I come to one of a more general nature; viz.: Whether, by the modern law of nations, the sovereign has a right to confiscate the debts due to his enemy, or the goods of his enemy found within his territory at the commencement of the war. I might spare myself the consideration of the question as to debts; but, as it *has [**140** been ably argued, I will submit some views respecting it, because they will illustrate and confirm the doctrine applicable to goods. It seems conceded, and indeed is quite too clear for argument, that, in former times, the right to confiscate debts was admitted as a doctrine of national law. It had the countenance of the civil law. (Dig. lib. 41, tit. 1; Id. lib. 49, tit. 15); of Grotius, (*De jure belli et pacis*, lib. 3, ch. 2, § 2, ch. 6, § 2, ch. 7, § 3 and 4, ch. 13, § 1, 2); of Puffendorf, (*De jure Nat. et Nat.*, lib. 8, ch. 6, § 23); and lastly of Bynkershoek, (*Quæst.* Pub. Juris, lib. 1, ch. 7), who is himself of the highest authority, and pronounces his opinion in the most explicit manner. Down to the year 1737, it may be considered as the opiniou of jurists that the right was unquestionable. It is, then, incumbent on those who assume a different doctrine, to prove that, since that period, it has by the general consent of nations, become incorporated into the code of public law. I take upon me to say that no jurist of reputation can be found who has denied the right of confiscation of enemies debts. Vattel has been supposed to be the most favorable to the new doc-

trine. He certainly does not deny the right to confiscate; and if he may be thought to hesitate in admitting it, nothing more can be gathered from it than that he considers that, in the present times, a relaxation of the rigor of the law has been in practice among the sovereigns of Europe. (Vattel, lib. 3, ch. 5, § 77.) Surely a relaxation of the law in practice cannot be admitted to constitute an abolition in prineiple, when the principle is asserted, as late as 1737, by Bynkershoek, and the relaxation shown by Vattel in 1775. In another place, however, Vattel, speaking on the subject of reprisals, admits the right to seize the property of the nation or its subjects by way of reprisal, and, if war ensues, to confiscate the property so seized. The only exception he makes is of property which has been deposited in the hands of the nation, and intrusted to the public faith; as is the case of property in the public funds. (Vattel, lib. 2, ch. 18, § 342, 343, 344.) The very exception evinces pretty strongly the opinion of Vattel as to the general rule. Of the character of Vattel as a jurist, I shall not undertake to express an opinion. That he has great merit is conceded; though a learned civilian, Sir James MacIntosh, informs us that he has fallen into great mistakes in important "praetical discussions of public law." **141*]** *(Discourse on the law of nations, p. 32, note.) But if he is singly to be opposed to the weight of Grotius and Puffendorf, and, above all, Bynkershoek, it will be difficult for him to sustain so unequal a contest. I have been pressed with the opinion of a very distinguished writer of our own country on this subject. (Camillus, No. 18 to 23, on the British treaty of 1794.) I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable. He proves incontrovertibly what the highest interest of nations dictates with a view to permanent policy; but I have not been able to perceive the proofs by which he overthrows the ancient principle. In respect to the opinion of Grotius, quoted by him in No. 20, as indicating a doubt by Grotius of his own principles, I cannot help thinking that the learned writer has himself fallen into a mistake. Grotius, in the place referred to (lib. 3, ch. 20, § 16), is not adverting to the right of confiscation, but merely to the general results of a treaty of peace. He says (§ 15), that, after a peace, no action lies for damages done in the war; but (§ 16), that debts due before the war are not, by the mere operations of the war, released, but remain suspended during the war, and the right to recover them revives at the peace. It is impossible to doubt the meaning of Grotius, when the preceding and succeeding sections are taken in connection. Grotius, therefore, is not inconsistent with himself, nor is "Bynkershoek more inconsistent;" for the latter explicitly avows the same doctrine, but considers it inapplicable to debts confiscated during the war; for these are completely extinguished. (Bynk. *Quæst.* Pub. Juris, ch. 7.)

It is supposed by the same learned writer, that the principle of confiscating debts had been abandoned for more than a century. That the practice was intermitted, is certainly no very clear proof of an abandonment of the principle. Motives of policy and the general interests of commerce may combine to induce a nation not to enforce its strict rights, but it ought not therefore to be construed to release them. It may, however, be well doubted if the practice is quite so uniform as it is supposed. *The case [***142** of the Silesia loan, which exercised the highest talents of the English nation, is an instance to the contrary, almost within half a century (in 1752). In the very elaborate discussions of national law to which that case gave birth, there is not the slightest intimation that the law of nations prohibited a sovereign from confiscating debts due to his enemies, even where the debts were due from the nation; though there is a very able statement of its injustice in that particular case; and the English memorial admits that when sovereigns or states borrow money from foreigners, it is very commonly expressed in the contract that it should not be seized as reprisals, or in case of war. Now, it strikes me that this very circumstance shows in a strong light the general opinion as to the ordinary right of confiscation. The stipulations of particular treaties of the United States have been cited, in corroboration of their general doctrine, by the claimant's counsel. These treaties certainly show the opinion of the government as to the impolicy of enforcing the right of confiscation against debts and actions. (See treaty with Great Britain, 1794, art. 10; with France, 1778, art. 20; with Holland, 8th October, 1782, art. 18; with Prussia, 11th July, 1799, art. 23; with Morocco, 1787, art. 24.) But I cannot admit them to be evidence for the purpose for which they have been introduced. It may be argued with quite as much if not greater force, that these stipulations imply an acknowledgement of the general right of confiscation, and provide for a liberal relaxation between the parties. I hold, with Bynkershoek (*Quæst.* Pub. Jur., ch. 7), that where such treaties exist, they must be observed; where there are none, the general right prevails. It has been further supposed that the common law of England is against the right of confiscating debts; and the declaration of *Magna Charta*, ch. 30, has been cited to show the liberal views of the British constitution. This declaration, so far as is necessary to the present purpose, is as follows: "If they" (*i. e.*, foreign merchants), "be of a land making war against us, and be found in our realm at the beginning of the war, they shall be attached without harm of body or goods (*rerum*) until it be known unto us, or our chief justice, how our merchants be entreated, then in the land making war against us, and if our merchants be well entreated there, theirs shall be likewise with us." I *quote the trans- [***143** lation of Lord Coke (2 Just., 27). This would certainly seem to be a very liberal provision; and if its true construction applied to all property and persons, as well transiently in the country as domiciled and fixed there, it would certainly be entitled to all the encomiums which it has received. (Montesq. Spirit of Laws, lib. 20, ch. 14.) How far it is now considered as binding, in relation to vessels and goods found within the realm at the commencement of the war, I shall hereafter consider. It will be ob-

served, however, that this article of *Magna Charta* does not protect the debts or property of foreigners who are without the realm; it is confined to foreigners within the realm upon the public faith on the breaking out of the war. Now, it seems to be the established rule of the common law, that all choses in action, belonging to an enemy, are forfeitable to the crown; and that the crown is at liberty, at any time during the war, to institute a process, and thereby appropriate them to itself. This was the doctrine of the year books, and stands confirmed by the solemn decision of the exchequer, in the *Attorney-General* v. *Weeden* (Parker Rep., 267; Maynard's Edw., 2, cited Ibid). It is a prerogative of the crown which, I admit, has been very rarely enforced (see Lord Alvanley's observations in *Furtado* v. *Rodgers*, 3 Bos. and Pul., 191); but its existence cannot admit of a legal doubt. On a review of authorities, I am entirely satisfied that, by the rigor of the law of nations and of the common law, the sovereign of a nation may lawfully confiscate the debts of his enemy, during war, or by way of reprisal; and I will add, that I think this opinion fully confirmed by the judgment of the Supreme Court in *Ware* v. *Hylton* (3 Dall., 199), where the doctrine was explicitly asserted by some of the judges, reluctantly admitted by others, and denied by none.

In respect to the goods of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius, and Puffendorf, and Bynkershoek, and Burlamaqui, and Rutherforth and Vattel. (See Grotius, and Puffendorf, and Bynkershoek *ubi supra;* and Bynk. Qu. Pub. Jur., c. 4 and 6; 2 Burlam., p. 209, sec. 12, p. 219, sec. 2, p. 221, sec. 11; Ruth. lib. 2, c. 9, p. 558 to 573.) Such, also, is the rule of the common law. (Hale in Harg. law tracts, p. 245, c. 18.) Vattel **144***] has indeed contended (and *in this he is followed by Azuni, part 2, ch. 4, art. 2, sec. 7), that the sovereign declaring war can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration, because they came into the country upon the public faith. This exception (which, in terms, is confined to the property of persons who are within the country), seems highly reasonable in itself, and is an extension of the rule in *Magna Charta*. But, even limited as it is, it does not seem followed in practice; and Bynkershoek is an authority the other way. (Bynk. *Quæst.* Pub. Jur., c. 2, 3, 7.) In England, the provision in *Magna Charta* seems, in practice, to have been confined to foreign merchants domiciled there; and not extended to others who came to ports of the realm for occasional trade. Indeed, from the language of some authorities, it would seem that the clause was inserted, not so much to benefit foreign merchants as to provide a remedy for their own subjects, in cases of hostile injuries in foreign countries. (See the opinion of Ch. J. Lee in *Key* v. *Pearse*, cited Doug., 606, 607.) However this may be, it is very certain that Great Britain has uniformly seized, as prize, all vessels and cargoes of her enemies found afloat in her ports at the commencement of war. Nay, she has proceeded yet farther, and, in contemplation of hostilities, laid embargoes on foreign vessels and cargoes, that she might, at all events, secure the prey. It cannot be necessary for me to quote authorities on this point. In the articles respecting the droits of admiralty in 1665, there is a very formal recognition of the rights of the crown to all vessels and cargoes seized before hostilities. (*The Rebeckah*, 1 Rob., 227, and Id., 230, note [a.]) This exercise of hostile right, of the *summum jus*, is so far, indeed, from being obsolete, that it is in constant operation, and, in the present hostilities, has been applied to the property of the citizens of the United States. Of a similar character is the detention of American seamen found in her service at the commencement of the war, as prisoners of war; a practice which violates the spirit, though not the letter, of *Magna Charta;* and, certainly, can, in equity and good faith, find few advocates. Of the right of Great Britain thus to seize vessels and cargoes found in her ports on the breaking out of war, I do not find any denial in authorities which are *entitled to much weight; and I, there- [***145** fore, consider the rule of the law of nations to be, that every such exercise of authority is lawful, and rests in the sound discretion of the sovereign of the nation.

The next question is, whether Congress (for with them rests the sovereignty of the nation as to the right of making war, and declaring its limits and effects) have authorized the seizure of enemies' property afloat in our ports. The act of 18th June, 1812, ch. 102, is in very general terms, declaring war against Great Britain, and authorizing the President to employ the public forces to carry it into effect. Independent of such express authority, I think that, as the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized. In cases where no grant is made by Congress, all such captures, made under the authority of the executive, must enure to the use of the government. That the executive is not restrained from authorizing captures on land, is clear from the provisions of the act. He may employ and actually has employed the land forces for that purpose; and no one has doubted the legality of the conduct. That captures may be made, within our own ports, by commissioned ships, seems a natural result of the language—of the generality of expression in relation to the authority to grant letters of marque and reprisal to private armed vessels, which the act does not confine to captures on the high seas, and is supported by the known usage of Great Britain in similar cases. It would be strange, indeed, if the executive could not authorize or ratify a capture in our own ports, unless by granting a commission to a public or private ship. I am not bold enough to interpose a limitation where Congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived, that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. This, though a strictly *national right, is so [***146**

justly deemed odious in modern times, and is so generally discountenanced that nothing but an express act of Congress would satisfy my mind that it ought to be included among the fair objects of warfare; more especially as our own government have declared it unjust and impolitic. But if Congress should enact such a law, however much I might regret it, I am not aware that foreign nations, with whom we have no treaty to the contrary, could, on the footing of the rigid law of nations, complain, though they might deem it a violation of the modern policy.

On the whole, I am satisfied that Congress have authorized a seizure and condemnation of enemy property found in our ports under the circumstances of the present case. And the executive may lawfully authorize proceedings to enforce the confiscation of the same property before the proper tribunals of the United States. The District Attorney is, for this purpose, the proper agent of the executive and of the United States. From the character and duties of his station, he is bound to guard the rights of the United States, and to secure their interests. Whenever he chooses to institute proceedings on behalf of the United States, it is presumed by courts of law that he has the sanction of the proper authorities; and that presumption will avail, until the executive or the legislature disavow the proceedings, and sanction a restoration of the property.

I have taken up more time than I originally intended, in discussing the various subjects submitted in the argument. An apology will be found in their extraordinary importance. If I shall have successfully shown that the principles of prize law, as admitted in England and in the United States, have the sanction of the principles of public law and public jurists, I shall not regret the labor that has been employed, although, in this particular case, I may pronounce an erroneous sentence.

I reverse the decree of the District Court, and condemn the 550 tons of timber to the United States; subject, however, to the right of the owners of the Emulous to a re-imbursement of their actual charges and expenses for the custody of the property, which I shall reserve for further consideration; and I shall order the **147***] said *property to be sold, and the proceeds brought into court to abide the further order of the court.

Such is the opinion which I had the honor to pronounce in the Circuit Court; and upon the most mature reflection, I adhere to it. The argument in this court, urged on behalf of the claimant, has put in controversy the same points which were urged before me. But as the opinion of this court admits many of the principles for which I contended, I shall confine my additional remarks to such as have been overruled by my brethren.

It seems to have been taken for granted in the argument of counsel that the opinion held in the Circuit Court proceeded, in some degree, upon a supposition that a declaration of war operates *per se* an actual confiscation of enemy's property found within our territory. To me this is a perfectly novel doctrine. It was not argued, on either side, in the Circuit Court, and certainly never received the slightest countenance from the court. I disclaim, therefore, any intention to support a doctrine which I always supposed to be wholly untenable. I go yet further, and admit that a declaration of war does not, of itself, import a confiscation of enemies' property within or without the country, on the land or on the high seas. The title or the enemy is not by war devested, but remains *in proprio vigore*, until a hostile seizure and possession has impaired his title. All that I contend for is, that a declaration of war gives a right to confiscate enemies' property, and enables the power to whom the execution of the laws and the prosecution of the war are confided, to enforce that right. If, indeed, there be a limit imposed as to the extent to which hostilities may be carried by the executive, I admit that the executive cannot lawfully transcend that limit; but if no such limit exist, the war may be carried on according to the principles of the modern law of nations, and enforced when and where, and on what property the executive chooses.

In no act whatsoever, that I recollect, have Congress declared the confiscation of enemies' property. They have authorized the President to grant letters of marque and general reprisal, which he may revoke and annul *at his [***148** pleasure; and even as to captures actually made under such commissions, no absolute title by confiscation vests in the captors, until a sentence of condemnation. If, therefore, British property had come into our ports since the war, and the President had declined to issue letters of marque and reprisal, there is no act of Congress which, in terms, declares it confiscated and subjects it to condemnation. If, nevertheless, it be confiscable, the right of confiscation results not from the express provision of any statute, but from the very state of war which subjects the hostile property to the disposal of the government. But until the title should be devested by some overt act of the government and some judicial sentence, the property would unquestionably remain in the British owners, and if a peace should intervene, it would be completely beyond the reach of subsequent condemnation.

There is, then, no distinction recognized by any act of Congress between enemies' property which was within our ports at the commencement of war, and enemies' property found elsewhere. Neither are declared *ipso facto* confiscated; and each, as I contend, are merely confiscable.

I will now consider what, in point of law, is the operation of the acts of Congress made in relation to the present war.

The act of 18th June, 1812, ch. 102, declares war to exist between Great Britain and the United States, and authorizes the President of the United States to use the land and naval force of the United States to carry the same into effect; and further authorizes him to issue letters of marque, &c., to private armed vessels, against the vessels, goods and effects of the government of Great Britain and the subjects thereof.

The prize act of 26th June, 1812, ch. 107, confers the power on the President to issue instructions to private armed vessels, for the regulation of their conduct. The act of 6th July, 1812, ch. 128, authorizes the President to make regulations, &c., for the support and

exchange of prisoners of war. The act of 6th July, 1812, ch. 129, respecting trade with the **149***] enemy, authorizes the President *to grant passports for the property of British subjects within the limits of the United States during the space of six months, and protects certain British packets, &c., with dispatches, from capture. The act of 3d March, 1813, ch. 203, vests in the President the power of retaliation for any violation of the rules and usages of civilized warfare by Great Britain.

These are all the acts which confer powers, or make provisions touching the management of the war. In no one of them is there the slightest limitation upon the executive powers growing out of a state of war; and they exist, therefore, in their full and perfect vigor. By the constitution, the executive is charged with the faithful execution of the laws; and the language of the act declaring war authorizes him to carry it into effect. In what manner, and to what extent, shall he carry it into effect? What are the legitimate objects of the warfare which he is to wage? There is no act of the legislature defining the powers, objects or mode of warfare. By what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion, or he can have none. Upon what principle, I would ask, can he have an implied authority to adopt one and not another? The best manner of annoying, injuring and pressing the enemy, must, from the nature of things, vary under different circumstances; and the executive is responsible to the nation for the faithful discharge of his duty, under all the changes of hostilities.

But it is said that a declaration of war does not, of itself, import a right to confiscate enemies' property found within the country at the commencement of war. I cannot admit this position in the extent in which it is laid down. **150***] *Nothing, in my judgment, is more clear from authority than the right to seize hostile property afloat in our ports at the commencement of war. It is the settled practice of nations, and the modern rule of Great Britain herself, applied (as appears from the affidavits in this very cause) to American property in the present war; applied, also, to property not merely on board of ships, but to spars floating alongside of them. I forbear, however, to press this point, because my opinion in the court below contains a full discussion of it.

It is also said that a declaration of war does not carry with it the right to confiscate property found in our country at the commencement of war, because the constitution itself, in giving Congress the power "to declare war, "grant letters of marque and reprisal, and "make rules concerning captures on land and "water," has clearly evinced that the power to declare war did not, *ex vi terminorum*, include a right to capture property everywhere, and that the power to make rules concerning captures on land and water, may well be considered as a substantive power as to captures of property within our own territory. In my judgment, if this argument prove anything, it proves too much. If the power to make rules respecting captures, &c., be a substantive power, it is equally applicable to all captures, wherever made, on land or on water. The terms of the grant import no limitation as to place; and I am not aware how we can place around them a narrower limit than the terms import. Upon the same construction, the power to grant letters of marque and reprisal is a substantive power; and a declaration of war could not, of itself, authorize any seizure whatsoever of hostile property, unless this power was called into exercise. I cannot, therefore, yield assent to this argument. The power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect. If the constitution had been silent as to letters of marque and captures, it would not have narrowed the authority of Congress. The authority to grant letters of marque and reprisal, and to regulate captures, are ordinary and necessary incidents to the power of declaring war. It would be utterly ineffectual without them. The expression, therefore, of that which is implied in the very nature of the grant, cannot weaken the *force of the grant itself. [***151** The words are merely explanatory, and introduced *ex abundanti cautela*. It might be as well contended that the power "to provide and maintain a navy" did not include the power to regulate and govern it, because there is in the constitution an express provision to this effect. And yet I suppose that no person would doubt that Congress, indepeudent of such express provision, would have the power to regulate and govern the navy; and if they should authorize the executive "to provide and maintain a navy," it seems to me as clear that he must have the incidental power to make rules for its government. In truth, it is by no means unfrequent in the constitution to add clauses of a special nature to general powers which embrace them, and to provide affirmatively for certain powers, without meaning thereby to negative the existence of powers of a more general nature. The power to provide "for the common defense and general welfare," could hardly be doubted to include the power "to borrow money;" the power "to coin money," to include the power "to regulate the value thereof;" and the power "to raise and support armies," to include the power "to make rules for the government and regulation" thereof. On the other hand, the affirmative power "to define and punish piracies and felonies committed on the high seas," has never been supposed to negative the right to punish other offenses on the high seas; and Congress have actually legislated to a more enlarged extent. I cannot, therefore, persuade myself that the argument against the doctrine for which I contend, is at all affected by any provision in the constitution.

The opinion of my brethren seems to admit that the effect of hostilities is to confer all the rights which war confers; and it seems tacitly

to concede, that, by virtue of the declaration of war, the executive would have a right to seize enemies' property which should actually come within our territory during the war. Certainly no such power is given directly by any statute. And if the argument be correct, that the power to make captures on land or water must be expressly called into exercise by Congress, before the executive can, even after war, enforce a capture and condemnation, it will be very difficult to support the concession. Suppose a British
152*] *ship of war or merchant ship should now come within our ports, there is no statute declaring such ship actually confiscated. There is no express authority either for the navy or army to make a capture of her; and although the executive might authorize a private armed ship so to do, yet it would depend altogether on the will of the owners of the ship, whether they would so do or not. Can it be possible that the executive has not the power to authorize such seizure? And if he may authorize a seizure by the army or navy, why not by private individuals if they will volunteer for the purpose?

The act declaring war has authorized the executive to employ the land and naval force of the United States, to carry it into effect. When and where shall he carry it into effect? Congress have not declared that any captures shall be made on land; and if this be a substantive power, not included in a declaration of war, how can the executive make captures on land, when Congress have not expressed their will to this effect? The power to employ the army and navy might well be exercised in preventing invasion, and in the common defense, without necessarily including a right to capture, if the right to capture be not an incident of war; and upon what ground, then, can the executive plan and execute foreign expeditions or foreign captures? Upon what ground he can authorize a Canadian campaign, or seize a hostile fort or territory, and occupy it by right of capture and conquest I am utterly at a loss to perceive, unless it be that the power to carry the war into effect gives every incidental power which the law of nations authorizes and approves in a state of war. I am at a loss to perceive how the power exists, to seize and capture enemy's property which was without our territory at the commencement of the war, and not the power to seize that which was within our territory at the same period. Neither are expressly given nor denied (except as to private armed ships), and how can either be assumed except as an incident of war, acknowledged upon national and public principles? It may be suggested that the executive, "as commander-in-chief of the army and navy," has the power to make foreign conquests. But this is utterly inadmissible, if the right to authorize captures resides
153*] as a substantive power in *Congress, and does not follow as an incident of a declaration of war; and certainly the rights of the "commander-in-chief" must be restrained to such acts as are allowed by the laws. Besides, the same difficulty meets us here as in the former case; if his powers, as commander-in-chief, authorize him to make captures without the territory, why not within the territory?

The acts respecting alien enemies and prisoners of war, have been supposed, even in a state of actual war, to confer new powers on the executive. I cannot accede to the inference in the extent to which it is claimed. In general, these acts may be deemed mere regulations of war, limiting and directing the discretion of the executive; and it cannot be doubted that Congress had a perfect right to prescribe such regulations. To regulate the exercise of the rights of war as to enemies, does not, however, imply that such rights have not an independent existence. Besides, it is clear that the act respecting alien enemies applies only to aliens resident within the country; and not to the property of aliens, who are not so resident. I might answer, in the same manner, the argument drawn from the act of 6th July, 1812, ch. 129, § 4, and the act of 3d of March, 1813, ch. 203. But even admitting that these acts did confer some new powers, still, as these powers do not respect the present case, I cannot consider them as affording even a legislative implication against the existence of the powers for which I contend.

It has been supposed that my opinion assumes for its basis the position that modern usage constitutes a rule which acts directly on the thing itself by its own force, and not through the sovereign power. Certainly I do not admit this supposition to be correct. My argument proceeds upon the ground that when the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, *as to declaring war and limiting its [*
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effects, rests with the legislature. The sovereignty, as to its execution, rests with the President. If the legislature do not limit the nature of the war, all the regulations and rights of general war attach upon it. I do not, therefore, contend that modern usage of nations constitutes a rule acting on enemies' property, so as to produce confiscation of itself, and not through the sovereign power; on the contrary, I consider enemies' property in no case whatsoever confiscated by the mere declaration of war; it is only liable to be confiscated at the discretion of the sovereign power having the conduct and execution of the war. The modern usage of nations is resorted to merely as a limitation of this discretion, not as conferring the authority to exercise it. The sovereignty to execute it is supposed already to exist in the President, by the very terms of the constitution; and I would again ask, if this general power to confiscate enemies' property does not exist in the executive, to be exercised in his discretion, how is it possible that he can have authority to seize and confiscate any enemies' property coming into the country since the war, or found in the enemies' territory? Yet I understood the opinion of my brethren to proceed upon the tacit acknowledgement that the executive may seize and confiscate such property under the circumstances which I have stated.

On the whole, I am still of opinion that the

judgment of the Circuit Court was correct and ought to be affirmed.

It is due, however, to myself to state, that, at the trial in the Circuit Court, it was agreed that the timber had always been afloat ou tide waters; and the affidavit by which it is proved to have rested on land at low tide, was not taken uutil after the hearing and decision of the cause.

In the opinion which I have expressed I am authorized to state that I have the concurreuce of one of my brethren.

S. C. 1 Gall. 563.
Cited—2 Black, 671, 687; 6 Wall. 537; 7 Wall. 557; 11 Wall. 316; 20 Wall. 468; 6 Otto, 181, 284, 309; 7 Otto, 52, 54; Newb. 358, 365; 1 Low. 15; 9 Blatchf. 462; Blatchf. Pr. 90, 207, 212, 213; 3 Ben. 120; 5 Blatchf. 237; Woolw. 251, 262; 2 Sprague, 130; 2 Wood. & M. 52.

155*] *THE RAPID, PERRY, MASTER.

After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property.

THIS was an appeal from the sentence of the Circuit Court, for the District of Massachusetts.

The material facts in the case were these:

Jabez Harrison, a native American citizen, the claimant aud appellaut in this case, had purchased a quantity of English goods in England, before the declaration of war by the United States against that country, and deposited them on a small island belonging to the English, called Indian island, and situated near the line between Nova Scotia and the United States. Upon the breakiug out of the war, Harrison's agents in Boston hired the Rapid, a vessel licensed and enrolled for the cod-fishery, to proceed to the place of deposit and bring away the goods. The Rapid accordingly sailed from Boston on the 3d of July, 1812, with Harrisou, the claimant, on board, proceeded to Eastport, where Harrison was left, and from there, agreeably to Harrison's orders, to Indian island, where the cargo in question was taken on board. Ou the 8th of July, while ou her return, she was captured by the Jefferson privateer, on the high seas, and brought into Salem. The goods, being libeled as prize, and claimed by Harrison as his property, were condemned, iu the Circuit Court of Massachusetts, to the captors, on the ground that by "trading with the enemy," they had acquired the character of enemies' property.

A claim was also interposed by the United States, on the grouud of a violation, by the Rapid, of the non-intercourse act. This claim was also rejected. From the decree of the Circuit Court the United States and Harrison appealed.

Harper, for Harrison.

The ground of condemuation, iu the Circuit Court, of the goods in question, was, that trading with the enemy made them enemies' property. But we contend that, in this case, there **156***] was no trading with the enemy. *Trading is a commercial contract or a series of coutracts of sale. Coutract is of the essence of trading. But no commercial transactiou of this kind took place betweeu Harrison and the enemy. The contract, in the present case, was made, the goods were purchased aud paid for before the declaration of war; consequently when the British were friends. Here was merely a case of removal by Harrison of his own property from the enemies' country to this, it was the simple exercise of an act of ownership, and an act which surely does not invest the property with a hostile character.

Every citizen has a right, on the breaking out of a war, to withdraw his property, purchased before the war, from the enemy's country aud remove it to his own; and it is certainly the interest of the community to permit such removal.

The cargo, therefore, being American property, neither the declaration of war nor the commissiou of the privateer authorized the capture.

But this case does not rest on general principles alone. In the case of *Hallet* v. *Jenks* (3 Cranch, 210), the actual purchase of a cargo in a French port was decided by this court to be no violation of the non-intercourse act of 13th June, 1798, a case much stronger than the present. Congress, also, has given a very different construction to transactions of this kind by the act of 27th February, 1813 (laws U. S., vol. 11, p. 388), remitting the forfeitures which had accrued uuder the non-intercourse act of March 1st, 1809. (Laws U. S., vol. 9, p. 243.)

The claim of the United States will uot, at this time, be interposed.[1]

Pitman, contra, contended,

1. That it appeariug, on the face of Harrison's claim, that the property iu question was put on board the Rapid in violation of the laws of the United States, he can have *uo [***157** standing in court for the purpose of claiming the same.

In support of this point he cited the following cases: 2 Rob., 72, 77, *The Walsingham Packet;* 5 Rob., 28, 32, *The Cornelis* and *Maria;* 6 Rob., 348, *The Recovery.*

2. That all intercourse with the enemy being illegal, the vessel and cargo iu question are subjected to confiscation as prize. The following cases were cited as going to establish this point: Dupouceau's Bynkershoek, p. 24, 5 Rob., 224, 253, 4, *The Abby;* Id., 302, *The Jonge Cassini;* 1 Rob., 208, 248, *The Odin;* Id., 178, 212, case of *The Fortuna*, cited in the case of *The Hoop;* Edwards' Adm. Rep., 32, *The Comet;* 1 Rob., 76, *The Santa Cruz;* Id., 196 *The Hoop;* Id., 74, 89, *The Ringende Jacob;* 1 Bos. and Pul., 349, case of *The Louisa Margaretha*, cited in *Bell* v. *Gibson;* 8 T. R., 556, case of *St. Philip*, cited in *Potts* v. *Bell;* Id., 561, Lord Kenyon's opinion; 3 Rob. Apx. B., p. 7, 294, *The Angelique;* 4 Rob., 289, 355, *The Venus;* Id., 206, 251, *The Nayade;* 1 Rob., 126, 150 *The Vrow Judith;* Id., 78, 93, *The Betsey;* Id., 144, 170, *The Neptunus;* Id., 184, 219, case of *The Nelly*, cited in note to the case of *The Hoop;* 4 Rob., 161, 195, *Madonna delle Gracie;* 5 Rob., 141, *Juffrow Catharina.*

Pinkney, on the same side.

By the constitution of the United States, Congress has power to declare war. War, in

1.—This claim was subsequently, during the same term, revived, and an argument had thereupon. The decision of the court will be found in the opinion delivered March 15th, in the case of the Sally.

the present case, had been declared. After knowledge of the declaration of war, the claimant fitted out a vessel to go to the enemies' country to bring away his property. The voyage was accordingly prosecuted, and the property brought away. By this intercourse with the enemy the vessel and cargo are to be considered as having adhered to the enemy, and as being, *pro hac vice*, hostile.

With regard to the general principle, that trade with an enemy is illegal, there can be no doubt: the principle is recognized by the common law and by the maritime codes of all the European nations. By these laws all intercourse with an enemy, not sanctioned by the sovereign power, is prohibited. This principle is founded on the strongest reasons. Without **158***] this salutary * provision, what a wide door would be opened for every species of treasonable intercourse. The English authorities are almost omnipotent on this subject. (Vid. 8, T. R., 554, *Potts* v. *Bell;* Sir J. Nicholl's argument, and the cases there cited.) Many of these authorities are judicial decisions in cases which occurred before the revolution. The principle contended for was therefore brought over, before that time, by the English emigrants to this country, and is consequently to be considered of equal force here as in England.

The doctrine, then, may be considered as established.

The voyage, in this case, was undertaken by Harrison with full knowledge of the war—against his double duty—in violation both of the non-importation act and of the rights of war.

But the appellants have attempted to take a distinction between a purchase made before the declaration of war and a purchase made since; and they contend that, as the purchase, in the present case, was made previous to the declaration of war, the property is not liable to confiscation, no trading having been carried on with the enemy. But all the cases on this subject condemn such a distinction. Any commercial intercourse with the enemy is trading, within the meaning of the term as used in prize law; and that, for the very obvious reason before assigned, viz., that if commercial intercourse of any kind were permitted, it would facilitate the means of carrying on a traitorous correspondence.

The case of *Hallet* v. *Jenks* (3 Cranch, 210), cited by the appellants, was a case of clear compulsion. The transaction in the present case was perfectly voluntary.

Harper, in reply.

No case has been cited by the claimant's counsel in which there was not a trading with the enemy. Here, we contend, there was none In the case of *Escott*, cited in the case of *The Hoop* (1 Rob., 182), the goods were the product of a trade long carried on, and shipped under fictitious names. Here they were shipped openly. No circumstances of suspicion at-**159***] tended the transaction. *In some of the cases cited, part of the goods were purchased after the declaration of war. All the cases cited are either new acts of trade, or a continuation of trade in the regular course of employment of the parties, and are also attended with circumstances of suspicion.

The mere act of going into the enemies' country is not illegal. Any man may go thither at any time, if the enemy will permit him. He violates no law of his own country by so doing. Those laws prohibit commercial intercourse only; and that, not because it gives an opportunity of affording information to the enemy and opens a door for the commission of traitorous practices, but because such prohibition is rendered necessary by the modern mode of warfare which is intended to affect the enemy through his commerce. The principle and object of the rule, therefore, are not applicable to this case. The rule is confined to commercial transactions and commercial objects. If facility of treasonable intercourse were the reason on which the prohibition is founded, it would operate to prevent our citizens from going to the frontiers, or even towards them—an operation which was surely never intended to be given it. The question to be considered in every case of this nature is this: Has the privilege of going to the enemies' country been applied to improper purposes?

Monday, March 7th. *Absent*—TODD, *J.*

JOHNSON, *J.*, delivered the opinion of the court as follows:

This capture was made on the high seas, about a month after the declaration of war. The claimant, Harrison, had purchased a quantity of English goods in England, "a long time," to use his own language, before the declaration of war, and deposited them on a small island, called Indian island, near to the line between Nova Scotia and these states. Upon the breaking out of the war, his agents in Boston hired the Rapid, a licensed vessel in the cod-fishery, to proceed to the place of deposit and bring away these goods. On her return she was captured by the Jefferson privateer, and was condemned for trading with the enemy's country.

*On the argument, it was contended, [***160** in behalf of the appellant, that this was not a trading within the meaning of the cases cited to support the condemnation; that, on the breaking out of a war, every citizen had a right, and it was the interest of the community to permit her citizens, to withdraw property lying in an enemy's country and purchased before the war; finally, that neither the declaration of war nor the commission of the privateer authorized the capture of this vessel and cargo, as they were, in fact, American property.

It is understood that the claim of the United States for the forfeiture is not now interposed. The court, therefore, enters upon this consideration unembarrassed by a claim which would otherwise ride over every question now before us.

This is the first case, since its organization, in which this court has been called upon to assert the rights of war against the property of a citizen. It is with extreme hesitation, and under a deep sense of the delicacy of the duty which we are called upon to discharge, that we proceed to adjudge the forfeiture of private right, upon principles of public law highly penal in their nature, and unfortunately too little understood.

But a new state of things has occurred—a new character has been assumed by this nation,

which involves it in new relations, and confers on it new rights; which imposes a new class of obligations on our citizens, and subjects them to new penalties.

The nature and consequences of a state of war must direct us to the conclusions which we are to form on this case.

On this point there is really no difference of opinion among jurists; there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations.

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The **161***] individuals who compose *the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.

War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother; and accustoms the ear of humanity to hear with indifference, perhaps exultation, "that thousands have been slain."

These are not the gloomy reveries of the bookman. From the earliest time of which historians have written or poets imagined, the victor conquered but to slay, and slew but to triumph over the body of the vanquished. Even when philosophy had done all that philosophy could do to soften the nature of man, war continued the gladiatorian combat; the vanquished bled wherever caprice pronounced her *fiat*. To the benign influence of the Christian religion it remained to shed a few faint rays upon the gloom of war; a feeble light but barely sufficient to disclose its horrors. Hence, many rules have been introduced into modern warfare at which humanity must rejoice, but which owe their existence altogether to mutual concession, and constitute so many voluntary relinquishments of the rights of war. To understand what it is in itself, and what it is under the influence of modern practice, we have but too many opportunities of comparing the habits of savage with those of civilized warfare.

On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. It is not necessary to quote the authorities on this subject; they are numerous, explicit, respectable, and have been ably commented upon in the argument.

But, after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty?

162*] *The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent, and of the property found engaged in anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.

This liability of the property of a citizen to condemnation as a prize of war, may be likewise accounted for under other considerations. Everything that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally at the same time that he makes out his interest, he confesses the commission of an offense which, under a well-known rule of the civil law, deprives him of his right to prosecute his claim.

This doctrine, however, does not rest upon abstract reason. It is supported by the practice of the most enlightened (perhaps we may say of all) commercial nations. And it affords us full confidence in our decision, that we find, upon recurring to the records of the Court of Appeals in prize cases established during the revolutionary war, that, in various cases, it was reasoned upon as the acknowledged law of that court. Certain it is that it was the law of England before the revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this court in pursuance of the constitution.

After taking this general view of the principal doctrine on this subject, we will consider the points made in behalf of the claimant in this case, and,

1. Whether this was a trading, in the eye of the prize law, such as will subject the property to capture.

The force of the argument on this point depends upon the terms made use of. If by trading, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule, is to cut off all communication or actual *locomotive [***163** intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility, is the offense against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument.

2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimant certainly had not a right to leave the United States for the purpose of bringing home his property from an enemy country; much less could he claim it as a right to bring into this country goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known that the forfeiture was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American *charge d'affaires* in England. But this claimant could allege no such excuse.

3. On the third point, we are of opinion that

the foregoing observations furnish a sufficient answer.

If the right to capture property thus offending, grows out of the state of war, it is enough to support the condemnation in this case, that the act of Congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume the belligerent character.

Such a character, we are of opinion, this vessel and cargo took upon herself; or at least, she is deprived of the right to prove herself otherwise.

We are aware that there may exist considerable hardship in this case—the owners, both of vessel and cargo, may have been unconscious that they were violating the duties which a state of war imposed upon them. It does not appear that they meant a daring violation either **164***] *of the laws or belligerent rights of their country. But it is the unenvied province of this court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling.

Friday, March 11th. The claim of the United States was taken up.

Rush, Attorney-General.

The United States claim the property in question as a forfeiture under the non-intercourse act of 1st March, 1809. This act was in force at the breaking out of the war, and still continued in force at the time of the capture of the Rapid. The 6th section of the act declares the prohibited goods liable to forfeiture immediately on being shipped with intention of importing the same into the United States. The United States do not claim in any case but where the vessel was unquestionably bound and sailing to the United States, and when no force was necessary to bring her in. When such a vessel actually arrives in a port of the United States, the intent is not only evidenced, but carried into effect, and the offense is complete.

The arrival, in this case, must be taken as a voluntary coming into port. For as the Rapid was bound to the United States previous to the capture, the intervention of the privateer was immaterial, and cannot be considered as rendering the arrival involuntary. The commencement of the illegal act was at the time of the shipment, and was prior to any forfeiture under belligerent rights. The forfeiture under the non-intercourse act, therefore, relates back to the inception of the offense. The municipal law, we contend, abrogated the *jus belli, pro tanto.*

It is true that, by the 14th section of the prize act of 26th June, 1812, (laws U. S., vol. 11, p. 238), provision is made for the importation of British goods captured from the enemy and made good and lawful prize of war; and it is admitted that such goods are forfeited and accrue to the captors; but the question recurs, **165***] what is *good and lawful prize of war? Not, we contend, American property in an American bottom coming to the United States, as in the present case.

By the 16th section of the same act, the act of 4th of April, 1812, laying an embargo, and the non-exportation act of the 14th of the same month, are repealed so far as they relate to ships and vessels having commissions or letters of marque and reprisal. It was equally necessary that there should be an express repeal of the non-intercourse act.

By the act of 2d January, 1813, (laws U. S., vol. 11, p. 341), directing the Secretary of the Treasury to remit fines, forfeitures and penalties in certain cases, property shipped and departing from Great Britain between the 23d of June and 15th of September, and forfeited, under the non-intercourse acts, to the United States, is to be restored to the owners, no notice is taken of any claim of the captors. The plain inference is, that the legislature did not suppose that any claim existed on the part of the captors. The same inference may be drawn from the act of 27th February, 1813, (laws U. S., vol. 11, p. 388).

The sovereign is not to be deprived of his rights by implication. Where the rights of the sovereign clash with those of a private individual, the rights of the latter must yield to those of the former. (2 Cranch, 358, *Fisher* v. *Blight;* Plowd., fo. 253, *Hales* v. *Petit.*) This last is a leading case on this point.

From the act of 13th July, 1813, (laws U. S., vol. 12, p. 14), it is clearly to be inferred, that, previous to the passage of that act, the rights of the captors were considered as being merged in the forfeiture under the non-intercourse acts. The act of July has merely suspended the right of the United States.

Pitman, contra, for the captors.

We do not claim adversely to the United States, but under the United States, as grantees. We were authorized by our commission to capture this vessel, and, upon capture, it was forfeited to us; condemnation, we *con- [***166** tend, is not necessary to give us title: our title accrued at the moment of capture. The United States relinquished to us their right by the fourth section of the prize act.

The non-intercourse act had reference solely to time of peace.

The property in question could not be forfeited to the United States, merely by being put on board; for a municipal law can only have a municipal operation; it cannot operate extraterritorially; it can have no effect upon goods in a foreign country, whether that country be hostile or neutral.

Again, by the act of 1st March, 1809, sec. 8, no persons are authorized to seize property for a violation of that act, except the officers particularly mentioned therein. Until, therefore, a seizure was made by some person so authorized, no forfeiture to the United States could attach; and if, as in the present case, a seizure had been made *jure belli,* no seizure under the municipal act could subsequently be made, until the first was determined. (1 Rob., 68, 81, *The Mercurius.*)

The non-intercourse act was merged in the declaration of war, as it respected British subjects and American citizens; this property was therefore forfeited to the United States *jure belli;* they had a right to seize it *jure belli.* This right they have granted to us, and our title to the property we have captured must be tried *jure belli.* If this were a municipal seizure,

and if the property were British, the British owner would have had a right to come into court and assert his claim; but this he could not now do, being an alien enemy.

The 2d sec. of the act of the 13th July, 1813, we consider, notwithstanding what has been said by the counsel for the United States, as acknowledging a previous right in the captors.

Jones, on the same side, considered,

1st. The law independent of the instructions of the President to privateers.

167*] *2d. The instructions themselves.

1st. The United States did not mean to relinquish the broad ground of *jus belli*, as to British property coming to the United States.

The declaration of war and the prize act, being subsequent to the non-intercourse law, are to be considered as having abrogated or superseded that law.

But if this should not be admitted, we contend that these acts may exist together without any inconsistency. There is room enough for the non-intercourse and the prize act both. It has been decided by this court, that trading with the enemy is, *per se*, a ground of confiscation. There, then, the prize act may operate. But many hostile cargoes may escape capture, and reach the United States. Many such cargoes may be imported by neutrals. Here is room for the operation of the non-intercourse act.

The act of 13th July, 1813, relinquishing to the captors the claims of the United States to the captured property, is conclusive to show that the United States did not mean to relinquish the rights of war. That act describes the property to which the United States give up their claim, as property captured on the high seas, without limitation.

2d. As to the President's instructions. These instructions do not apply to vessels sailing after knowledge of the declaration of war.

But we contend that the President, not having the power of war and peace, had no authority to give such instructions; he could only control the privateers by the power he had of revoking their commissions. There is a difference between his power over these vessels and his power over the public armed ships of the United States.

The prizes taken by privateers under the prize act are forfeitures, and are to be appropriated differently from those captured under the non-intercourse act.

To show that the capture, and not the con-

168*] demnation, *is the foundation of the captor's right of property, the court is referred to 1 Wils., 211, *Morrough* v. *Comyns*.

Irving, contra.

By the 3d section of the prize act, privateers are bound to observe all the laws of the United States. Supposing, therefore, the non-intercourse act to have been in force, they had no right to seize for a violation of that act. Besides, the mode of prosecution under the non-intercourse act is essentially different from that directed to be pursued under the prize act. There is also a difference in the manner of distributing the captured property.

Pinkney. The rights of the captors depend not upon the non-intercourse act. Both that and the prize act may be in force at the same time, and operate on the same thing. The first seizure decides which mode of condemnation, &c., shall be adopted.

Harper, in reply.

There is a distinction between importations made by citizens of the United States and those made by foreigners. The latter cannot be affected by the non-intercourse act until the goods have arrived within the United States. They commit no offense till the goods are actually imported. But with regard to citizens of the United States the case is different. They are guilty of a violation of the act by the mere shipment of prohibited goods in a foreign country, with intent to import the same into the United States. The law, as to them, has an extraterritorial operation; it binds them wherever they are. By the shipment, therefore, at Indian Island with intent to import into the United States, the property in the present case was immediately forfeited; and the right of the United States to the forfeiture, at that moment became complete.

For the opinion of the court on the foregoing question, respecting the claim of the United States, under the non-intercourse act, see the opinion in the case of the *Sally*, delivered by STORY, *J.*, 15th March, 1814, in which the court decided in favor of the captors.

Aff'g—1 Gall. 295.
Cited—8 Cranch, 179, 383, 444, 454; 7 Peters, 593; 18 How. 114; 5 Wall. 405; 6 Wall. 535; 7 Wall. 557; 6 Otto, 301, 302; Blatchf. Pr. 68, 74, 76, 162; Newb. 391, 399; 2 Gall. 98; 1 Dill. 577; 1 Low. 21.

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*THE ALEXANDER, PICKET, MASTER. [*169

A vessel, owned by citizens of the United States, sails from Naples, in the year 1812, for the United States, with a cargo and a British license to carry the same to England. On her passage, hearing that war had broken out between Great Britain and the United States, she alters her course for England; is captured by the British, carried into Ireland, libeled, and acquitted upon her license; sells her cargo, and, after a detention of seven months in Ireland, purchases a return cargo in Liverpool, sails for the United States, and is captured by a United States privateer. Vessel and cargo condemned as prize to the captors. Capture good, though only a prize-master put on board.

THIS was an appeal from the sentence of the Circuit Court for the District of Massachusetts.

The following were the material facts in the case:

The brig Alexander, William S. Picket, master, sailed from Naples on the 22d June, 1812, with a cargo of brandy, wine and cream of tartar, with a British license to carry the same from Naples to England. She touched at Gibraltar, and there left her deck-load, consisting of brandy, and sailed from thence for the United States. On the 3d of August, 1812, she received intelligence of the war between the United States and Great Britain, and changed her course for England. She was afterwards captured by the British, and sent into Cork, Ireland, and acquitted, and there disposed of her cargo. After seven months' detention in Cork, she proceeded to Liverpool, in ballast. At Liverpool, she took in the cargo in question, purchased by Samuel Welles, one

of the claimants, then in England, from the proceeds of the cargo brought from Naples, and sailed from Liverpool for Boston, May 9th, 1813. On the 2d of June following, she was captured by the privateer America, John Kehew, commander, and libeled, as prize, in the District of Massachusetts.

When the Alexander sailed from Naples, she and her cargo were owned, one-half by the claimants, and the other half by W. and S. Robinson, of New York.

The master, on his examination upon the standing interrogatories, stated that the vessel belonged to J. and S. Welles and W. and S. Robinson.

He also stated that, on his arrival in the United States, he delivered to the chief clerk of J. and S. Welles, of Boston, bills of lading, invoices and letters relating to the vessel and goods. These papers were never produced by the claimants.

John Welles, of Boston, claims the vessel [*170] and cargo *for himself and Samuel Welles, alleging that Samuel Welles, in London, purchased, on their joint account, of the agent of W. and S. Robinson, their half of the brig and the proceeds of the Naples cargo, before the purchase of the cargo in question. The United States, also, interposed a claim to the vessel and cargo, as forfeited under the non-importation act.

In the District Court the claim of J. and S. Welles was rejected, and the property condemned to the United States. From this decree the captors and claimants appealed.

In the Circuit Court the property was condemned to the captors. From this decree the United States and the claimants appealed.

Rush, Attorney-General, stated that it was not the intention of government to interpose.

Dexter, for claimants.

There being no general rule of the law of nations, that every trading with the enemy is unlawful, and there being no municipal law on the subject, an American citizen, surprised abroad by an unexpected war, has a right to use all necessary means to save his property and to secure his return home, provided the means used for that purpose be not inconsistent with the interest of the nation to which he belongs. All the means employed in the present case were necessary to save the property in question, and were so far from being inconsistent with the interest of the United States that they clearly tended to the national benefit.

That there is no general rule of the law of nations prohibiting all trade with the enemy, is a proposition which probably will not be controverted. Even Sir William Scott does not deny the right to withdraw funds upon the breaking out of a war; he allows that cases of this kind are entitled to be treated with indulgence; he only holds, that if a particular mode of withdrawing funds has been prescribed by the municipal law, as by license, for instance, the person who pursues a different mode is punishable. He has, however, expressly de- [*171] cided, *that where circumstances rendered it impossible for the party to obtain a license, there the property shall not be condemned, if it be a case where a license ought to have been granted, if applied for. (2 Rob., Cranch 8. 264, 322, *The Harmony;* 3 Rob., 37, 38, *The Citto;* 5 Rob., 90, *The Ocean;* 4 Rob., 193, 234, *The Dree Gebroeders.*)

No man is bound, on the breaking out of a war, to abandon his property to the enemy; and if no tribunal is established to decide in what cases property shall or shall not be withdrawn, every man must judge for himself.

In the case of *Hallet* v. *Jenks* (3 Cranch, 210), there was an entire prohibition of trade; a prohibition more complete than any one which results from any provision of the law of nations; yet this court decided, in that case, that the party being forced into the prohibited port, and obliged by the public authorities of the place to sell, he might purchase a return cargo. In the present case, the captain of the Alexander, hearing of the war and believing it impossible to reach the United States without capture, conceived himself to be under the necessity of changing his course for England, or losing his vessel and cargo; and, having a license, he determined to deceive the enemy. Being captured by a British cruiser and carried into Ireland, he was libeled, but acquitted upon his license. He was compelled to sell his cargo. What was he to do with the proceeds? Suppose he had sold for bank bills—must he bring them to this country? He could not bring specie; it is prohibited. The only way in which he could withdraw his property was to purchase a return cargo and obtain another license. This course he pursued; and we conceive that he was perfectly justified in so doing. The motives for withdrawing his property, after acquitted, were strong. One among others which might be mentioned was the danger that the deception he had practiced upon the enemy would be detected.

2. But allowing, for the sake of argument, that sailing to England after a knowledge of the war, would have been an illegal act—it is clear, in this case, that there was no sailing to England; there was only an intention to go *thither; and it is a well-known rule of [*172] law that the bare intention to commit an illegal act is not punishable. Again, it cannot be contended that the sailing to Ireland was illegal, as the vessel was forcibly carried in there by the enemy.

3. This is a case which comes within the additional instruction of the President of the United States to our public and private armed vessels, issued August 28th, 1812. That instruction prohibits the interruption, by our public and private armed vessels, of "any vessels belonging to citizens of the United States, coming from British ports to the United States laden with British merchandise, in consequence of the alleged repeal of the British orders in council." Kehew, the commander of the privateer, had received this instruction.

As to the power of the President to issue such instructions, there can be no doubt. Even if there were no act of Congress relating to the subject, the general power of the executive to direct all hostile operations, gives him the particular power in question. But Congress has sanctioned the instruction in question by the proviso contained in the 1st sec. of the act of 13th July, 1813. (Laws United States, vol. 12, p. 16.)

But it will be said, perhaps, that this instruc-

tion is applicable only to vessels sailing from a British port after the repeal of the orders in council, and before the knowledge of the war. Such a construction is erroneous. By the act of Congress last mentioned it is provided: That nothing in the said act contained shall extend to any capture made by private armed vessels, in violation of the additional instructions of the President of 28th Aug., 1812, after the captor "shall have been" apprised thereof. From the use of the phrase, "shall have been," it is clear that the instructions were in force as late as the date of the act of 13th July, *i. e.*, nearly a year after the instructions in question were first given by the President. Government also continued to issue these instructions to the privateers, up to the time of the trial of this cause in the District Court, and afterwards. Now, to what vessels coming from a British port, and laden with British merchandise, could **173***] *those instructions apply which were issued more than a year after the declaration of war? Surely not to vessels which sailed while the orders in council were supposed to be repealed, and which had not heard of the war: it would be absurd to suppose that there were any such, so long after the event had taken place. The instructions, therefore, must be considered as having been originally intended to apply to vessels sailing with a knowledge of the war, as well as to those sailing without that knowledge. Again, what was the great object government had in view in issuing these instructions? No doubt to give our citizens an opportunity of withdrawing their property from the enemy's country, and bringing it to the United States. Our citizens had immeuse funds in England. The whole commercial capital of the United States was there. It was an object of vast importance to get it home; and so long as Great Britain would permit us to withdraw it, it was our interest to afford to our citizens every possible facility in aid of that permission. This was the policy of our government, and this the source of the instructions.

3. This was not a capture *jure belli*. The cruiser was afraid of running the risk of damages for an illegal capture. An understanding was, therefore, had between the parties, which was considered as being mutually beneficial, that the captor should preserve his claim to any British goods which might be found on board, and that the residue should remain to the claimants. A single man only, not a prize crew, was put on board the Alexander. The prize-master alone was utterly unable to secure the vessel against a rescue, should one be attempted. He was utterly unable to bring her into port, without the aid of the hands originally belonging to her. How, then, can it be considered as a capture? But if the court should finally decide it to be a capture, we shall contend that it was only partial, a capture of the British goods only.

Pitman, contra, contended, on behalf of the captors,

1. That Samuel Welles being in England at the time of the purchase of the cargo, he is to be presumed there *animo manendi*, and is clothed with a British character.

174*] *2. That the suppression of papers connected with the origin of the voyage, affords a sufficient presumption of a concealment of enemy intercsts, to subject the vessel and cargo to condemnation.

3. That the vessel and cargo, being taken in trade with the enemy, are condemnable to the captors as enemy's property.

As to the first point. It appearing that S. Wellcs was residing in England at the time of the purchase of the property in question, it is incumbent on him to explain the circumstances of his residence there. This has not been done. The presumption, then, must be that he was in England *animo manendi;* that the property was, of course, hostile and liable to condemnation. (1 Rob., 87, 103, *The Bernon.*)

On the second point little need be said. Suppression of papers is always a suspicious circumstance. In the present case it will, no doubt, have its due weight with the court.

Third point. That here was an actual trading with the enemy, the claimants do not attempt to deny; but they would justify it on the ground of necessity. They say that the vessel was captured by the enemy and carried into Ireland, where she was compelled to sell her cargo, and had no other means of sccuring the proceeds, but by laying them out in the purchase of British goods. This plea of necessity comes with a very bad grace from the claimants. If there were any necessity, it was one voluntarily brought upon themselves. They voluntarily, and, as we contend, unnecessarily, placed themselves and their property in the the power of the enemy, after a knowledge of the war; and can therefore claim no indulgence on the ground of necessity.

The cases which have been cited in which Sir William Scott speaks with indulgence of withdrawing funds, are inapplicable to the present case. Where the withdrawing of funds is spoken of, those funds only are meant which were in the enemy's country before the war; which was not the case here. Besides, the cases cited depend not on trade with the enemy, but on domicile. *A license to withdraw the [**175** property would not have been granted in such a case as the present, in England. The President of the United States, acting on English principles, could not have granted a license, supposing him to have the same power in relation to the subject which the King of England has. But he has no such power. Congress has not invested him with it, though they might have done so; and this court, it is presumed, will not undertake to say that the present is a case in which a license would have been granted, supposing the President to have possessed the power. No such power, then, having been granted by Congress, it is to be presumed that they did not intend there should be any exception to the general rule, that trade with the enemy is unlawful.

But it has been urged that this case comes within the President's instructions of 28th of August, and that this capture, being in violation of those instructions, is void. The vessels contemplated by those instructions are described as vessels coming from British ports, "in consequence of the alleged repeal of the British orders in council." Now, it is clear that the Alexander did not sail from the enemy's port in consequence of that alleged repeal; she cannot, therefore, be within the meaning of the instructions.

The delivery of the instructions to cruisers, after the case contemplated by them no longer existed, is quite unimportant, notwithstanding the great stress which has been laid upon that circumstance by the claimants. The thing is very easily accounted for. The instructions may have continued to be issued through mere inattention; but the counsel for the claimants, in the explanation which he has attempted, has given to them a coustruction in direct hostility both with their letter and spirit. (See letter from the Secretary of State to Mr. Russel, of August 21, 1812, accompanying the President's message of Dec., 1812).

It has been also coutended that there was no capture. But here is the property before the court, and we trust they will not restore it, unless non-capture be fully proved, and eveu theu there can be no restoration unless the claimants prove their right—which they have not yet **176***] *doue. They have produced no title papers, no documents whatever, proviug property in themselves.

On this point of uon-capture, which was iusisted on in the courts below, the District Court ordered further proof. We contend,

1. That as the preparatory examinations prove a capture, no further proof should have been ordered.

2. That the further proof establishes the fact of the capture.

3. That the proof upon this order offered by the claimants was inadmissible, being the depositions of the captain and mate, who were examined *in preparatory*.

As to the putting no prize crew on board, that is a circumstance which in no degree alters the nature of the case; it is not essential to capture. The capture is always made before either a prize-master or crew are put on board; and if the circumstauces of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, there is no reason why the property of the captor may not be retained as well by a prize-master alone as by a considerable crew. The object, in such cases, in putting a prize-master ou board, is merely to keep possession, and show that the vessel is not abandoned. (6 Rob., 21, *The Resolution;* 4 Rob., 316, 386, *The William and Mary.*)

Pinkney, on the same side.

If the declaration of war is to be cousidered as confining captures to property belonging to British subjects, municipally speaking, there is an end of the belligerent rights of the United States upon the ocean. But it is not so to be considered; it is to be construed by the law of nations.

The claimants seemingly deny that there was any capture in this case; but they iu fact contend, not for uon-capture, but abandonment. We coutend that there was a capture, and that **177***] it has not been abandoued. It *was unuecessary to put a prize crew on board to navigate the vessel to the United States, for she was already bound thither. If it was the intention of the captor to abandon her, why put any person on board? The very circumstance of puttiug a prize-master on board clearly evidences an intention not to abandon.

It is perfectly immaterial whether the capture was absolute or couditional only, to secure the British property found on board. To secure that, it was necessary to capture the whole. The capture cannot be considered as partial.

It is said, on the part of the claimauts, that there is no general rule of the law of nations that every trading with the enemy is unlawful. We are of a different opinion. Bynkershoek lays down the rule. (Bynk. Q. J. P. book 1, c. 3.) Vattel gives it by implication. He says that, in time of war, not only the two belligerent nations, in their politic capacity are enemies, but that all the subjects of the one are enemies to all the subjects of the other inclusively. (Vattel, lib. 3, c. 5, § 70.) Sir William Scott, in the case of the Hoop (1 Rob., 167), has laid down the rule—the universal rule. The exception which he allows to this general principle is, that, under certain circumstances, funds may be withdrawu with liccuse from the war-making power. So, in the United States licenscs for the same purpose may be granted by the same power. But this, as has been already observed, is not a case of withdrawing funds; the funds entitled to the benefit of the exception are such only as were in the couutry before the war.

It is said by the counsel for the claimants, that the intention to sail to England was not carried into effect, and therefore no illegal act was committed, even supposing that the act, if committed, would have been illegal. But we contend that the offense was cousummated by the overt act of sailing for the enemy's country several days. Such is the law in the case of blockade. Such, also, it is stated to be by Sir William Scott, in the case of a vessel sailing to a port which was captured, during the voyage, by the nation to which the vessel belonged. By all the analogies of law au intention in part executed completes the offense. (1 Rob., 132, 156; *The Columbia.*)

*But it has been denied that the act, [***178** if carried into executiou, would have been illegal, in the present case; it has been urged that the safety of the property required it. But the law of nations does not permit a man to secure his property by taking it to the enemy's country.

The case of *Hallet* v. *Jenks* was cited as supporting the claim of the appellants. But there, compulsion to sell and to take the produce of the enemy's country in paymeut was part of the case stated. Here, the purchase of a return cargo was voluntary; which materially alters the case. Welles ought to have left his funds in the euemy's country.

As to the additional instructions of the President, they clearly do not embrace this case, either by their letter or spirit. An expectation had been raised that, upon the repeal of the orders in council, our non-iutercourse would cease. The instructious were intended to meet this case—to redeem the pledge, and save the national faith. These instructions are explained by the act of Congress of January 2, 1813, authorizing the remission of the forfeitures incurred under the non-intercourse. That act directs the Secretary of the Treasury to remit the forfeitures in the case of such American property only as sailed before the 15th September, 1812; a time by which the merchauts in England were presumed to have been uudeceived.

The proviso to the act of 13th July, 1813,

does not alter the nature of the instructions; it leaves them to be expounded by the courts.

Dexter, in reply.

This is a more favorable case than if the property had been in the enemy's country before the war. The object in going to England was merely to save the property from British capture, to which it was exposed, and for this purpose to pass through the enemy's country in disguise—conduct perfectly justifiable in a case like this.

As to the capture, no evidence has been produced to prove the fact. If there had been any agreement that this should be considered
179*] as a capture, we will admit *that it would have been one. But no such agreement is shown—it does not appear that anything of the kind was intended.

But supposing it to have been a capture by agreement—even then the extent of the capture must be limited by the terms of that agreement. (1 Rob., 204, 243, *The Jonge Jacobus Baumann.*)

There is no evidence of Welles being in England *animo manendi.*

Monday, March 7th. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The principles settled in the case of the Rapid decides this cause so far as respects the character of the Alexander and her cargo. In open sea, unpressed by any peculiar danger, with a full knowledge of the war, she changes her course and seeks an enemy's port. If such an act could be justified, it were vain to prohibit trade with the enemy. The subsequent traffic in the enemy country, by which her return cargo was obtained, connects itself with this voluntary sailing for an enemy port; nor does the circumstance that she was carried by force into Ireland, when her actual destination was England, break the chain. The conduct of the Alexander is much less to be defended than that of the Rapid.

But it is alleged by the claimants, that in this case there was no actual capture. This allegation cannot, in the opinion of the court, be sustained. That the America took possession of the Alexander with the intention of making prize of that part of her cargo which might be deemed British, is not controverted. How was this intention to be executed? how was this part of the cargo to be libeled, if it was not captured? And if such part of the cargo as might eventually be British, was captured, and the whole remained together in the vessel, how can the capture be considered as partial?

But it has been truly observed, that it is not non-capture, but abandonment, for which the complainants in fact contend.

180*] *But while the whole cargo remains together, claimed by the captor, if it be enemy property, how can any part of it be said to be abandoned? If it was entirely abandoned, for what purpose was one of the crew of the America put on board the Alexander?

The inability of the prize-master to secure the captured vessel against a rescue, should one be attempted, his inability to bring in the vessel without the aid of the hands belonging to her, is, in reason, no proof of abandonment. If the circumstances of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, no reason is perceived why the property of the captor may not be retained as well by a prize-master alone as by a considerable detachment from his crew. The cases cited to this point by the counsel for the captors are entirely satisfactory.

With as little reason do the claimants seek to shelter themselves under the instructions of the 28th of August, 1812. Those instructions apply, in express terms, to such American vessels as have sailed from Great Britain for the United States, "in consequence of the alleged repeal of the British orders in council." A vessel which sailed while those orders were not alleged to be repealed, cannot bring herself within these instructions.

But it is alleged that these instructions are still issued, and must mean something. Rather than ascribe their continuance to inattention, the counsel for the claimants would give them a construction in direct hostility with their letter and spirit. Were this reasoning even admitted to be correct, which it is not, it would become the duty of the court to be astute in finding some object to which they might possibly apply. It is possible, though certainly it is barely possible, that some vessels which sailed from England while the orders of council were supposed to be repealed, may not yet have reached the United States. It would be more reasonable to reserve these instructions for such possible case than to apply them to cases which can neither be brought within their words nor their meaning.

The sentence is affirmed with costs.

Aff'g—1 Gall. 532.
Cited—8 Cranch, 454; 18 How. 114; 2 Gall. 98.

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*THE JULIA, LUCE, MASTER. [*181

The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war.

THIS was an appeal from the Circuit Court for the District of Massachusetts.

D. Davis, for the claimants.

The brig Julia and cargo, consisting of about three hundred hogsheads of salt, were captured by the United States frigate Chesapeake, Samuel Evans, commander, about the last of December, 1812, and libeled and condemned in the District Court of Massachusetts. Upon appeal to the Circuit Court, the sentence of condemnation was affirmed, and the claimants now appeal to this court.

The allegation in the libel is that the property belongs to British subjects.

The facts proved and relied upon by the claimants, and which are fully substantiated by the documents contained in the record, are as follows: That the Julia and cargo were owned wholly by the claimants, who are native American citizens; that she was documented as an American ship, for a voyage from Baltimore to Lisbon, with a cargo of corn, flour, and bread; that she sailed with this cargo from Baltimore to Lisbon, where she arrived in safety; that the

outward cargo was there sold to Portuguese merchants in that port, and a return cargo of salt purchased with a part of the proceeds of the outward cargo; and that, as the Julia was returning to Boston, her port of discharge, with her homeward cargo, she was captured by the Chesapeake; that all the transactions of the voyage were really and truly for account of the claimants, and that, in point of fact, no connection, intercourse, trade, supply, or other matter or thing relative thereto, was ever had, made, intended, or contemplated with the enemy, in the whole course of this voyage.

It is admitted by the claimants, that copies of the following documents signed and granted by Admiral Sawyer and Andrew Allen, late the British consul at Boston, were filed in the **182***] courts below, and, for the *reasons stated by the learned judges, admitted in evidence, viz:

1st. A license from Admiral Sawyer, in the words following:

"By Herbert Sawyer, Esq., Vice-Ad-[SEAL] miral of the blue, and commander-in-chief of His Majesty's ships and vessels employed and to be employed in the river St. Lawrence, along the coast of Nova Scotia, the islands of Anticosti, Madelaine and Saint John, and Cape Breton and the Bay of Fundy, and at and about the island of Bermuda, or Somers' Islands, &c., &c., &c.

"Whereas, Mr. Andrew Allen, His Majesty's consul at Boston, has recommended to me Mr. Robert Ewell, a merchant of that place, and well inclined towards the British interest, who is desirous of sending provisions to Spain and Portugal, for the use of the allied armies in the Peninsula, and whereas, I think it fit and necessary that encouragement and protection should be afforded him in so doing.

"These are therefore to require and direct all captains and commanders of His Majesty's ships and vessels of war which may fall in with any American, or other vessel bearing a neutral flag, laden with flour, bread, corn, or peas, or any other species of dry provisions, bound from America to Spain or Portugal, and having this protection on board, to suffer her to proceed without unnecessary obstruction or detention in her voyage; provided she shall appear to be steering a due course for those countries, and it being understood this is only to be in force for one voyage and within six months from the date hereof.

"Given under my hand and seal, on board His Majesty's ship Centurion, at Halifax, this fourth day of August, one thousand eight hundred and twelve.

"H. SAWYER, *Vice-Admiral.*"

By command of the vice-admiral,
WILLIAM AYRE.

183*] *2d. The following document signed by Andrew Allen:

"To the commanders of His Majesty's ships of war or of private armed ships belonging to subjects of His Majesty:

"Whereas, from the consideration of the great importance of continuing a regular supply of flour and other dried provisions to the allied armies in Spain and Portugal, it has been deemed expedient by His Majesty's government that, notwithstanding the hostilities now existing between Great Britain and the United States, every degree of encouragement and protection should be given to American vessels laden with flour and other dry provisions, and *bona fide* bound to Spain and Portugal. And whereas, in furtherance of these views of His Majesty's government, Herbert Sawyer, Esq., Vice-Admiral and Commander-in-Chief on the Halifax station, has addressed to me a letter under the date of the 5th of Aug., 1812, (a copy whereof is hereunto annexed), wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound, destined to serve as a perfect safeguard and protection of such vessel in the prosecution of her voyage. Now, therefore, in obedience to these instructions, I have granted to the American brig Julia, Tristram Luce, master, of 159 tons burthen, now lying in the harbor of Boston, and bound to Baltimore for the purpose of taking in a cargo of flour and corn, and proceeding thence to a port in Spain or Portugal, not under French domination, the annexed documents, requesting all officers commanding His Majesty's ships of war, or private armed ships belonging to subjects of His Majesty, to give to the said vessel all due assistance and protection in the prosecution of her voyage to Spain or Portugal, and on her return thence to her port of original departure, laden with salt or with specie to the net amount of her outward cargo, or in ballast only.

"Given under my hand and seal of office at Boston, this eighteenth day of September, 1812.
[CONSULAR SEAL.]

"ANDREW ALLEN, Jun.,
"*His Majesty's Consul.*"

*3d. "A copy of admiral Sawyer's [***184** letters to A. Allen, referred to in the preceding document, and certified under the consular seal; as follows:

(COPY.)

"*His Majesty's ship Centurion,*
At Halifax, the 5th of August, 1812.

"SIR—I have fully considered that part of your letter of the eighteenth ultimo which relates to the means of insuring a constant supply of flour and other dried provisions, to the allied armies in Spain and Portugal, and to the West India islands; and, being aware of the importance of the subject, concur in the proposition you have made. I shall therefore give directions to the commanders of His Majesty's squadron under my command not to molest American vessels unarmed and so laden, "*bona fide*" bound to British, Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal.

"I have the honor to be, sir,
"Your most obedient humble servant,
"H. SAWYER, *Vice-Admiral.*

To Andrew Allen, Esq.,
His Majesty's Consul, Boston.

"*Office of His Britannic Majesty's Consul:*

"I, Andrew Allen, Jun., His Britannic Majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed to me by Herbert

Sawyer, Esq., Vice-Admiral and commander on the Halifax station.

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, [CONSULAR SEAL.] this eighteenth day of September, in the year of our Lord one thousand eight hundred and twelve.

"ANDREW ALLEN, Jun."

185*] *If the opinions of the courts below, in admitting copies of these documents to be received as evidence, were correct, then it is also admitted that these licenses and letters had been obtained for, and were found on board the Julia at the time of her capture.

Upon this statement, and upon the evidence contained in the record, the claimants submit two points to the decision of the court.

1. That the mere acceptance or possession of the British license and documents do not subject the property to condemnation.

2. That if the peculiar terms of the license in this case create a presumption unfavorable to the claimants, either of an intention to supply the enemy, or of any other unlawful intercourse with the enemy, such presumption is entirely destroyed by the evidence in the case, which shows that no such supply or intercourse did ever, in fact, take place.

As to the first point. The nature and effect of an enemy's license, so far as respected the acceptance, possession or use of such a document by an American citizen, were so fully and ably pointed out in the case of the Aurora, that the counsel for the claimants is content to rely upon, and to refer the court to the arguments and authorities which were submitted and quoted in that case, upon this point.

But as to the second point. If the Julia had been captured on her passage to Lisbon, with these British documents on board, there might have been some ground for a condemnation. The suspicious or obnoxious parts of them, such as those which state that "Elwell is well inclined towards the British interest," and that he contemplates furnishing supplies to the allied armies in the Peninsula, might have raised a presumption that such was his intention, and would have cast the *onus probandi* upon him, or upon those in whose hands the license might be found. But it is contended, that if, upon furnishing the proof, it shall appear that no unlawful intercourse with the enemy ever did, in fact take place, and, moreover, that no such **186***] intercourse was ever even intended *to be held with the enemy, the presumption against the claimants, arising from the terms of the British documents, will be entirely destroyed, and the complainants left in a state wholly free from guilt, both legal and moral.

That this is a correct position, the court is referred to the case of the Matilda, decided in the North Carolina Circuit, by the Chief Justice of the United States, and reported in the American Law Journal, p. 478. In that case, the license was granted after the war, and for the express purpose of a trade and supply to the British W. I. islands. But there was no evidence that any act of trading had been committed. In that case the Chief Justice is said to have declared, "that there was no evidence of "a criminal intent, except that of the license; "that the obtaining the license was to deceive "the enemy, which the claimants lawfully "might do; and that the case was cleared of all "doubts by the evidence, which stated the real "object of the voyage."

In the case of the *Abby* (5 Rob., p. 254), it is expressly stated to be law "that there must "be an act of trading to the enemy country, "as well as the intention; that there must be a "legal as well as moral illegality." It is in the same case stated, that "no case has been pro- "duced, in which a mere intention to trade "with the enemy, contradicted by the fact, "enures to condemnation." Upon both points (said Sir William Scott), "I am of opinion, that "the claimant is entitled to restitution. On "the first there was no illegal act; on the "second there was neither intention nor act."

There is no principle better known or established by the writers, both upon law and ethics, than that there must be both a will and an act to constitute an offense. The act is necessary to demonstrate the depravity of the will: a vicious will without a vicious act is no offense.

It is not denied that the Julia and her outward cargo were the property of the claimants; it is not denied that the Julia, on her departure from Baltimore, was documented, in every respect, as required by law, as an American ship bound from Baltimore to Lisbon, with a cargo of flour, corn and bread.

*It is not denied that the Julia, [***187** with this cargo on board, was ordered to proceed, and that she did in fact proceed, to Lisbon; and that it was the intention of the owners that the cargo should be there sold to the best advantage, to merchants or other subjects of that government; nor is it denied that the Julia and cargo did, in fact, proceed to Lisbon for these purposes.

It is not denied that this cargo of corn, flour and bread, was in fact carried to Lisbon, there landed, and sold to a house of merchants of that city. It is also a fact, probably not disputed, that the cargo of salt with which the Julia was laden, and with which she was captured on her homeward voyage, was purchased with the proceeds of the cargo sold at Lisbon. And it is not pretended that there was any intercourse with the enemy at Lisbon, or with any of his agents; or that there was in reality any sale, contract or other transaction by the claimants, or their agents, that any part of the cargo, or of the proceeds of it, should, in any manner, serve as a supply or come to the hands and possession of the enemy. On the other hand, it does appear from all the evidence in the case, that the whole object of the voyage was to export the cargo of the Julia to Lisbon, there to be sold, and the proceeds to be invested in such funds as are pointed out in the owners' letter of instructions to the captain. The intention to trade with, or supply the enemy, is proved only from the *prima facie* evidence of the license and other British documents; and this evidence is fully explained and counteracted by the whole mass of evidence in the case, showing the real object of the voyage, and that no supply, trading or intercourse were in fact had with the enemy.

If the bare possession or acceptance of a license condemns the property which it pur-

ports to protect, the Julia must be condemned; but if the *presumptive* or *prima facie* evidence resulting from the possession of the license, however obnoxious may be the terms of it, can be explained and counteracted by evidence of the facts, the Julia and cargo must be restored. The former position, it is conceived, will never be sanctioned by this court; and if the latter be not established, the claimants will be severely punished for an act which they never committed, and which they never intended to commit, viz., that of the trading with, and supplying **188***] the enemies of their country. *The case of the Julia, therefore, turns upon a question of fact. Did the Julia pursue a voyage to a neutral port, and was her cargo disposed of to the subjects of a neutral country, or did she pursue the voyage and furnish the supplies to the enemy, which appear to have been the objects of the British admiral? It is repugnant to law and reason that a man shall not be permitted to prove his innocence; and, when he has proved it, that he should be held guilty, and punished. If taken with the mainor, may he not prove that he came honestly by the goods?

If a contrary doctrine be established, it will lead to one inevitable result—viz., a prohibition of all trade from this to a neutral country which happens to be in alliance with Great Britain; it will be, in fact, declaring that a cargo of flour shall not be exported to Spain or Portugal, because the neutral subjects, to whom it may be there sold, may sell it again to their British allies.

This case is distinguishable from, and stands upon much firmer ground than, that of the Aurora. In that case, the ship was taken on her outward passage, and (as it was alleged) out of her course to her ostensible port. It was therefore impossible for the claimants to remove the presumption against them, arising from the possession of the license, by the subsequent events of the voyage. But in this case, everything is explained, and every doubt or suspicion removed by the evidence showing the *bona fide* objects and ultimate termination of the voyage. The case is thus cleansed of everything that might be presumed to be foul by the unhappy terms of the license, or the officious and unofficial interpositions of Mr. Allen. The case must turn upon the *bona fide* views and intention of the claimants, and upon the evidence that, in point of fact, no unlawful intercourse between them and the enemy ever existed, or was ever contemplated. If they have merely accepted a license, but have made no unlawful use of it, they cannot be injured by it.

Rush, Attorney-General, in behalf of the United States.

It is utterly impossible that, if any American property, embarked in a trade under an enemy license, can be the subject of prize, this should escape. The transaction is the most obnoxious **189***] of its class; and presents the *leading question in its most advantageous forms for the captors.

The object of the enemy was supply to the allied armies in Portugal and Spain. The engagement to execute that purpose was the consideration of the protection granted by the license. The purpose was executed in fact, and in strict conformity with the engagement. The homeward cargo was purchased with the proceeds of the outward; and, when captured, was still under the protection of the license. If the circumstances in this case do not amount to a trading with the enemy, there is no such thing. If this license (or rather these licenses) should not be held to give to the property a hostile character, no license, whatever may be the facts with which it is combined, can produce that effect.

There can be no foundation for restitution in this case but one. It has been doubted whether American property can, for any cause, become subject to confiscation as prize, when captured by a privateer; and it will be contended, (as it is understood) in the case of the Frances, that it cannot.

The capture on this occasion, however, was made by a national vessel, in virtue of the declaration of war, and the public law of the world operating upon it. The Attorney-General does not believe that this difference in fact creates any difference in the legal conclusion; because he supposes that privateers have, upon the sound construction of the act of Congress, the same rights of capture with national vessels; but he contends that, even if it should be held that the rights of capture, vested by their commissions in private armed vessels, are confined to property strictly (not constructively) British, the rights of national vessels are not so restricted.

The court is referred to the opinion at large (in the transcript) of the learned judge by whom this cause was decided in the Circuit Court, for a very able discussion of the doctrine which it involves.

Monday, March 7th, 1814. *Absent.* TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

*The facts of this case, and the grounds[***190** upon which a decree of condemnation was pronounced in the Circuit Court, fully appear in the opinion of that court which accompanies this record. That opinion has been submitted to my brethren, and a majority of them concur in the decree of condemnation, upon the reasons and principles therein stated. It is not thought necessary to repeat those reasons and principles in a more formal manner; it is sufficient to declare as a result of them, that we hold that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war, and that the facts of the present case afford irrefragable evidence of such act of illegality.

The judgment of the Circuit Court is therefore affirmed with costs.

The following is the opinion of the Circuit Court of Massachusets, referred to in the foregoing opinion.

"The Julia and cargo were captured, as prize, by the United States frigate Chesapeake, commanded by Captain Evans, on the 31st December, 1812. From the preparatory evidence and documents it appears that she sailed from Baltimore on or about the 31st October, 1812, bound on a voyage to Lisbon, with a cargo of corn, bread and flour; and the capture took

place on the return voyage to the United States. The vessel and cargo were documented as American, and as owned by the claimants, who are American citizens. The vessel had on board sundry documents of protection from British agents, which were delivered up to the captors, and, together with the other ship's papers, were put on board of the prize, in the custody of the prize-master; and these documents were the unquestionable cause of the capture. It appears that the American master and crew were left on board the prize, and during the subsequent voyage to the United States, these British documents were taken from the custody of the prize-master surreptitiously and without his knowledge as to the time or manner. He alleged expressly that they were stolen, **191***] and this allegation seems *admitted by the master, in a supplementary affidavit, who, however, denies any knowledge or connection in the transaction. The prize-master took exact copies of these documents, for the purpose of sending them to the Secretary of the Navy; which copies have been produced in court, and verified by his affidavit. All the other original documents have been faithfully produced. Upon the examination of the master upon the standing interrogatories, on the 18th February, 1812, although there are several interrogatories, and particularly the 16th and 27th, which point directly to the subject matter, he did not state the existence of any British document, passport, safeguard or protection; and, what is quite as remarkable, he expressly declared that he knew not upon what pretenses nor for what reason the vessel and cargo were captured. It was not until after the time assigned for the trial, and on the 8th of March, 1813, that the master, by a supplementary affidavit (which was admitted through great indulgence, and contrary to the general practice of prize courts), attempted to explain his omission, and to vindicate his misconduct. The apology is equally weak and futile. At the time when these examinations were taken, the interrogatories had been drawn up with care and deliberation. The commissioners were present to explain to the understanding of every man intent on truth, the meaning of any question which might appear obscure. The master was a part owner of the vessel and cargo, and the regular depository of all the papers connected with the voyage. It is utterly incredible that he should not recollect, on his examination, the existence of these British documents. They were put on board for the special safeguard and security of the vessel and cargo. Indeed, independent of them, the risk of the capture would have been imminent. A master can never be admitted to be heard in a prize court, to aver his ignorance or forgetfulness of the documents of his ship. It is his duty to know what they are; and he cannot be believed ignorant of their contents, without overthrowing all the presumptions which govern in prize proceedings. Looking to the whole conduct of the master, it seems to be irreconcilable with the rules of morality and fair dealing; and I have great difficulty in exempting him from the imputation of being guilty of a willful suppression of the truth.

192*] *At the hearing, a preliminary objection was taken to the introduction of the copies of the British documents, upon the ground that the originals, as the best evidence, ought to be produced. The rule undoubtedly applies when the originals are in existence, and in the possession or control of the party. The extraordinary disappearance of these important papers, under the circumstances of this case, I can have little doubt was occasioned by a fraudulent substraction. There is no reason to impute this substraction to the prize-master. The documents were to him a very important protection; they constituted the avowed reason of the capture, as the mate and some of the seamen testify. It is true that the master has declared that he knew not the pretense of capture; but it can hardly be believed that he could be ignorant of a fact which so materially affected his interest. I feel myself bound to make very unfavorable inferences against him; and if, *in odium spoliatoris*, I impute the substraction to some person on board connected with the voyage, and in the confidence of the master, it is measuring out no injustice to one who appears to deem misstatements and concealments no violent breach of good faith. I shall, therefore, admit the copies, verified as they are, as good evidence in these proceedings; and I will add, that if a single material fact in favor of the claimants had depended upon the supplementary affidavit of the master, I should have felt myself compelled to repudiate it in order to vindicate the regularity of prize proceedings, and suppress the efforts of fraud to derive benefit from after thoughts and contrivances. These remarks are not made without regret; but public duty requires that manifest aberrations from moral propriety should not receive shelter in this court.

Having disposed of this preliminary objection, I now proceed to consider the two questions which have been so ably discussed in this case.

1st. Whether the use of an enemy's license or protection, on a voyage to a neutral country in alliance with the enemy, be illegal so as to affect the property with confiscation.

2d. If not, whether the terms of the present license distinguish this case unfavorably from the general principle.

*The British documents which were [***193** on board, and which, for conciseness, I have termed a license, are as follows:

[It is thought unnecessary to insert these documents here, as they are to be found at length in the argument of the claimant's counsel in the former part of this report.]

In approaching the more general question which has been raised in this case, I am free to acknowledge that I feel no inconsiderable diffidence, both from the importance of the question, and the different opinions which eminent jurists have entertained respecting it. Nor am I insensible, also, that it has entered somewhat into political discussions, and awakened the applause and zeal of some, and the denunciations of others, considered merely as a subject of national policy, and not of legal investigation. It has now become my duty to examimine it; and, whatever may be my opinion, I feel a consolation that it is in the power of a higher tribunal to revise my errors, and award ample justice to the parties.

At the threshold of this inquiry, I lay it down

as a fundamental proposition, that strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse. Bynkershoek says: "*Ex natura belli, commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant.*" (*Bynk* Q. J. P. book 1, c. 3.) And yet it seems not difficult to perceive that his reasoning extends to every species of intercourse. *Valin*, in his commentary on the French ordinance, speaking of the reason of requiring the name and domicile in a policy, says: "*Est encore de connaitre, en temps de guerre, si malgré l'interdiction de commerce, qu'emporte toujours toute déclaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec des amis ou alliés, par l'interposition desquels on ferait passer aux* **194*** *ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés; car tout cela, étant défendu comme préjudiciable à l'Etat, serait sujet à confiscation, et à être déclaré de bonne prise.*" (Lib. 1. tit. 6, art 3, p. 31.) In another place, adverting to a case of neutral, allied, and French property on board an enemy ship, &c., he declares it subject to confiscation, because "*C'est favoriser le commerce de l'ennemi et faciliter le transport de ses denrées et marchandises, ce qui ne peut convenir aux traités d'alliance ou de neutralité, encore moins aux sujets du Roi auxquels toute communication avec l'ennemi est strictement défendu sur peine même de la vie.*" (Lib. 3, tit. 9, art. 7, p. 253.) And *Valin, Traité des Prises*, (chap. 5, sec. 5, p. 62.)

From this last expression it seems clear that Valin did not understand the interdiction as limited to mere commercial intercourse. In the elaborate judgment of Sir W. Scott, in *The Hoop* (1 Rob., 165, 196), the illegality of commercial intercourse is fully established as a doctrine of national law; but it does not appear that the case before him required a more extended examination of the subject. The black book of the admiralty contains an article which deems every intercourse with the public enemy an indictible offense. This article, which is supposed to be as old as the reign of Edw. III., directs the grand inquest "*Soit enquis de tous ceux qui entrecommument, vendent ou achetent avec aucuns des enemis de notre Seigneur le Roi sans license spécial du Roi ou de son admiral.*" But, independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited. No contract is considered as valid between enemies, at least so far as to give them a remedy in the courts of either government; and they have, in the language of the civil law, no ability to sustain a *persona standi in judicio*. The ground upon which a trading with the enemy *is prohibited, is not the [***195** criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice. In the language of Sir William Scott, I would ask, "Who can be insensible to the consequences that might follow, if every person, in time of war, had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?"

Nor is there any difference between a direct intercourse between the enemy countries and an intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former. (4 Rob., 65, 79, *The Jonge Pieter*.)

It is argued that the cases of trading with the enemy are not applicable, because there is no evidence of actual commerce; and an irresistible presumption arises from the nature of the voyage to a neutral port, that no such trade is intended. If I am right in the position, that all intercourse, which humanity or necessity does not require, is prohibited, it will not be very material to decide whether there be a technical commerce or not. But is it clear, beyond all doubt, that no inference can arise of an actual commerce? The license is issued by the agents of the British government, and, I must presume, under its authority. It is sold (as it is stated) in the market; and if it be a valuable acquisition, the price must be proportionate. If such licenses be an article of sale, I beg to know in what respect they can be distinguished from the sale of merchandise? If purchased directly of the British government, would it not be a traffic with an enemy? If purchased indirectly, can it change the nature of the transaction? It has been said *that [***196** if purchased of a neutral, the trade in licenses is no more illegal than the purchase of goods of the enemy fabric *bona fide*, conveyed to neutrals. Perhaps this may, under the circumstances, be correct; but I do not understand that the purchase of goods of enemy manufacture, and avowedly belonging to an enemy, is legalized by the mere fact of the sale being made in a neutral port. The goods must have become incorporated into the general stock of neutral trade before a belligerent can lawfully become a purchaser. If such licenses be a legitimate article of sale, will they not enable the British government to raise a revenue from our citizens, and thereby add to their resources of war? Admit, however, that they are not so sold, but are a measure of policy adopted by Great Britain to further her own interests, and ensure a constant supply of the necessaries of life, either in or through neutral countries; can it be asserted

that an American citizen is wholly blameless, who enters into stipulations and engagements to effect their purposes? Is not the enemy thereby relieved from the pressure of the war, and enabled to wage it more successfully against the other branches of the same commerce not protected by this indulgence?

It is said that the case of a personal license is not distinguishable from a general order of council authorizing and protecting all trade to a neutral country. In my judgment they are very distinguishable. The first presupposes a personal communicaton with the enemy, and an avowed intention of furthering his objects, to the exclusion of the general trade by other merchants to the same country; it has a direct tendency to prevent such general trade, and relieves the enemy from the necessity of resorting to a general order of protection; it contaminates the commercial enterprises of the favored individual with purposes not reconcilable with the general policy of his country; exposes him to extraordinary temptations to succour the enemy by intelligence; and separates him from the general character of his country, by clothing him with all the effective interests of a neutral. Now, these are some of the leading principles upon which a trade with the enemy has been adjudged illegal by the law of nations. On the other hand, a general order opens the whole trade of the neutral country to every merchant. It presupposes no incorporation in enemy **197*]** *interests. It enables the whole mercantile enterprise of the country to engage upon equal terms with the traffic; and it separates no individual from the general national character. It relaxes the vigor of war, not only in that particular trade, but collaterally opens a path to other commerce. There is all the difference between the cases that there is between an active personal co-operation in the measures of the enemy, and merely accidental aid afforded by the pursuit of a fair and legitimate commerce.

In the purchase or gratuity of a license for trade, there is an implied agreement that the party shall not employ it to the injury of the grantor; that he shall conduct himself in a perfectly neutral manner, and avoid every hostile conduct. I say there is an implied agreement to this effect, in the very terms and nature of the engagement. I am warranted in declaring this, from the uniform construction put by Great Britain on the conduct of her own subjects acting under licenses. Can an American citizen be permitted in this manner to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal which imposes upon him the temptation or necessity of deeming his personal interest at variance with the legitimate objects of his government? I confess that I am slow to believe that the principles of national law, which formerly considered the lives and properties of all enemies as liable to the arbitrary disposal of their adversary, are so far relaxed that a part of the people may claim to be at peace, while the residue are involved in the desolations of war. Before I shall believe the doctrine, it must be taught me by the highest tribunal of the nation; in whose superior wisdom and sagacity I shall most cheerfully repose.

It has been said that no case of condemnation can be found on account of the use of an enemy license. Admitting the fact, I am not disposed to yield to the inference that it is therefore lawful. It is one of the many novel questions which may be presumed to arise out of *the extraordinary state of the world.. [***198** The silence of adjudged cases proves nothing either way. It may well admit of opposite interpretations. The case of the *Vrow Elizabeth* (5 Rob., 2), has been cited by the captors in support of the more general doctrine. It was a case where the ship had the flag and pass and documents of an enemy's ship; and the court held that the owner was bound by the assumed character. There is no similarity in the case before the court. The ship and cargo were documented as American and not as British property. As little will the *Clarissa* (5 Rob., 4), cited on the other side, apply. It was, at most, but a license given by the Dutch government, allowing a neutral to trade within its own colony; in all other respects the ship and property were avowedly neutral; and, unless so far as the English doctrines as to the colonial trade could apply, there was nothing illegal or improper in waiving any municipal regulations of colonial monopoly in favor of a neutral. There was nothing which compromitted the allegiance or touched the interest of the neutral country. If, however, this license had conferred on the neutral the special privileges of a Dutch merchant, or had facilitated the Dutch policy in warding off the pressure of the war, it would probably have received a very different determination. (See *the Vreede Scholtys*, 5 Rob., 5, note *a; The Rendsborg*, 4 Rob., 98, 121.) We all know that there are many acts which inflict upon neutrals the penalty of confiscatiou, from the subserviency which they are supposed to indicate to enemy interests; the carrying of enemy dispatches; the transportation of military persons; and the adopting of the coasting trade of the enemy. The ground of these decisions is the voluntary interposition of the party to further the views and interests of one belligerent at the expense of the other, and I cannot doubt that the Clarissa would have shared the general fate, but from some circumstance of peculiar exemption.

By the prize code of Louis XIV, (which I quote the more readily because it is, in general, a compilation of prize law as recognized among civilized nations,) it is a sufficient ground of condemnation that a vessel bears commissions from two different states. Valin (*Traite des prises*, p. 53) says: "*A l' égard du vaisseau ou se trouverent des commissions de deux differens princes ou *états, il est également juste* [***199** *qu' il soit declaré de bonne prise, soit parce qu' il se peut arborer le pavillon de l'un, en consequence de sa commission, sans faire injure à l'autre, ceci, au reste, regarde les Francais comme les êtrangers.*" In what consists the substantive difference between navigating under the commissions of our own and also of another sovereign, and navigating under the protection of the passport of such sovereign which confers or compels a neutral character? Valin, in another place (*sur l'ordinance*, lib. 3, tit. 9, art.

4, p. 241), declares, "*si sur un navire Francais il y a une commission d'un prince étranger avec cette de France, il sera de bonne prise, quoiqu'il n'ait arboré que le pavillon Francais.*" It is true that he just before observes, "*que ce circonstance de deux congés ou passe-ports, ou de deux connaissements, dont l'un est de France, et l'autre d'un pays ennemi, ne suffit pas seule faire declarer le navire ennemi de bonne prise, et que cela doit dependre des circonstances capables de faire découvrir sa véritable destination.*" But Valin is referring to the case of an enemy ship having a passport of trade from the sovereign of France. I infer from the language of Valin, that a French ship sailing under the passport, *conge*, or license of its enemy, without the authority of its own sovereign, would have been lawful prize.

This leads me to another consideration; and that is, that the existence and employment of such a license affords a strong presumption of concealed enemy interest, or, at least, of ultimate destination for enemy use. It is inconceivable that any government should allow its protection to an enemy trade, merely out of favor to a neutral nation, or to an ally, or to its enemy. Its own particular and special interests will govern its policy; and the *quid pro quo* must materially enter into every such relaxation of belligerent rights. It is, therefore, a fair inference, either that its subjects partake of the trade under cover, or that the property, or some portion of the profits, finds its way into the channel of the public interests.

It has been argued that the use of false or simulated papers is allowable in war as a stratagem to deceive the enemy and elude his vigilance. However this may be, it certainly cannot authorize the use of real papers of a hostile character, to carry into effect the avowed pur- **200*]** pose *of the enemy. We may be allowed to deceive our enemy; but we can never be allowed to set up, as such a deception, a concert in his own measures for the very purpose he has prescribed.

An allusion has been made to the passports or safe-conducts granted, in former times, to the fishing vessels of enemies; and it has been argued that such passports or safe-conducts have never been supposed to induce the penalty of confiscation. This will at once be conceded, as to the belligerent nation who granted these indulgences; but as to the other nation, where such passports were not guaranteed by treaty or mutual pacts, I have no authority to lead me to an accurate decision. The French ordinance of 1543 authorized the admiral to make fishing truces with the enemy; and, where no such truces were made, to deliver to the subjects of the enemy, safe-conducts for fishing upon the same stipulations as they should be delivered to French subjects by the enemy. This, therefore, was an authority to be exercised only in cases of reciprocity; and it seems to have been abolished from the manifest inconveniences which attended the practice. (Valin, *sur ord.* lib. 1, p. 689, 690.) I do not think that any argument in favor of the validity of the present license (unrecognized as it is by our government) can be drawn from these ancient examples as to fisheries.

It has been argued that the voyage was lawful to a neutral port, and the mere use of a license cannot cover a lawful voyage with the taint of illegality. This, however, is assuming the very point in controversy. It is not universally true that a destination to a neutral port gives a *bona fide* character to the voyage. If the property be ultimately destined for an enemy port or an enemy use, it is clear that the interposition of a neutral port will not save it from condemnation. (4 Rob., 65, 79, *The Jonge Pieter.*) Suppose, in the present case, the vessel and cargo had been destined to Lisbon for the express use of the British fleet there, could there be a doubt that it would have been a direct trade with an enemy? Whether the voyage, therefore, be legal or not, depends not merely upon the destination, but the ultimate application of the property, or the ascertained intentions of the party. A contract to carry provisions to St. Bartholomews for the *ultimate supply of the British West [***201** India Islands, would be just as much an infringement of the law of war as a contract for a direct transportation. On the whole, I adopt, as a salutary maxim of war, the doctrine of Bynkershoek: "*Vetatur quoquo modo hostium utilitati consulere.*" It is unlawful in any manner to lend assistance to the enemy, by attaching ourselves to his policy, sailing under his protection, facilitating his supplies, and separating ourselves from the common character of our country.

I am aware that the opinion which I have formed as to the general nature of licenses, is encountered by the decisions of learned judges for whom I entertain every possible respect. This circumstance alone, independent of the novelty and importance of the question, would awaken in my own mind an unusual hesitation as to the correctness of my own opinion; but, after much reflection upon the subject, I have not been able to find sufficient grounds to yield it; and my duty requires that, whatsoever may be its imperfections, my own judgment should be pronounced to the parties.

I am glad, however, to be relieved from the painful necessity of deciding the more general question, by the peculiar terms of the present license, which I consider as affording irrefragable proof of an illicit intercourse with the enemy, and a direct contract to transport the cargo for the use of the British armies in Spain and Portugal. The very preamble to the license of Admiral Sawyer shows this in a most explicit manner, and discloses facts which it is no harshness to declare, are not very honorable to the principles or the character of the parties.

It has been attempted to distinguish the present claimants from Mr. Elwell, to whom the original license was granted. It could hardly have been expected that such an attempt would be successful. The assignees cannot place their derivative title on a better footing than the original party. They must be considered as entering into the views and contracting to effectuate the intentions of the latter; and, at all events, the illegality of the employment of the license attaches indissolubly to their conduct. If it were material, however, it might deserve consideration how far an actual assignment is *shown in the case. It [***202** rests on the affidavit of one of the claimants, and on the mere face of papers which carry no very decisive character, and are quite recon-

cilable with concealed interests in other persons, as the records of prize courts abundantly show. However, I only glance at this subject, as it in no degree enters into the ingredients of my judgment.

A very bold proposition was, at one time, advanced in the argument by the claimants' counsel, that if this cargo had been actually destined to Portugal for the use of the allied armies of Great Britain and Portugal, or even for the use of the British army, it would not be an offense against the laws of war. In the sequel, if I rightly understand, this proposition, in this alarming extent, was not contended for; and certainly it is utterly untenable upon the principles of national law.

But it was insisted on, that the British armies in Portugal and Spain were to be considered as incorporated into the armies of those kingdoms, and as not holding the British character.

If I could so far forget the public facts of which, sitting in a prize court, I am bound to take notice, there is sufficient in the papers before me to prove the contrary of this suggestion. In Admiral Sawyer's license and Mr. Allen's certificate they are expressly called the allied armies; thereby plainly admitting a separate character and organization; and so, in point of fact, we all know it to be; if, indeed, the British character be not predominant throughout these countries. I reject the distinction, therefore, as utterly insupportable in point of fact.

It has been further argued that, if the conduct be illegal, it is but a personal misdemeanor in no degree affecting the vessel and cargo; and at all events, that the illegality was extinguished by the termination of the outward voyage. The principles of law afford no countenance to either part of the proposition. If the property be engaged in an illegal traffic with the enemy, or even in an attempt to trade, it is liable to confiscation as well on the return as on the outward voyage; and it may be assumed as a proposition, liable to few, if any, exceptions, that the **203***] *property which is rendered auxiliary or subservient to enemy interests, becomes tainted with forfeiture.

I cannot but remark that the license in this case, issued within our own territory by an agent of the British government, carries with it a peculiarly obnoxious character. This circumstance, which is founded on an assumption of consular authority that ought to have ceased with the war, affords the strongest evidence of improper intercourse. The public dangers to which it must unavoidably lead, by fostering interests within the bosom of the country, against the measures of the government, and the breach of faith which it imports in a public functionary receiving the protection of the government, can never be lost sight of in a tribunal of justice. I forbear to dwell further on this delicate subject.

Upon the whole, I consider the property engaged in this transaction as stamped with the hostile character; and I entirely concur in the decision of the district judge, which pronounced it subject to condemnation."

Aff'g—1 Gall. 594.
Cited—8 Cranch, 219, 449; 2 Wheat. 145; 3 Wheat. 207, (n); 7 Wall. 558; 6 Otto, 302; Blatchf. Pr. 264, 268; 1 Gall. 522; 2 Gall. 336; Newb. 404; 1 Pet. C. C. 416.

THE AURORA, PIKE, MASTER.

The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation.

It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy.

Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property, although that intention be frustrated by capture.

THIS was an appeal from the Circuit Court for the District of Rhode Island.

The following were the material facts of the case:

Some months after the declaration of war, the ship Aurora, documented as American property, and owned by Thomas M. Clarke and Ebenezer Wheelright, the claimants, who are American citizens, sailed from Newburyport to Norfolk, in ballast. At the latter place she took in a cargo consisting of bread, flour, corn, &c., and sailed from thence on or about the 12th November, 1812, ostensibly for St. Bartholomews, a neutral island belonging to the Swedes, for which port she had obtained *her clearance. The cargo was consigned [***204** to the supercargo of the ship. On the 26th November, 1812, she was captured by the American privateer schooner Governor Tompkins, on the high seas. At the time of capture, she was to the leeward of St. Bartholomews, and had on board a British license, which she exhibited to the captors, supposing them to be British. This license consisted of three documents:

1st. A pass for the West Indies, exclusively, from Andrew Allen, His Britannic Majesty's consul, residing at Boston; to which is annexed a copy of a letter, under the consular seal, from Admiral Sawyer to Mr. Allen, as follows:

"To the commanders of any of His Majesty's ships of war or of private armed ships belonging to His Majesty.

"Whereas, from a consideration of the great importance of continuing a regular supply of flour and other dry provisions and lumber to the British islands in the West Indies, it has been deemed expedient by His Majesty's government, that, notwithstanding the hostilities now existing between Great Britain and the United States of America, every protection and encouragement should be given to American vessels laden with flour and other dry provisions and lumber, and bound to the British islands in the West Indies. And whereas, in furtherance of these views of His Majesty's government, Herbert Sawyer, Esq., Vice-Admiral and Commander-in-Chief of His Majesty's squadron on the Halifax station, has directed to me a letter under date of the 5th August, 1812, (a copy whereof is hereunto annexed) wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound to the West Indies, which is designed as a perfect safeguard and protection to such vessel in the prosecution of such voyage. Now, therefore, in pursuance of these instructions, I have granted to the American ship Aurora, William Augustus Pike, master, burthen 257 47-95ths.

tons, now lying in the harbor of Newburyport, and bouud to Norfolk for a cargo of flour, corn, and other dry provisions for St. Bartholomews, the annexed document, to avail ouly in **205***] a direct *voyage to the West Indies and back to the United States; requesting all the officers commanding His Majesty's ships of war, or of private armed vessels belonging to subjects of His Majesty, not only to suffer the said Aurora to pass without molestation, but also to extend to her all due assistauce and protection in the prosecution of her voyage to the West Indies and in her return to the United States laden with merchandise not exceeding the net amouut of her outward cargo, or in ballast ouly.

"Given under my haud and seal of office this first day of October, 1812.

[SEAL.]

"ANDREW ALLEN, Jun.,
"*His Majesty's consul.*"

To the above pass was annexed the following copy of a letter from Admiral Sawyer, certified under the consular seal, and alluded to in the above document:

"*His Majesty's ship Centurion,*
At Halifax, the 5th of August, 1812.

"SIR—"I have fully considered that part of your letter of the 18th ultimo which relates to the means of insuring a constant supply of flour and other dry provisions to Spaiu and Portugal, and to the West India Islands; and, being aware of the importance of the subject, concur in the proposition you have made.

"I shall therefore give directions to the commanders of His Majesty's squadron under my command, not to molest American vessels so laden, and unarmed, *bona fide* bound to British, Portuguese, or Spanish ports, whose papers shall be accompanied with a certified copy of this letter, under the consular seal.

"I have the honor to be, sir,
"Your most obedient humble servant,
"H. SAWYER, *Vice-Admiral.*"

Andrew Allen, Esq.,
British Consul, Boston.

206*] *"*Office of His Britannic Majesty's Consul.*

I, Andrew Allen, Junior, His Britannic Majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the annexed paper is a true copy of a letter addressed to me by H. Sawyer, Esq., Vice-Admiral aud Commander-in-Chief of His Majesty's squadron on the Halifax station.

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, this first day of October, in the year of our Lord one thousand eight hundred and twelve.

[SEAL.]

"ANDREW ALLEN, Jun."

2d. The following certificate of the Consul:

"*Office of His Britannic Majesty's Consul.*"

I, Andrew Allen, Junior, His Britannic Majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the ship Aurora, Wm. Augustus Pike, being bound to St. Bartholomews (on account of the existing law of the United States, which prevents her return to the United States from a British port) contemplates fulfilling the object comprised in the accompanying license from H. Sawyer, Esq., Vice-Admiral and Commander-in-Chief on the Halifax station, through a ueutral port iu alliance with Great Britain.

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, this second day of October, in the year of our Lord one thousaud eight hundred and twelve.

[SEAL.]

"ANDREW ALLEN, Jun."

3d. The following general pass for the West Indies:

"*Office of His Britannic Majesty's Consul.*"

I, Andrew Allen, Jun., His Britannic Majesty's consul for the states of Massachusetts, New Hampshire, *Rhode Island and Connecti-[***207** cut, request all officers commanding His Majesty's ships of war, or private armed ships belonging to subjects of His Majesty, to permit the American ship Aurora, William Augustus Pike, master, now lying in the harbor of Newburyport, and furnished with a protection from Vice-Admiral Sawyer, for the purpose of carrying flour, corn, lumber, and other necessary provisions to the West Iudies, and proceeding to Norfolk in ballast for a cargo, to pass without molestation.

"Giveu under my hand and seal of office, at Boston, in the state of Massachusetts, this first day of October, in the year of our Lord one thousand eight hundred and twelve.

[SEAL.]

"ANDREW ALLEN, Juu."

The Aurora was carried into Newport, Rhode Island, and there libeled. The Circuit Court of that district condemned vessel and cargo as prize to the captor; from which sentence the claimants appealed to this court.

Hunter, for Appellants.

The libel, in this case, sets forth that the sailing was for the purpose of supplying the British West India colouies, aud that the papers stating the voyage to St. Bartholomews were fraudulent and collusive; and urges the coudemnatiou of vessel and cargo, ou the following grouuds:

1. That the possession of and sailing with a British licence is cause of capture and condemnation.

2. That the voyage of the Aurora was intended as an indirect voyage to a British port, through St. Barts.

3. That the real destination of the ship was to a British port.

On the first point it is contended, on the part of the claimants, that the having on board a British license or *pass in a lawful trade [***208** to a neutral country, could not, before the act of Congress of August 2, 1813, prohibiting the use of British liceuses, subject a vessel to capture.

This is clear from the act itself, the operation of which is not to commeuce from its passage, but, with regard to vessels then in port, was to take effect in five days after the promulgation of the act; with regard to vessels at a distance from the United States, not until the 1st of November; and in some cases not before the 1st of December following. Hence it is evident

that the legislature did not consider this act as merely declaratory of the law of nations on the subject, but as then, for the first time, making the use of a British license by an American vessel, illegal. (Laws of U. S., vol. 12, p. 226.)

But we are bound to meet the general proposition, which is that the use of such a license gives a hostile character to the property and the voyage.

The doctrine that any intercourse with the enemy exposes to condemnation, has been supposed to be very ancient; but we find no case of a decision upon the principle, till the year 1747, when a bill was brought into parliament in consequence of insurance made for enemies. (Parl. debates, vol. 26, p. 178; Sir William Murray's speech on the subject of insuring enemy property; and 1 T. R., 84, *Gist* v. *Mason*.)

The rule appears to us to be unreasonable and impolitic. Where is the harm of taking advantage of a relaxation of the rights of war by the enemy? How can that be a crime when granted by the policy of the enemy, which would have been no crime if obtained by force—by conquest? It is not less for our own interest to take advantage of such permission from the enemy than it is for his interest to grant it. It is a public benefit.

The general rule by which to determine the national character of a vessel, is the domicile of the owner. Here, the owners were American citizens. The case of a vessel sailing under the flag or assumed character of a country to which she does not belong, is admitted to be an exception to the general rule. But here was no sailing under such assumed character. All the papers of *the Aurora were American, **209*] except the one in question, which cannot of itself be sufficient to give a hostile character to the holders of it, nor to the vessel and cargo. (1 N. Y. T. R., 64, *Jenks* v. *Hallet et al.*; Chitty's law of nations, 58; case of the *Clarissa* cited in 5 Rob., 4; *The Vrow Elizabeth*.)

The only prohibition existing at the time of the sailing of the Aurora was to take a license to a British port. That was prohibited by the act of July 6th, 1812, § 7.

By that act, we admit, all commercial intercourse with the enemy was rendered unlawful; but we contend that it was not unlawful to use a British license in a neutral voyage. (1 Rob., 167, 200, *The Hoop*.)

Suppose Great Britain should think proper to permit a particular neutral trade—suppose she were even to protect it by convoy—are we bound to refuse to except such permission—such protection?

Valin laughs at the English for restoring, in the form of insurance, the captures made by their cruisers; but does not censure the French merchant for taking it.

The voyage in this case was not made by the license, but merely made safer by it. The voyage was certainly lawful without it; and a license to pursue a voyage which was lawful without it, cannot make that voyage unlawful. (Pamphlet of cases decided in the district courts of Pennsylvania and Massachusetts, p. 80, 81; Judge Davis's opinion on the use of British licenses; Judge Peters's opinion, 1 Vez., 317; Duponceau's Bynk., 166.)

On the second point, viz.: That the voyage of the Aurora was intended as an indirect voyage to a British port through St. Barts, it is contended by the claimants that there is no evidence to justify the fact assumed.

Was this a *bona fide* voyage to St. Barts? On the decision of this point the whole case turns. In discussing this question all the circumstances of the case should be taken into consideration. (Vid. Portalis's opinion in the case of the *Pigou*, contained in a note to the case of the *Charming* *Betsy*, 2 Cranch, 98; Vid. also *Ch.* [*210 *J.* MARSHALL'S opinion in the case of the *Matilda*, decided in North Carolina; Hall's law journal, 487.)

With respect to those circumstances attending the transaction, which, on first view, are perhaps calculated to excite a suspicion that this was not a *bona fide* voyage to St. Barts, it may be observed, that it was the object of the Aurora to deceive the enemy, and thereby obtain an exemption from capture, during the voyage, by inducing him to suppose that the cargo was ultimately intended for the British. Such an imposition, in a case like the present, we conceive was justifiable.

What motive could the Aurora have had for sailing to a British island rather than to St. Barts? At a British island she could only take in a cargo of rum; and the importation of such a cargo was prohibited by our own laws. At St. Barts, she could take in a general West India cargo. Motives of interest, therefore, would have induced her to go to the latter place rather than the former.

But suppose the intention was to go to a British port; was that intention executed? It was not. But according to the decision in the case of the *Abby* (5 Rob., 254), there must be an act of trading as well as an intention, in order to subject the vessel to condemnation.

On the third point, which, it is presumed, constitutes the stress of the case, we contend that the real destination of the Aurora was not to a British port, and that the condemnation on the ground of a British supply being intended and proceeded in, is erroneous and against proof.

That the supply of the British West Indies was the object of Admiral Sawyer in granting the license, we do not deny; but what his intention was, is perfectly immaterial; such was not our intention in accepting it. Our object was to escape capture; and with that view we obtained a license from the enemy, by inducing him to believe that we intended to furnish supplies to his islands.

*What is said by Allen, the consul, [*211 is mere surplusage; his authority extended no farther than to certify Admiral Sawyer's letter. Having done this, he was *functus officio*. But suppose the license granted by Allen to have been valid, it was only for a voyage to St. Barts, and would not have protected the Aurora in any other voyage. That was the voyage insured.

J. Woodward, contra.

With regard to the act of August 2, 1813, which has been said, by the counsel for the claimants, to prove that the use of British licenses, previous to the passage of that act, was not unlawful, we are still of opinion that the act is merely in affirmation of the law of nations. It is also cumulative—it adds penalties

to what was before unlawful; but does not make anything unlawful which was not so before. The latter clause in the 3d sec. of the act providing "that nothing contained in the said act shall be so construed as to arrest or stay any prosecutions," &c., was intended to guard against the construction which the claimants have now attempted to give it. The several periods of time allowed to vessels in different situations, to obtain notice of the act, were allowed them in order that they might be enabled to avoid the new penalties.

Trading with the enemy was an indictable offense at common law, (2 Rolle's Abr., 173), but it was necessary for Congress to fix the penalty for trading on land; this they have accordingly done in the act of July 6, 1812. By the course of the admiralty, the thing itself was liable to forfeiture for trading with the enemy.

The British papers on board the Aurora show a case of supply, and therefore the question of pass or license is immaterial. The pass was expressly for the purpose of supplying the enemy.

But suppose the papers do not prove a case of supply, the use of the license on the high seas is, of itself, sufficient to give the property a hostile character. The license in this case is essentially different from a general license by an order in council. There no special favor—no particular benefit—is granted.

212*] *The use of a hostile protection in the prosecution of a neutral trade gives a hostile character to the voyage. Sailing under a hostile convoy is good ground of condemnation; Sir William Scott denominates it "illicit protection." Sailing under two commissions is also cause of condemnation. (Valin, p. 241, b. 3, art. 9.) All these cases are analogous to the present. The Aurora was sailing under the physical force of the enemy. Admiral Sawyer's letter requires the British naval force to assist her in the prosecution of her voyage. She must therefore be considered as having placed herself under the protection of the enemy, and as having, consequently, abandoned her national character.

Trading with an enemy was cause of forfeiture at common law; and whatever was cause of forfeiture at common law is good cause of condemnation in the admiralty. (2 Rob., 82, 69, *The Walsingham Packet.*)

The case of *Jenks* v. *Hallet et al.*, cited by the claimants, is not applicable to the present case—we were not then at war with France.

Sir William Scott, in the case of the *Vigilantia* (1 Rob., 11, 13), has laid it down as a known and established rule, that if a vessel is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails. Now, what was the license in question but such a pass?

The license is not a document under the law of nations. The granting of it is the exercise of a municipal right—a prerogative to the crown. The king, however, has no right to grant licenses to any but his own subjects, without a particular act of parliament authorizing him so to do. There is no case in which he has granted a license to strangers without such an act of parliament. If a license be granted without such authority, the person who takes it can take it only as a subject. (Chitty's law of nations, 256; Id., 316; 2 Roll. Abr., 173, tit., Prerogative; 1 Rob., 199, 200, *The Hoop*; 2 Tucker's Bl. Com., 258; Chitty's law of nations, 278; Reeves, 358.)

Any commercial intercourse, direct or indirect, with *the enemy, is illegal, and [***213** cause of condemnation; its illegality does not depend on contract. The intervention of a neutral port makes no difference. (8 T. R., 555, *Potts* v. *Bell et al*; 4 Rob., 68, 69, 83, 84, *The Jonge Pieter;* 1 Rob., 165, 196, *The Hoop;* Chitty's law of nations, 13, 14, 15).

When the Aurora was taken, she was out of the course to St. Barts, and very far to the leeward of that island. These circumstances afford a strong suspicion that her destination was to some other port.

The return cargo was British produce, and, *prima facie*, British property; if it was not, it is on the claimants to show it.

It appears that the captain was kept ignorant of the real destination of the Aurora, and that the supercargo, during his examination *in preparatoria*, was guilty of prevarication. These circumstances alone are good cause of condemnation. (Chitty's law of nations, 314).

As to what has been said with regard to the intention not being carried into effect, we contend that it was carried into effect to every legal purpose. An overt act was sufficient to constitute the offense; and sailing with the license was such an overt act.

Pinkney, on the same side.

The rule that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it. There was no necessity of any subsequent law to enforce the rule.

It has been said that no judicial decision on this subject is to be found of an earlier date than 1747. It is true Sir William Scott, in his enumeration of cases where this question was agitated, has gone no farther back than that date; but Sir John Nicholls, in his argument in the case of *Potts* v. *Bell*, has cited cases from Sir Edward Simpson's MS. reports in the admiralty, where this principle was decided to be correct as early as 1704 and 1707; and it is to be presumed that those *decisions were [***214** founded upon former cases. (See also 1 Vez., 317, *Henkle* v. *The Royal Ex. Ins. Co.* in 1749.)

The general rule is above all impeachment.

This case may be considered, as it regards,

1st. The license alone.

2d. The license as connected with the transaction itself.

First, then, we contend that no American citizen, in a time of war, has a right voluntarily to place himself under the protection of the enemy. War exists between the nations in their political capacity, and between the individuals of each nation respectively. The power of making peace follows the power of making war. Individuals cannot lawfully make peace, even for themselves. But the acceptance of a license from the enemy is making a peace with him so far as it goes; it is a partial truce—a partial cessation of hostilities. Transactions of this kind are productive of great evil. The American citizen who accepts a license from the enemy, does that which is highly injurious to the interests of his country. The indulgence of the enemy imposes on him an obligation to

act as a neutral, contrary to his duty as a citizen; it is an individual bribe—it has a tendency to poison the whole virtue and patriotism of the country; to undermine the government; to alienate the affections of the citizens, and to place the nation in the power of the enemy.

The circumstance, that acts of Congress have been passed prohibiting trade with the enemy, the use of his licenses, &c., has been urged by the claimants, as evidence that such communication with the enemy was not unlawful prior to the passage of those acts. But we contend that it was unlawful under a well-established rule of the law of nations; and that if these acts have not repealed that rule, they cannot aid the claimants in the present case. Sir Wm. Scott's observations in the case of the *Hoffning*, are in point. (2 Rob., 137, 165.)

But we have a special answer to the argu- **215*** ment of the *claimants. The act of July 6 goes upon the presumption that the intercourse with the enemy which it prohibits, was before unlawful—it does not profess to create a new offense.

Considering, then, this point as settled, the argument that the act of 6th July prohibits the use of licenses to trade with British ports only, falls to the ground.

The case of ransom has been said to militate with the argument we have employed in support of the illegality of sailing under the protection of the enemy. But the cases are widely different. In a case of ransom, the captured vessel is compelled to make an agreement with the enemy—she is under the necessity of accepting their protection—here the transaction was perfectly voluntary.

The rule of 1756, declaring illegal the coasting trade permitted by the enemy in time of war, which was prohibited by him in time of peace, is founded upon the same general principle. If, then, the permission only of the enemy gives a hostile character to vessels sailing under that permission, a *fortiori*, they acquire a hostile character by sailing under the protection of the enemy.

But suppose the claimants in this case did not mean to aid the British, but merely to benefit themselves at the expense of their country and their fellow-citizens—still the object of the license and the obvious consequence of the voyage, was the supply of the British West Indies. This the claimants must have known. They knew, also, that the pressure of the West Indies was one of the means which the United States were using to coerce the enemy; yet they become the agents of the British to prevent this pressure. If a neutral carry despatches for one of the belligerent powers, it affords just cause of condemnation to the other. How much stronger is the case of a citizen of one of the belligerent nations furnishing the other with supplies.

It has been said that here was only an intent to commit an illegal act (supposing the act con- **216*** templated to *be illegal), that there was no *corpus delicti*. But we contend that the very act of sailing with a view to execute the intention constitutes the offense. Such is the law in case of blockade: if a vessel sails for a blockaded port, knowing it to be blockaded, she thereby acquires a hostile character.

We might here contend that the real destination of the Aurora was not to St. Barts, but to a British port; for it appears that, when captured, she was 160 miles to the leeward of that island. But it is unnecessary to say anything on this point, as the principle is the same, and the vessel equally liable to condemnation, whether her destination were to a British port or to St. Barts. In the latter case, the cargo, it was well known, would be obtained by the enemy from the Swedes; so that it was, in effect, the same thing as if it had been carried direct to the enemy.

Dexter, in reply.

It is the universality of the rule in question we mean to controvert; we deny that there is such a general rule. It is not to be found in Puffendorf, Grotius, Vattel, or any of the other jurists excepting Bynkershoek, whose rules of war are written in blood; and even he has qualified the rule; he says himself that the rule prohibiting all commercial intercourse is done away by the laws of commerce. Valin only shows that a particular intercourse is forbidden by the law of France; and, in noticing British insurance, he does not condemn the French for procuring it. The case of *Potts* v. *Bell* proves that the doctrine in question has but recently been introduced. It is, however, in that case admitted with the exception of those cases where the royal license has been obtained; but this exception must be taken as part of the rule itself. The general principle without the exception would be ruinous to the nation. The inconveniences which would arise from it are incalculable. In 1747, Lord Mansfield and Sir Dudley Ryder were of a different opinion as to the policy of the rule, and as to the principle of law.

In *Henkle* v. *the Royal Ex. As. Co.* Lord Hardwicke said: "It might be going too far to "say that all trading *with an enemy is [***217** "unlawful; for the general doctrine would go "a great way even where only English goods "were exported, and none of the enemy's im- "ported, which may be very beneficial."

In this country there has been no decision to establish the rule; and if we take the British rule, we must take it with the power of dispensation; but the President has no such power; the sovereignty has been said to reside in the people; but the remedy by application to Congress would be too slow and uncertain. We must conclude, therefore, that in this country no such rule exists.

It has, nevertheless, been contended by the counsel for the captors, that the rule not only exists, but that it is universal. Is a man, then, bound to abandon all his property which may happen to be in the enemy's country at the breaking out of a war? Such would be the consequence of taking the rule without any exception. Some cases of intercourse with the enemy, it is true, are so palpably illegal as to admit of no doubt on the subject; such as all traitorous intercourse, and perhaps a direct trade; so, also, if the intercourse be in consequence of a new enterprise undertaken since the commencement of hostilities; but many cases must necessarily occur, on the breaking out of a war, which ought certainly to form exceptions. Such is the doctrine in England, where the excepted cases are provided for by the royal license permitting intercourse with the enemy, under certain circumstances and with certain

restrictions. In a country, then, where licenses cannot be obtained, all cases where they would be granted if a power of granting them existed, must be cases of judicial exception to the general rule. Many occasions may and frequently do occur, during war, on which such intercourse with the enemy would be highly expedient in a political view—occasions where the public good requires an exception; and those, too, cases neither of necessity nor humanity, which must always be excepted.

It is not necessary to inquire whether the mere acceptance of a license is ground of condemnation; it is the sailing under a license **218***] which constitutes the offense; but *in our case there was no sailing under the license. The license authorized a voyage to a British, Portuguese or Spanish port. The voyage in the present case was to a port belonging to the Swedes. The letter of Allen, the consul, which has been said to authorize a voyage to a Swedish port also, is entitled to no regard. Admiral Sawyer's letter was the only protection. All the acts of Allen, except certifying that letter, were unauthorized and unofficial; they were no protection to the Aurora. Allen's letter shows, on the face of it, that the voyage to St. Barts was not covered by the license; it merely expresses an opinion that that voyage would answer the purposes contemplated by the British government as well as a voyage to a British port.

It has been said that the real destination of the Aurora was to a British port; and in support of the position, the circumstance of her being considerably to the leeward of St. Barts, when captured, has been urged in proof; but the argument deserves little consideration; it is a very common thing to fall to the leeward. Besides, it appears that the Aurora had been beating to the windward three days before she was captured, although when she first made the land there were numerous British ports under her lee.

It has also been argued on the part of the captors, that a transshipment from St. Barts to an enemy port was intended; but there is no evidence even of this; nor was there any motive for such transshipment. The cargo would meet with as ready a sale at St. Barts as at a British island. The superior advantage of taking in a return cargo at the former place has been already noticed.

But it is said that it was equally criminal to carry this cargo to St. Barts as to a port of the enemy, because the Swedes would probably dispose of it to the British. This argument, also, we conceive to be wholly without foundation. No decision to that effect has ever been pronounced. The case of the island of St. Eustatius in the last war, goes to prove the reverse of this doctrine.

Nothing, therefore, as we conceive, having been proved, on the part of the captors, suffi- **219***] cient to subject the *property in question to condemnation, we trust that the court, on the consideration of the whole case, will decree restitution to the claimants.

Monday, March 7th. *Absent*—TODD, *J.*

LIVINGSTON, *J.*, delivered the opinion of the court.

The ship Aurora and cargo, owned by the claimants, who are American citizens, and documented as American property, were captured, on the 26th of November, 1812, by the private armed ship Governor Tompkins, on an ostensible destination for St. Bartholomews. From the documents on board and the preparatory examinations, it appears that the ship sailed from Newburyport to Norfolk, in ballast, took in her present cargo, consisting of bread, flour, corn, &c., at the latter place, and sailed from thence on the voyage on which she was captured, on or about the 12th of November, 1812. The cargo was consigned to the supercargo of the ship; and the destination thereof upon the ship's papers, supported by the preparatory examinations, was St. Bartholomews, for which island the ship obtained her clearance. At the time of capture, she was to the leeward of that island; and certain passports or protections from the agents of the British government were found on board, which are familiarly known by the title of British licenses; which documents are as follows.[1]

Two questions have been made at bar. 1. Whether the acceptance and use of an enemy's license or passport of protection, on a voyage performed in furtherance of the enemy's avowed objects, be illegal, so as to affect the property with confiscation. 2. If so, whether there is anything in the present case to exempt it from the general principle.

The first point having just been decided in the affirmative, in the *Julia*, it only remains to inquire whether there be anything in this case to exempt it from the general principle.

In the opinion of a majority of the court, it is not easy to discriminate between these cases. Both of the vessels *had licenses or pass- [***220** ports of the same character, and substantially for the same purpose, except only that the object of the Julia was to supply the allied armies in Portugal, and the original intention of the Aurora was to go to the British West Indies. It is by no means clear that this destination was ever changed; but admitting that, from an apprehension of seizure in case of her returning to the United States after touching at a British port, she, in fact, sailed on a voyage to St. Bartholomews, this can make no substantial difference in her favor. Her object in going there was equally criminal, and subserved the views of the enemy nearly if not quite as well as if her cargo had been landed in a British island; of the real design of the voyage there can remain no doubt; for it abundantly appears, from the license itself, that the professed object of Admiral Sawyer at least, in granting it, was to obtain a supply of provisions for the enemy; and the court will not easily lend its ear to a suggestion, that notwithstanding the Aurora was found with a British protection on board, of so obnoxious a character, yet her owners intended to deceive the enemy, either by going to a port not mentioned in it, or by disposing of her cargo in a way that would not have promoted his views. Without meaning to say that such conduct may under no circumstances whatever be explained, the court thinks that there is no proof, in this case, to show that it was not the intention of the claimants to carry into effect the original understanding be-

1.—See the statement at the beginning of the report of this case.

tween them and Mr. Allen. For although the destination to St. Bartholomews be conceded, it is evident that Mr. Allen, who acted as British consul, supposed the views of Admiral Sawyer might be answered as well in that as in any other way; nor is it clear, as was said at bar, that the documents which were received from Mr. Allen, which varied more in form than in substance from the Admiral's passport, would not have protected her against British capture, on a voyage to that island. The protection of Admiral Sawyer extended to unarmed American vessels laden with dry provisions, and *bona fide* bound to British, Portuguese or Spanish ports. The only modification, or extension, introduced by Mr. Allen, was a permission to go to a Swedish island, equally neutral with Spain and Portugal, in the vicinity of the British possessions. Whether all or any of these papers would have saved the Aurora from confiscation in a British court of admir-
221*] alty, this court is not bound *to assert; it is sufficient if that were the reasonable expectation of the parties, as it certainly was, and it is more than probable that such expectation would have been realized, considering the very important advantage which the enemy was to derive from them. In case of capture, there can be no doubt that the claimants would have interposed these very papers, which are now supposed to have emanated from unauthorized agents, and probably with success, as a shield against forfeiture. Why, then, should they be permitted to allege here, that they would have been ineffectual for that purpose?

It is also insisted, that, in this case, no illicit intercourse had actually taken place; that the whole offense, if any, consisted in intention; and that if a capture had not intervened, there was still a *locus penitentiæ*, and no one can say that even a project of going to St. Bartholomews might not have been abandoned. In this reasoning the court does not concur; but is of opinion that the moment the Aurora started on the voyage for St. Bartholomews, with the license in question and a cargo of provisions, she rendered herself liable to capture by the public and private armed ships of the United States, who were not bound to lay by and see how she would conduct herself during the voyage, the consequence of which would be that no right of capture would exist until all chance of making it were at an end.

Judgment affirmed.

Cited—2 Wheat. 145; 3 Wheat. 207 (n); 1 Pet. C. C. 416; Blatchf. Pr. 85.

THE ADVENTURE, ———, MASTER.

The case of a vessel and cargo, belonging to a citizen of one belligerent nation, captured on the high seas by a cruiser of the other belligerent, given to a neutral, and by him brought into a port and libeled in a court of his own country, between which and the nation to which the vessel originally belonged war breaks out before final adjudication, is to be considered as a case of salvage. One moiety adjudged to the libelants and the other moiety to remain subject to the future order of the court from which the appeal was brought up; and to be restored to the original owner after the termination of the war, unless legislative provision should previously be made for the confiscation of enemy's property found in the country at the declaration of war.

The act of bringing in the cargo, though consisting of articles the importation of which was prohibited by law, was not considered, under the peculiar circumstances of this case, as subjecting the property to forfeiture.

THIS was an appeal from the decree of the Circuit Court for the District of Virginia.

The facts of the case, as stated by JOHNSON, *J.*, in delivering the opinion of the court, were as follow:

The libelants were the master and crew of the American brig Three Friends. On the 14th November, 1811, whilst on their voyage from Salem to the Brazils, *with a val- [*222
uable cargo on board, they were captured by the Nymphe and Medusa, French frigates, and by them the brig was plundered and burnt. On the 21st, the frigates captured the Adventure, a British ship laden with British goods; and, after taking out a part of the cargo, made a present of the residue to the libelants. The fact of the gift is established by a writing under the hand of the captain of the Medusa, commander of the squadron, in which he says: "*Je donne au capitaine,*" in the language of an unqualified donation. On the 23d November they left the squadron, and arrived at Norfolk on the 1st of February, 1812, after a long and boisterous voyage in a large ship navigated by a very inadequate crew. On her arrival in the United States, she was libeled by the captain and crew as their property acquired under the donation of the French captor; and the United States interposed a claim for the forfeiture incurred under the non-importation act. At the time of her arrival peace existed between this country and Great Britain: but on the 18th of June following, and pending this suit, war was declared.

Pinkney, for the libelants,

Said it was not his intention, at this time, to inquire whether or not this be a case for condemnation under the non-intercourse act of March 1, 1809; he did not mean to deny that it is not. Waiving that question, therefore, for the present, he contended that the property in controversy is either a *droit* of admiralty subject to salvage, or that it is to be considered as derelict. But no evidence has been produced in support of the latter supposition. It must therefore be considered as a case of the former description, and a case, too, of the most meritorious character.

If this be conceded, the next question is, what rate of salvage shall be allowed. The English rule on this subject is fixed only in the case of recapture by the government ships and privateers. The salvage allotted to the first is at the rate of one-eighth of the beneficial interest in the whole recaptured property; to the last, one-sixth. In all other cases, the judge of the court is at liberty to order such salvage as he *shall deem reasonable. Sometimes [*223
the whole property saved is allowed—sometimes the moiety only, and sometimes less. The present case is one of extraordinary merit.

In the court below, two points were made in behalf of the United States:

1. That this was a case of forfeiture under the non-intercourse act of 1st of March, 1809; and if not, then,

2. That it was a case of salvage, and the rate to be allotted discretionary with the court.

JOHNSON, *J.*, here suggested a doubt whether it was not a case under the non-intercourse act; and asked whether the United States could rightfully seize the property in question as a *droit* of admiralty, in port, or any other British property on the land. He also observed that there might be some difficulty with regard to the allotment of salvage, should this prove to be a case of that kind.

Harper, for the libelants.

On a capture of a vessel, the right of the captors is only inceptive. In order to complete that right, it is necessary to prosecute it to the condemnation of the vessel in a court of competent jurisdiction. In the present case, the French captors transferred their right, whatever it was, to the American master and crew. Could they lawfully do this? The decision of the question depends upon the doctrine relative to the transfer of a chose in action. We contend that they could; and that the transferees were consequently entitled, as captors, to prosecute the original capture.

But if the libelants are not entitled as captors, then it is a question whether it be a case under the non-intercourse act, or a case of salvage.

In order to bring it within the meaning of the non-intercourse act, it must be shown that there was an intention to import for sale or use —that there was a voluntary importation, and that the importation was from a foreign port or place. But here there was no such intention; **224***] *here was no voluntary importation; and no importation, as we conceive, from any foreign port or place within the meaning of the act; here was no intention to infract any law whatsoever; it was a case of clear necessity; the master and crew were obliged to bring in the ship to save their own lives.

But it may perhaps be said that though it was necessary to bring in the ship, it was not necessary to bring in the cargo. What, then, was to be done with it? Was it to be thrown into the sea? The British owner was not divested of his right. Such an act, therefore, would have been inconsistent with the neutral character which it was the duty of all Americans to preserve towards Great Britain, with whom we were then at peace. We conceive that the course pursued by the libelants was unexceptionable. They proceeded openly to the United States, and, immediately on their arrival, delivered up the property to be disposed of according to law. There is no appearance, throughout the whole transaction of the smallest intention to violate any law whatever.

It must, therefore, be considered as a case of salvage; and had the relations between Great Britain and the United States continued as they were at the time of the importation, the residue of the property in question, after deducting the salvage, must have been restored to the British owner.

But the declaration of war has altered the nature of the case. The ship and cargo have now become enemy property, and, as such, are claimed by the American government, subject, however, to the right of the libelants.

What salvage is to be allotted to us, the court will decide. Our case is certainly one of great merit; we were, for more than two months, exposed to the perils and hardships of a long and boisterous voyage; and that, too, in a large ship to the management of which the small crew on board was by no means adequate. Less than half the amount of the property would not, we conceive, compensate us for the trouble and danger we have incurred.

Pinkney* observed that he had not [*225** considered this as a case coming within the meaning of the non-intercourse act, and had therefore waived the discussion of that point; he still doubted whether there were sufficient grounds to support it. The law only prohibits importations from a foreign port or place. In cases of transshipment, it may perhaps be said that the property transshipped is imported from a foreign place; but here was no transshipment, no change of vessel; here, the property is imported from the high seas, which can hardly be considered as coming within the description of a foreign port or place. He did not mean, he said, to enter into a formal argument. He would, however, observe that, in his opinion, the captors, in the present case, could not complete their right to the property in question by means of a neutral master and crew, even if the British owner was divested of his right.

Rush, Attorney-General, conceived that the high seas might be considered as a foreign place; that the cargoes of whale ships from the Pacific, such as oil, whalebone, blubber, &c., which originate from the sea, might be considered as within the meaning of the non-intercourse act. He suggested that the word place, in the act, was probably used in contradistinction to port.

MARSHALL, *Ch. J.* In the Circuit Court the high seas were considered as common to all nations, and, of course, foreign to none.

Pinkney said this was a case of very considerable difficulty. How is the property to be disposed of? It cannot be decreed to the United States, for it is not a case under the non-intercourse act, nor was the seizure *jure belli*. A prize court had no jurisdiction, for the seizure was in time of peace, for a supposed violation of the non-intercourse law, and after the property was landed. It cannot be decreed wholly to the libelants, because it must be considered as a case of salvage. Nor can it be restored to the original owner, because he is an alien enemy.

Monday, March 7th. *Absent*—TODD, *J.*

STORY, *J.*, did not sit in this cause, some distant relative of his having an interest in it.

*JOHNSON, *J.*, after stating the facts [***226** of the case, as before mentioned, delivered the opinion of the court as follows:

The very peculiar circumstances of this case require the application of a variety of principles; and the court has not been aided in its inquiries by that elaborate discussion which such novel cases generally elicit. But they are relieved by the reflection, that the principles to which they must resort in forming their judgment are well established, and lead satisfactorily to a conclusion.

The most natural mode of acquiring a definite idea of the rights of the libelants in the subject matter, will be, to follow it through the successive changes of circumstances by which

the nature and exteut of the rights of the parties were affected—the capture, the donation, the arrival in the United States, and the state of war.

As between the belligerents, the capture undoubtedly produces a complete devesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribuuals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, as will dispossess the purchaser of a ship originally British. (*The Fladoyen*, 1 Rob., 114, 135). Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage. And, on her arrival in a neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the thing **227***] *in possession which the civil law gave for care and labor bestowed upon it.

The question, then, occurs, is this a case of salvage?

On the negative of the proposition it is contended, that it is a case of forfeiture, and therefore not a case of salvage as against the United States—that it was an unneutral act to assist the enemy in bringing the vessel *infra presidia*, or into any situation where the rights of recapture would cease, and therefore not a case of salvage as against the British claimant.

But the court entertain an opinion unfavorable to both these objections.

This could never have been a case within the view of the legislature, when passing the non-importatiou act. The ship was the plank on which the shipwrecked mariner reached the shore; and although it may be urged that bringing in the cargo was not necessarily connected with their own return to their country, yet, upon reflection, it will be found, that this also can be excused upon very fair principles. It was their duty to adhere strictly to their neutral character; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury by taking away that chance of recovery subject to which they took it into their possession. Besides, bringing it into the United States, did not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as we are of opinion it did, legal provision exists for disposing of it in such a mauner as would comport with the policy of our laws. At last, they could but deliver it up to the hands of the government, to be reshipped by the British claimant, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violatiou of the laws of the country, upon their arrival here they deliver it up to the custody of the laws, and leave it to be disposed of under judicial sanction. The case has no one feature of an illegal importation, and cannot possibly have imputed to it the violation of law.

*As to the question arising on the in- [***228**
terest of the British claimant, it would, at this time, be a sufficient answer, that they who have no rights in this court cannot urge a violation of their rights against the claim of the libelants. But there is still a much more satisfactory answer. To have attempted to carry the vessel *infra presidia* of the enemy, would, unless it could have been excused on the grouud of necessity, have been an unneutral act. But when every exertion is made to bring it to a place of safety, in which the original right of the captured would revive and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the English claimant.

It being determined to be a case of salvage, the next question is, as to the amount to be allowed. On this subject there is no precise rule; nor is it, in its nature, reducible to rule. For it must, in every case, depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, &c., all of which must be estimated and weighed by the court that awards the salvage. As far as our inquiries extend, when a proportion of the thing saved has been awarded, a half has been the *maximum*, and an eighth the *minimum;* below that, it is usual to adjudge a compensation in *numero*. In some cases, indeed, more than a half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of very small amount. In the present case, the account sales of the cargo was near $16,000; and we are of opinion that the one-half of that sum will be an adequate compensation:

The next question arises on the application of the residue. On this point, the court is led to a conclusion by the following considerations:

At the arrival of the vessel in the United States, the original British owner would, unquestionably, have been entitled to the balance. The state of war, however, at present, prevents his interposing a claim in the courts of this country. But as this property was found within the United States at the declaration of war, it must stand on the same footing with other British property similarly situated. Although property of that description is liable to be disposed of by the legislative *power of [***229**
the country, yet, until some act is passed upon the subject, it is still under the protection of the law, and may be claimed after the termination of war, if not previously confiscated. We will, therefore, make such order respecting it as will preserve it, subject to the will of the court, to be disposed of as future circumstauces shall render proper.

As to the mode of distributing the amount of the salvage, the court have concluded to adopt an arbitrary distribution; because there exists no positive rule on that subject. They would have adopted the rules of the prize act relative to cases of salvage, had the circumstances of the case admitted of its application.

This court orders and decrees, that the decree of the Circuit Court of Virginia, in this case,

be reversed; that the costs and charges be paid out of the proceeds of the sale; that the one-half of the balance be adjudged to the libelants, to be divided into thirteen and a half parts, three of which shall be paid to the captain, two to the supercargo, two to the chief mate, one and a half to the second mate, and one to each of the seamen. And that the balance be deposited in the bank of Virginia, to remain subject to the future order of the Circuit Court.

Rev'g—1 Brock. 235.
Cited—1 Wheat. 128; 7 Wall. 163; 1 Mason, 377; 5 Mason, 471; 5 McLean, 367; 1 Low. 17; Newb. adm. 137.

JOHN GREEN
v.
JOHN LITER AND OTHERS.

The circuit courts of the United States have jurisdiction in writs of right, where the property demanded exceeds $500 in value; and if, upon the trial the demandant recover less, he is not to be allowed his costs; but, at the discretion of the court, may be adjudged to pay costs.

At common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement of the writ. If the demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof non-tenure is pleaded and admitted or proved.

Under the act of Kentucky, to amend process in chancery and common law, the party may recover, although he prove only part of the claim in his declaration; but it does not enable him to join parties in an action, who could not be joined at the common law. The act of Virginia of 1786, reforming the method of proceeding in writs of right, did not vary the rights or legal predicament of the parties, as they existed at the common law. It did not therefore change the nature and effect of the pleadings; and notwithstanding that act, the tenant shall still have the full benefit of the ordinary pleas in abatement. The clause of the act which provides that the tenant at the trial may, on the general issue, give in evidence any matter which might have been specially pleaded, is confined to matters in bar. Under the act of Virginia of 1786, the tenant may, at his election, plead any special matter in bar in a writ of right, or give it in evidence on the mise joined. The act is not compulsive, but cumulative. The act of Virginia of 1786, did not change the nature of the inquiry as to the titles of the parties to a writ of right. In order to support a writ of right, it is not necessary to prove an actual entry under title, or actual taking of esplees. A constructive seizin in deed is sufficient.

Under the land law of Virginia, the whole legal estate and seizin of the commonwealth pass to the patentee, upon the issuing of his patent, in as full and beneficial a manner (subject only to the rights of the commonwealth), as the commonwealth itself held them.

A conveyance of wild and vacant lands gives a constructive seizin thereof, in deed, to the grantee, and attaches to him all the legal remedies incident to the estate. A *fortiori*, this principle applies to a patent.

In Kentucky, a patent is the completion of the legal title; and it is the legal title only that can come in controversy in a writ of right.

A better subsisting adverse title in a third person, is no defense in a writ of right.

If tenants claiming different parcels of land by distinct titles, omit to plead that matter in abatement, and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the demandant for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the demandant.

If a man enter into lands, having title, his seizin is not bounded by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seizin is confined to his possession by metes and bounds.

An entry into a parcel which is vacant, will not give seizin of a parcel which is in an adverse seizin; but an entry into the last parcel, in the name of the whole, will enure as an entry into the vacant parcel.

Under a conveyance, taking effect under the statute of uses, the bargainee has a complete seizin in deed without actual entry or livery of seizin.

THIS was a writ of right brought by Green, the demandant, against the tenants, to recover seizin of a large tract of land lying in Kentucky, and set forth in the count. The writ of right was sued out under the act of the Virginia Assembly, entitled "an act for reforming the method of proceeding in writs of right."

At the trial in the Circuit Court for the Kentucky District, several questions arose upon which the court was divided; whereupon those questions were certified for the opinion of the Supreme Court. They are as follows:

*1st. Has the Circuit Court of the [*230 United States jurisdiction in a writ of right, where the land claimed by the demandant is above the value of $500, but the tenement held by the tenant is of less value than $500?

2d. Can the demandant join in the writ and count several tenants claiming under several distinct, separate and independent original titles, all of which interfere with the land of the demandant? If he can, must he demand of them the tenements they severally hold, or may he demand a tenement to the extent of his own title? If it comprises a part not claimed or held by any of the said tenants, may he demand, in his count against the several tenants, his own tenement, or must he demand of each tenant the tenement he severally holds?

3d. Can the tenant, under the act of the Virginia Assembly for reforming the method of proceeding in writs of right, plead in abatement either the plea of non-tenure, joint tenancy, sole tenancy, several tenancy, or never tenant of the freehold, or any of them, or other pleas in abatement necessary to his case; or is he compellable to join in the mise in the form prescribed by the said act? If he can, when or at what stage of the proceedings? If he cannot, may he give it in evidence on the mise joined?

4th. May the tenant, under the said act, plead specially any matter of bar, or must he join the mise, without other plea, in the form prescribed by the said act?

5th. Can a demandant who has regularly obtained a patent from the land-office of the state of Virginia for the land in contest, under the act of the Virginia Legislature, passed in the year 1779, commonly styled the land law, maintain a writ of right, under such patent, against a person claiming and holding possession under a younger patent from the said state, without having first taken the actual possession of the land, under his patent, held by the tenant? If he can maintain a writ of right without such proof in the general, can he do it where his right of entry is barred by an actual adverse possession of twenty years?

6th. Is the eldest patent, obtained as afore-
231*] said, for *the land in controversy, sufficient proof of the best mere right; or can the demandant be put on the proof that, in the incipiency, and in the different steps necessary to complete his title, he has complied with the requisites prescribed by the acts, the one entitled "an act for adjusting and settling the titles of claimants to unpatented lands under the present and former government, previous to the establishment of the commonwealth land-office," and the other, "an act for establishing a land-office and ascertaining the terms and manner of grauting waste and unappropriated lands," and the subsequent laws of Virginia on the same subject, in force at the time of the erection of the District of Kentucky into a separate state?

7th. If the demandant is not compellable to show anything beyond his patent, can the tenant holding the younger patent be permitted to impeach the demandant's pateut, to show the incipiency and completion of his own title, and the relative merits of his own and the demandant's title?

8th. Can the defendant defend himself by showing an older and better existing title than the demandant's, in a third person?

9th. Where several tenants, claiming in severalty, are joined in a writ of right, should the finding of the jury be several of the mere right between the demandant and each tenant, or may it be a general findiug that the demandant hath the most mere right?

10th. The commonwealth having first made and granted a patent to the demandant, and afterwards, by her patent, granted a part of the same land to the defendants, who entered and obtained the first possession, the demandant afterwards entered and took possession, under his first grant, of that part of his laud not within the patent of the first grantee—who has the best mere right to the land, where the patents conflict, outside of the actual close of the last grantee?

11th. Will an entry upon part, and taking the esplees under the elder graut from the commonwealth, and making claim to the whole land included within the bounds of the elder grant, authorize the demandant to maintaiu his
232*] *writ of right against the tenants holding the previous possession under a youuger patent interfering with the elder grant?

Wickliffe, for the demandant.

The court below being divided in opinion upon the several questions already stated, they have been adjourned to this court. The questions themselves sufficiently show the controversy. And the several points will be examined as they present themselves on the record.

With regard to the first, we contend that the Circuit Court has jurisdiction in the case therein stated; and that the defendant's only remedy, in such case, under the act of Congress, is, that he shall be excused from paying costs, and that he may, at the discretion of the court, be allowed his costs. In support of this point we rely on the judicial act of 1789. (Laws U. S., vol. 1, p. 47, 1 Sess., 1 Cong., eh. 20, § 11 and 20.)

2d. Upon the second question, we contend, in behalf of the demandant, that under the act of assembly of Virg. (Rev. Co. P. P., 34), if his tenement is an entire one, and interfered with by divers tenants, he can only demand his tenement as it is, and cannot know how the adverse claimants bound or abut their claims or possession; and that as all claim and obstruet him in the use and possession, he has a right to sue all. We contend, further, that although the demandant claim more than the tenants or either of them hold, still he may recover as much as is withheld from him by the tenant or tenants. To support this positiou we rely upon the act of assembly of Virginia of 1792, ch. 125, which is in force in Kentucky and is the same in substance with the act of 25 Edw. 3, ch. 16, which enacts "that by the exception of non-tenure of parcel no writ shall be abated but for quantity of the non-tenure which is alleged;" and the act of assembly of Kentucky, entitled "an act to amend proceedings in chancery and common law;" the latter of which acts expressly provides, that if the plaintiff at law shall prove part of his demand or claim set up in his declaration, he shall not be non-suited, but shall have judgment for what he proves. (Sec, also, Boothe on real action, p. 2.)

*3d. On the third question, we insist,[*233 that, under a sound construction of the act of assembly of Virgiuia of 1786 (Revised Code, vol. 1, p. 33, ch. 27), no matter in abatement which does not affect the right can be pleaded. But if it can be pleaded, yet, under the acts of assembly of Kentucky, and the rules of the Circuit Court of the District of Keutucky, it ought to be pleaded during the appearance term, and be supported by oath. It is further insisted that only such matters as assume the character of abatement at common law, and which effect the mere right, such as non-tenure, can be given in evidence on the mise joined. A contrary construction of the act would lead to the worst of consequences. If, upon the mise joined, all matter in abatement might be giveu in evidence, a man might lose his valuable inheritance by the defendant proving on the trial that he claimed and held as joiut tenant, and not as sole tenant. It would also involve the monstrous absurdity of making the jury the sole and exclusive judges of the demandant's count and pleading.

4th. The fourth proposition seems to be abstract and indefinite. If the matter in bar affects the mere right, and goes to show substantially that the demandant has no claim in fee-simple, it is submitted to the court to say, whether, under a just construction of the act, he can plead it. But as the act allows him to give such bar in evidence on the general issue, it is within the sound discretion of the inferior court, to permit the defendant to plead the special matter, or give it in evidence on the general issue; and that must depend upon the time when the application is made. On this point, the case of *Resler* v. *Sheehee* (1 Cranch, 110), and the case of *Fox* and *White*, in the Court of Appeals in Kentucky, are relied upon. It is further submitted, whether the mere etiquette of pleading and the time when that pleading shall be filed, is not a matter of practice only, and proper to be left to the circuit courts to settle under their own rules or the statutes and practice in Kentucky.

5th. The fifth question seems to be a more important one; and it would have been, perhaps, more regular to have placed that before the

other questions, inasmuch as a decision upon that, affirmatively, would preclude the necessity of deciding several of the others.

234*] *Upon this question we contend that the demandant can, upon his patent, maintain his writ of right; and that actual possession is not necessary. To maintain this point it is not at all material to prove that by the king's letters patent, granting titles to land in England, a writ of right could be maintained. It is believed that no case has occurred where that point has been directly decided. But titles in England are conditional, not absolute. Since the time of William the Conqueror, all grants of land have been made on feudal principles; and a patent in England is not of itself a right, but an authority to the grantee to take a right; that right rests upon conditions; and one of those conditions is entering and taking possession of the land. In the grant there are two parties supposed, the king and grantee; and the grantee becomes bound to the king when he accepts the estate, and not till then; the ultimate property remains with the king; and upon the tenant's entering, he becomes seized of the use only; and hence exists the reason, in the English books, of requiring the demandant, in the most solemn trial of a right to real estate, to show and prove the highest title the subject ever had, the *dominium utile*, or usufruct of the property; for if neither he nor his ancestor had entered and been seized of the use, (the *dominium directum* remaining in the king) they never had a fee-simple estate; the feudal grant not being an estate in fee, but a right to enter and take one; and if that right was never exercised, the estate was never taken. (See 2 Bl. Com., 46, 104, 105, 107, 108.) It appears, also, further, from Boothe, and Fitz. (Nat. Brev. tit. writ of right, letter F.), that the demandant had not only to set out when he was seized, but by what service he held the land.

It is important to state the kind of title made by letters patent such as those under which the demandant claims. In 1777, the legislature of Virginia abolished all servile and feudal tenures; and in 1779, passed her land law, under which we derive title. In one section of that act, the form of an allodial grant is given; and, by way of closing every doubt as to the title, the register was directed to indorse that the patentee had title. Having provided, in that section, for the complete investment of an absolute and unconditional title under that act, and actuated by a laudable desire to place all

235*] *her citizens upon the same tenure, in the 19th section of the same act she declares, "that "all reservations and conditions in the patents "or grants of land from the crown of England "or of Great Britain, under the former govern- "ment, are hereby declared to be null and "void; and that all lands thereby respective- "ly granted shall be held in absolute and un- "conditional property, to all intents and pur- "poses whatsoever, in the same manner with "lands hereafter to be granted by the common- "wealth, by virtue of this act." And by a subsequent section of the same act, all laws requiring the seating or possession of land to vest title, are expressly repealed. It will be perceived that the legislature not only gave the form of a patent such as never had been issued before in that state, but provided that an indorsement should appear on the back of the letters patent, that the grantee had title, no such indorsement ever having been made or allowed during the regal government. But lest the titles might, in some manner, be tinctured with the learning of the feudal law, they explicity declare that the estate shall be held in absolute and unconditional property. It might here be asked, can any man say that the patent of the commonwealth, issued in strict pursuance of this act, does not convey a fee-simple estate, without any condition being performed by the patentee? To us it seems that this is a point too clear for doubt.

The attention of the court is next called to the act of 1786. That act, in its title and context, professes to be an act to reform the method of proceeding in writs of right; and expressly provides, that it shall be lawful for a person claiming a fee-simple title to sue forth the *præcipe quod reddat*, &c. This act gives the writ. If the demandant has a fee-simple estate (and the only question which can be involved is, has the demandant, by these letters patent, a fee-simple estate), a further argument is drawn from the fact of passing the act itself. The necessity of this reform had become obvious to the legislature and the people of Virginia, from the great and radical change of the land titles created by the act of 1779. That act had repealed all laws which required claimers of land to settle them; had repealed and abolished every service and tenure by which lands in that state had been theretofore held. Of course the form of the count at common law was totally defective and improper; *because that [***236** contained not only the charge of actual seizin, but the time when, and by what kind of service the lands were held. The common law titles having ceased, the remedy ceased also; it then well became the legislature to give a statutory remedy suited to the statutory and then existing state of titles; and thus you find a form of *præcipe* and count given, precisely correspondent with the title. The act of 1779 abolished all the feudal tenures, and dispensed with actual possession; and the old allegations of possession and the kind of tenure, are omitted. This omission means something; and why did it take place if not for the causes now assigned? (See, on the foregoing points, Cruise on Real Estates, 12; Co. Litt., folio 48; Ch. Rev., 61.)

The form of the writ and count is very obviously taken from the British forms; and is not only the act of a legislature famed for its wisdom and learning, but report makes this form the peculiar work of a committee of the first lawyers then of the Virginia bar. To ascribe such unmeaning omissions to such men and to such a body, is wholly inadmissible.

But surely, on common law principles, it cannot be fairly contended that the demandant shall prove actual possession. The statute has given him his count or declaration. That count will, it is believed, be sufficient for him after verdict; and if a man proves everything he has alleged upon a good declaration, we understand the common law to be, that he shall have a verdict. If you require of the demandant to prove more than his count contains, where will you stop? If you say that after he proves and exhibits a fee-simple title, he shall also prove pos-

session, why not say that he must prove by what tenure he holds, and whatever else he was bound to prove at common law; and which were equally indispensable to be proved before this statute? The case of *Clay* v. *White* (1 Munford, 162) will be relied on to prove that the patentee is, to every legal purpose, possessed of land, in Virginia, by his letters patent. Upon this point, the attention of the court is further called to the state of the country at the date of the Virginia land law. It was in the midst of a war with Great Britain; when sound policy required that many of the grantees who were engaged in the war (the officers and **237***] *soldiers) should remain in it during its continuance; and that those not engaged should, to a certain extent, be drawn into its armies. In fact, this very land-office was opened with the twofold view of raising men and money to carry on the war. It is therefore asked, if the objects of the legislature would not have been defeated if the very bounty offered for the public service, and which might be the price of the blood of the father to the children, should depend upon seating and possessing the land? For if the doctrine obtain, that actual possession is necessary to a perfect title, or to give a fee-simple estate, it is incontrovertible (by the rules of the common law) that the death of the grantee before entry prevents the estate from descending; that the grantee cannot sell nor devise a mere right of entry; and that, by the bare attempt to do the one or the other, he works a forfeiture. (See Co. Litt., 214, 266, and Noy's Maxims, 84.) It is believed that one-third of the best lands in Kentucky are held by devise, purchase, or descent, without the original grantee ever having been possessed. With what astonishment will the Virginian or Kentuckian learn, for the first time, the monstrous doctrine that destroys every estate of the kind. Again, with the exception of four small forts or stations, the whole territory which now forms the state of Kentucky was, at the date of the law, a wilderness, in the possession and under the power of the Indians. In fact, a considerable part granted out by the state, below the Tennessee, is yet held, and may be held for a century, by the Indians. And can it be supposed that Virginia could have intended, when she invited the soldier and the capitalist to embark their fortunes in the war, and offered as a reward these lands, to have imposed the necessity of actual settlement and taking the esplees as a prerequisite to title? What are the esplees of a wilderness under the dominion of the tomahawk and the scalping knife? Are they the game or the wild acorns? If we be correct in supposing that the commonwealth vests in the demandant, in this case, a fee-simple estate, and legally possesses him of that estate, it follows that nothing less than an adverse possession of thirty years can bar him; and that twenty years is not a sufficient bar. In support of the foregoing observations, see Ch. Rev., p. 97; Id., p. 98, sec. 6; 1 Rev., Code of Vir. Laws, p. 33; **238***] Id., p. —, Noy's Maxims, *160; Co. Litt., 48, note; Boothe., 112; Id., 98; Harding's (Kentucky) Reports, 162, *Bradford* v. *Patterson;* Sneed's Reports, 237, *Brown* v. *Quarles;* Co. Litt., 57; Fitz. N. B., 506, note; Rev. Code, ch. 114.

6th. On the sixth question proposed, we contend that the first patent conveys the legal estate in fee; that the incipiency of title was a matter between the commonwealth and the patentee; and, when settled with the commonwealth, and the title made perfect, that it does not lie in contest between the demandant and defendant. We contend, also, that, in a trial at law, of a mere legal right, the defendant cannot set up an equity against the elder grant. This point was settled by the Court of Appeals of Kentucky, in the old case of *Brown* v. *Quarles*, and has ever since been considered the law of that state.

8th. On the eighth question, we contend that the mise is joined upon the mere right between the demandant and defendant; and that the jury is to inquire whether the demandant hath more right, &c., or the defendant, &c., and that it will be absurd to inquire whether the demandant or someone else hath the most mere right.

9th. On the ninth, it may be observed that it must depend upon the manner in which the mise is joined. If the tenants jointly and severally join the mise upon the whole land claimed by the demandant in his count, then a general finding will be proper. But if they severally plead as to part, and disclaim or plead nontenure as to the rest, then the finding should be several, and respond to each issue.

10th. On the tenth, we contend that an entry into part in the name of the whole, and claiming the whole, will, on common law authority, sustain the writ and count as to all claiming under a younger and inferior right, that have not had thirty years' adverse possession; and, of course, that the land in the demandant's patent and outside of the close of the defendant, belongs to the demandant.

11th. The observations upon the tenth question will apply to this also.

Hughes, contra. [***239**

The fifth question being the most important, and that to which the demandant's counsel has principally directed his attention in the course of his argument, I shall confine my observations also, chiefly to that point.

The Virginia act of assembly of 19th December, 1792, which declares that "actual possession need not be proved to maintain a writ of right," was passed after the separation of Kentucky from Virginia; and consequently is not in force in the former state.

At common law, a writ of right cannot be maintained without proof of seizin in the demandant, and actual taking of esplees within the time of limitation; which, in England, is thirty years on a man's own seizin, and fifty on the seizin of his ancestors; and such was the law of Virginia until the year 1786, when the act for reforming the method of proceeding in writs of right was passed. But this act merely changed the mode of trial, not the substance of proof. It did not dispense with proof of the demandant's seizin; and, consequently, the law on that subject remains the same as before the passage of the act of 1786. (*Vid.* Boothe, 85, 111, 112; Co. Litt., 281, 393, 294; 2 Saund., 45, 46; Bac. Abr. tit. Limitation of Actions, B.; 4 Rep., 8, *Bevill's* case; Old Laws of Virginia, 147.)

From the case of *Tisson* v. *Clarke* (3 Wils., 419), it appears, that if the tenant did not pay

his demi-mark, and deny the seizin of the demandant, such seizin was taken for confessed. Hence the defendant was put to prove his title, contrary to the general rule. (*Vid.* the case of *Tisson* v. *Clarke*, 3 Wils., 419; Id. 541; Co. Lit. § 514; Boothe, 113.) But the legislature of Virginia, by omitting to require the allegation of seizin, made it necessary that the demandant should prove it. If it had been alleged, and not denied, such proof, on the part of the demandant, would not have been necessary.

Although, according to the decision of the Court of Appeals of Kentucky in the case of *Innis et al.* v. *Crawford* (M. S. report), the patent conveys a fee-simple estate, yet the patentee must so use it as not to lose his estate, **240***]*and in such a manner as to prevent the operation of the statute of limitations. A patentee may lose his right by not entering in due time; and, in such case, having nothing superior to a right of entry, he cannot maintain a writ of right. At the time of the separation of Kentucky from Virginia, the statute of limitations of Virginia was, *verbatim*, the same as the statute of 32d of Henry VIII., c. 2, on which it has been decided that seizin was necessary within fifty years. (*Vid.* the M. S. report of the case of *Sprigs* v. *Griffith*, decided in Kentucky; also, the M. S. report of the case of *Speed* v. *Buford*, decided in the Court of Appeals of the same state, in May, 1813.)

But admit that a patent is equivalent to livery in law; we contend that livery in fact is necessary; and so must the case of *White* v. *Clay* (in 1 Munf., 162), be understood. (Co. Lit., 240, b.; Id. 111; Shep. Touch., 209, 223.)

The reason of the law requiring proof of actual possession is obvious. Such proof was required in order to secure the peaceable occupancy of the land to the rightful proprietor. Investiture and seizin were invented for the purpose of putting an end to litigation. They were notorious acts in the country, performed in the presence of the vicinage; and where there had been such actual seizin and investiture, the law, after the right of entry was gone, gave the demandant the writ of right to revive his former possession. (2 Bl. Com., 311, 312, Shep. Touch., 209.)

It is true that, according to the old law, a charter of feoffment, without actual livery, only gave an estate at will; and the statute of uses transfers the possession in law to the use; but no change was made thereby in the law respecting writs of right, which requires proof of actual possession.

With regard to the other questions adjourned, the counsel for the tenants contended,

As to the 1st and 2d points, that the demandant could not join, in the writ and count, several tenants claiming under several distinct, separate and independant original titles; and that, as they could not be joined, the Circuit **241***] Court had no jurisdiction; inasmuch *as no one of the tenements in question was of the value of $500.

As to the 3d point, that non-tenure, no seizin, &c., might be pleaded under the act of Virginia, of 1786.

The 4th point he submitted.

On the 6th and 7th, he contended that the patent was not conclusive evidence in a writ of right.

On the 8th, he supported the affirmative of the question.

The 9th, he said respected matter of form merely.

As to the 10th, he insisted, that when a man takes possession, he takes possession to the extent of his claim.

The 11th, he said was answered by the observations on the 1st point.

Wickliffe, in reply,

Contended, that the Kentucky cases cited by the tenant's counsel, not being final and absolute, were not authority; that the Court of Appeals of Kentucky was, in fact, waiting for the decision of this court in these cases. But admitting them to be authority, still there was error in the finding of the jury; they had found a special verdict, which, by the common law, they could not do; they ought to have decided the mere right, and nothing more.

In the case of a grant from the crown of the same land to two different persons, if the last grantee enter, the former may maintain trespass.

In the case of *Innis* v. *Crawford*, the court, in effect, said, that the patent gave seizin; because they dated the disseizin by the tenant, from the date of his entry; but if the demandant was not seized, he could not have been disseized.

*The Court of Appeals of Virginia, [**242** at different times have decided differently on the same law; but the courts of Kentucky have always decided that when the reason of the English law ceased in consequence of the different circumstances of the country, the law itself ceased.

Friday, March 11th. *Present—All the Judges.*

STORY, *J.*, delivered the opinion of the court as follows:

This is a writ of right brought by the demandant against the tenants, to recover seizin of a large tract of land set forth in the count. At the trial in the Circuit Court for Kentucky District, several questions arose upon which the court were divided; and these questions are now certified for the opinion of this court.

As to the first question, we are satisfied that the Circuit Court had jurisdiction of the cause. Taking the 11th and 20th sections of the judicial act of 1789, ch. 20, in connection, it is clear that the jurisdiction attaches where the property demanded exceeds $500 in value; and if, upon the trial, the demandant recover less, he is not allowed his costs; but, at the discretion of the court, may be adjudged to pay costs.

As to the second question, we are of opinion that, at common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement of the writ. If the demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; and this plea, by the ancient common law, would have abated the whole writ. But the statute 25 Edw. 3, (St. 5, ch, 16), which may be considered as a part of our common law, having been in force at the emigration of our ancestors, cured the defect, and declared that the

writ should abate only as to the parcel whereof non-tenure was pleaded, and admitted or proved. In fact the act of Virginia of 1792, ch. 125, which is in force in Kentucky, enacts substantially the same provision as the statute of Edward.

243*] *But it is supposed, in argument, that the act of Kentucky, to amend proceedings in chancery and common law, which provides that if the plaintiff at law shall prove part of his demand or claim set up in his declaration, he shall not be non-suited, but shall have judgment for what he proves, entitles the demaudaut in this case to join parties who hold in severalty by distinct titles.

To this doctrine the court cannot accede. At common law, in many iustances, if the party demanded in his writ more than he proved was his right, he lost his action by the falsity of his writ. It was to cure this ancient evil that the act of Kentucky was made. It enables the party to recover, although he should prove only part of the claim in his declaration. But it does not intend to enable him to join parties in an action who could not be joiued at the commou law. It could no more entitle a demandant in a real action to recover against several teuants claiming by distinct and separate titles, than it could entitle a plaintiff to maintain a joiut action of *assumpsit*, where the contracts were several and independent. Infinite inconvenience and mischief would result from such a coustruction; and we should not incline to adopt it unless it were unavoidable.

As to the third question. It is clear, at the common law, that non-tenure, joint tenure, sole tenure and several tenure, were good pleas in abatement to a writ of right. But they could only be pleaded in abatement; for the tenant, by joining the mise, or pleading in bar, admitted himself tenant of the freehold. Such pleading in bar was an admission that he had a capacity to defend the suit; and he was estopped, by his own act, from denying it. The act of Virginia of 1786, ch. 27, reforming the proceedings on writs of right, was not intended to vary the rights or legal predicament of the parties. It did not, therefore, intend to change the nature and effect of the pleadings; and notwithstanding that act, the tenant shall still have the full benefit of the ordinary pleas in abatement. It is true that the act provides that the tenant, at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded. But this provision is manifestly confined to matters in bar. It would be absurd to suppose that the legislature meant to **244***] give to a mere *exception in abatement the full effect of a perfect bar on the merits; which would be the case if such an exception would authorize a verdict for the tenant on issue joined on the mere right. The time and manner of filing the pleadings must, of course, be left to the established practice and rules in the Circuit Court.

As to the fourth point, we are of opinion that, under the act of Virginia of 1786 the tenant may, at his election, plead any special matter in bar, in a writ of right, or give it in evidence on the mise joined. The act is not deemed compulsive, but cumulative.

The fifth question is that which has been deemed most important; and to this the counsel on each side have directed their efforts with great ability.

It is clear, by the whole current of authority, that actual seizin, or seizin in deed, is, at the common law, necessary to maintain a writ of right. Nor is this peculiar to actions ou the mere right. It equally applies to writs of entry; and the language of the count in both cases is, that the demandant, or his ancestor, was, within the time of limitation, seized in his demesne as of fee, &c., taking the esplees, &c. It is highly probable that the foundation of this rule was laid in the earliest rudiments of titles at the common law. It is well known that, in ancient times, no deed or charter was necessary to couvey a fee-simple. The title, the full and perfect dominion, was conveyed by a mere livery of seizin in the presence of the vicinage. It was the notoriety of this ccremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of a later age, and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of seizin was absolutely necessary to produce a perfect title, or as Fleta calls it, *juris et seisinæ conjunctio*. But, whatever may be its origin, the rule as to the actual seizin has long since become an inflexible doctrine of the common law.

It has been argued that the act of Virginia of 1786, ch. 27, meant in this respect to change the doctrine of the commou law, because that act has given the form of *the count in [***245** a writ of right, and omits any allegation of seizin and taking esplees. There is certainly some counteuance in the act for the argument. But, on mature consideration, we are of opinion that it cannot prevail. The form of joining the mise in a writ of right, is also given in the same act; and that form includes the same inquiry, viz., "which hath the greater, right" as the forms at common law. It would seem to follow that the legislature did not mean to change the nature of the facts which were to be inquired into, but only to provide a more summary mode of proceeding. The clause in the same act allowing any special matter to be given in evidence on the mise joined, may also be called in aid of this construction. That clause certainly shows that it was not intended to relieve the demandant from the effect of auy existing bar; and want of seizin was, at the common law, a fatal bar. The statute of limitations of Virginia, of 19th December, 1792, ch. 77, which, as to this point, is a revisal of the old statute, limits a writ of right upon ancestra lseizin to 50 years, and upon the demandant's own seizin to 30 years next before the *teste* of the writ. It is therefore incumbent on the demandant to prove a seizin within the time of limitation; otherwise he is without remedy; and if so, it must be involved in the issue joined on the mere right. We are therefore of opinion that the act of 1786 did not mean to change the uature of the inquiry as to the titles of the parties, but merely to remedy some of the inconveniences in the modes of proceeding.

If, then, an actual seizin or seizin in deed be necessary to be proved, it becomes material to inquire what constitutes such a seizin. It has been supposed, in argument, that an actual entry under title and perception of esplees were

necessary to be proved in order to show an actual seizin. But this is far from being true, even at the common law. There are cases in which there is a constructive seizin in deed, which is sufficient for all the purposes of action in legal intendment. In Hargrave's note (3 Co. Litt., 39 a), it is said that an entry is not always necessary to give a seizin in deed; for if the land be in lease for years, curtesy may be without entry or even receipt of rent. The same is the doctrine as to seizin in a case of *possessio fratris*. So, if a grantee or heir of several parcels of land in the same county enter into
246*] one parcel *in the name of the whole, where there is no conflicting possession, the law adjudges him in the actual seizin of the whole. (Litt., s. 417, 418.) In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own he hath presently, by such claim, a possession and seizin in the lands, as well as if he had entered in deed. (Litt., s. 419.) And livery within the view of the land will, under circumstances, give the feoffee a seizin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seizin in deed. They are founded upon this plain reason, that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that, under the circumstances of the case, he was bound to do. *Lex non cogit seu ad vana aut impossibilia.* The same is the result of conveyances deriving their effect under the statute of uses; for there, without actual entry or livery of seizin, the bargainee has a complete seizin in deed. (Com. Dig., uses [B. 1] [I.]; Cro. Eliz., 46; 1 Cruise Dig., 12; Shep. Touch., 223, &c.; Harg. Co. Litt., 271, note.) And the Kentucky act respecting conveyances, which is, in substance, like the statute of uses, gives to private deeds the same legal effect.

It has, however, been supposed, in argument, that not only an actual seizin or complete investiture of the land, but also a perception of the profits, or, as it is technically called, a taking of the esplees, is absolutely necessary to support a writ of right. It cannot, however, be admitted that the taking of the esplees is a traversable averment in the count. It is but evidence of the seizin; and the seizin in deed once established, either by a *pedis positio*, or by construction of law, the taking of the esplees is a necessary inference of law. If, therefore, a seizin be established, although the lands be leased for a term of years, and thereby the profits belong to the tenant, still the legal intendment is that the esplees follow the seizin. And so it would be although a mere trespasser, without claiming title, should actually take the profits during the time of the seizin alleged and proved. And, indeed, of certain real property, as a barren rock, a complete seizin may exist without the existence of esplees.

247*] *The result of this reasoning is, that wherever there exists the union of title and seizin in deed, either by actual entry and livery of seizin, or by intendment of law, as by conveyances under the statute of uses, or in the other instances which have been before stated, there the esplees are knit to the title, so as to enable the party to maintain a writ of right. And it will be found extremely difficult to maintain that a deed, which, by the *lex loci*, conveys a perfect title to waste and vacant lands, without further ceremony, will not yet enable the grantee to support that title by giving him the highest remedy applicable to it, without an actual entry.

Let us now consider how far a perfect title to waste and vacant lands can be considered as having passed by a patent under the land law of Virginia of 1779, ch. 13. It is argued that such a patent conveys only a right or title of entry, which, until consummated by actual possession, gives the patentee no actual investiture or seizin of the land; and it is likened to the case of a patent from the crown. Some countenance is lent by authority to this position, so far as respects patents from the crown; but a careful examination will be found by no means to establish its correctness. No livery of seizin is necessary to perfect a title by letters patent. The grantee, in such case, takes by matter of record; and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. The contrary is the fact as to feoffments. The deed is inoperative without livery of seizin. This difference alone would seem to carry a pretty strong implication that actual seizin passed by operation of law, on a patent from the crown; for it is the union of a right and seizin that constitutes a perfect title; and when once the law has declared a title perfect, it must include everything necessary to produce that effect. Accordingly we find it expressly held in *Barwick's* case (5 Co., 94), that letters patent under the great seal do amount to a livery in law. What is a livery in law but such an act as in legal contemplation amounts to a delivery of seizin? If, for instance, a feoffment include divers parcels of land in the same county, livery of seizin of one parcel, in the name of the whole, is livery of all not in an adverse seizin. This, therefore, as to all the parcels except that whereof livery is actually made, is but a livery *in law; and yet to all [*
248 intents and purposes it is as effectual as livery in deed. And it was upon the footing of this doctrine that, in *Barwick's* case, the court held that the conveyance of a freehold by letters patent to commence *in futuro*, was void as much as if the conveyance had been by feoffment; because in neither case could there be a present livery of the future freehold estate. The livery must operate at the time when it is made, or not at all. It is not, therefore, admitted by this court that letters patent of the crown do not convey a perfect title, where there is no interfering possession.

But even admitting it were otherwise, still we think a patent under the land law of Virginia must be considered as a statute grant, which is to have all the legal effects attached to it which the legislature intended. It cannot be doubted that the legislature were competent to give their patentees a perfect title and possession without actual entry. Have they so done? We think that it is impossible, looking to the language of their acts, or the state of the country, to doubt that the whole legal estate and seizin of the commonwealth in the lands passed to the patentee, upon the issuing of his

patent, in as full an extent and beneficial a manner (subject only to the rights of the commonwealth) as the commonwealth itself held them. At the time of the passing of the act of 1779 Kentucky was a wilderness. It was the haunt of savages and beasts of prey. Actual entry or possession was impracticable; and, if practicable, it could answer no beneficial purpose. It could create no notoriety; it could be evidence to no vicinage of a change of the property. An entry therefore would have been a vain and useless and perilous act; and if there ever was a case in which the maxim would apply that the law does not oblige to vain or impossible things, we think it is such a one as the present. There is no pretense that the legislature have expressly made an entry a prerequisite to the completion of the title. Such a prerequisite, if it exist at all, must arise from mere implication only, and under circumstances which would render it nugatory or absurd. We do not, therefore, feel at liberty to insert in the operation of the grant a limitation which the law has not of itself interposed.

249*] *And this leads us to say, that even if, at common law, an actual *pedis positio*, followed up by an actual perception of the profits, were necessary to maintain a writ of right, which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our country. The common law itself in many cases dispenses with such a rule; and the reason of the rule itself ceases when applied to a mere wilderness. The object of the law in requiring actual seizin was to evince notoriety of title to the neighborhood, and the consequent burthens of feudal duties. In the simplicity of ancient times there were no means of ascertaining titles but by the visible seizin; and, indeed, there was no other mode, between subjects, of passing title, but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized, he had a perfect investiture; and, if ousted, could maintain his action in the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety, to prevent frauds upon the lord and upon the other tenants. But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn convey to civilized man at the distance of hundreds of miles? The reason of the rule could not apply to such a state of things; and *cessante ratione, cessat ipsa lex.* We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seizin thereof, in deed, to the grantee, and attaches to him all the legal remedies incident to the estate. *A fortiori*, this principle applies to a patent; since, at the common law, it imports a livery in law. Upon any other construction, infinite mischiefs would result. Titles by descent and devise, and purchase, where the party from whom the title was derived was never in actual seizin, would, upon principles of the common law, be utterly lost.

As to the sixth question. We are of opinion that in Kentucky a patent is the completion of the legal title of the parties; and it is the legal title only that can come in controversy in a writ of right. The previous stages of title are merely equitable, which a court of chancery may enforce, but a court of common law will not entertain. In this opinion we adopt the principles which the *courts of [***250** Kentucky have been understood uniformly to sanction. And this opinion is also an answer to the seventh question.

As to the eighth question. We are of opinion that a better subsisting adverse title in a third person is no defense in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit.

As to the ninth question. We have already expressed our opinion that tenants claiming different parcels of land by distinct titles cannot be joined in a writ of right. If, however, they omit to plead in abatement and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the demandant for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the demandant.

As to the tenth question. The general rule is, that if a man enter into lands, having title, his seizin is not bounded by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seizin is confined to his possession by metes and bounds. In the case put by the court below, the first patentee had the better legal title; and his seizin presently, by virtue of his patent, gave him the best mere right to the whole land, upon the principles which we have already stated. *A fortiori*, he must have the best mere right to the land not included in the actual close of the second patentee. For, by construction of law, he has the eldest seizin as well as the eldest patent.

As to the eleventh point: We are of opinion that if a man having title to land enter into a part in the name of the whole, he is, upon common law principles, adjudged in seizin of the whole, notwithstanding an adverse seizin thereof. But if the land be in the seizin of several tenants claiming different parcels thereof in severalty, an entry into the parcel held by one tenant will not give seizin of the parcels held by the other tenants; but there must be an entry into each. (Co. Litt., 252, b.) By parity of reason, an entry into a parcel which is vacant will not give seizin of a parcel which is in an adverse seizin. But an entry into the last parcel, in the name of the whole, will enure as an entry *into the vacant parcel. It [***251** does not appear, in the question put by the court below, into which parcel the entry is supposed to be made.

Such are the unanimous opinions of this court, which are to be certified to the Circuit Court of Kentucky.

Cited—7 Wheat. 29, 31; 2 Pet. 212; 3 Pet. 133, 172, 188; 5 Pet. 354, 493; 6 Pet. 743; 9 Pet. 735; 10 Pet. 224; 12 Pet. 449; 3 How. 690; 9 How. 447; 15 How. 208; 13 Wall. 86; 1 Otto, 375; 9 Otto, 167; 12 Otto, 399; 3 Wash. 478; 2 Sawy. 496; 1 Mason, 212; 4 Mason, 272, 274; 5 Mason, 464; 1 Wood. & M. 216; 2 Wood. & M. 214, 364; 2 Ware, 248; McCahon, 241; 1 McLean, 480.

CARTER'S HEIRS
v.
CUTTING AND WIFE.

Absent—WASHINGTON, *J.*

An appeal lies to this court from the sentence of the Circuit Court of the District of Columbia affirming the sentence of the Orphan's Court of Alexandria county, which dismissed a petition to revoke the probate of a will.

THIS was an appeal from the Circuit Court for the District of Columbia.

E. I. Lee, for the Appellants.

Taylor, for the Appellees.

March 11th. STORY, *J.*, delivered the opinion of the court as follows:

The appellants, who are heirs at law of Sally Carter, deceased, petitioned the Orphan's Court of the county of Alexandria to revoke and repeal the probate of a will of the said Sally Carter procured by the respondents, upon the ground that the said will was admitted to probate without notice to the appellants, and that the supposed testatrix was an inhabitant of and resident in Virginia at the time of her death, and left no assets, real or personal, or debts in the county of Alexandria. The Orphan's Court, without issuing a summons to the respondents, dismissed the petition, and upon an appeal this dismissal was confirmed by the Circuit Court of the District of Columbia.

Two objections have been taken to the sustaining of the appeal to this court. 1. That by the act of Congress of 27th February, 1801, (ch. 86, s. 12, vol. 5, p. 272), it is enacted that on **252***] appeals from the Orphan's *Court to the Circuit Court, the latter "shall therein have all the powers of the chancellor" of the state of Maryland; and by the laws of Maryland the decree of the chancellor in a like case would be final. 2. That the decree of dismissal is not any final judgment, order, or decree of the Circuit Court wherein the matter in dispute, exclusive of costs, exceeds one hundred dollars.

The majority of the court cannot yield assent to the validity of either of these objections. As to the first, we are of opinion that the conclusiveness of its sentence forms no part of the essence of the powers of the court. Its powers to act are as ample, independent of their final quality, as with it. Besides, the act of February 27, 1801, (§ 8, vol. 5, p. 270), has expressly allowed an appeal from "all final judgments, orders and decrees of the Circuit Courts" where the matter in dispute exceeds the limited value, and there is nothing in the context to narrow the ordinary import of the language. We cannot admit that construction to be a sound one, which seeks by remote inferences to withdraw a case from the general provisions of a statute, which is clearly within its words and perfectly consistent with its intent. The case of *Young* v. *The Bank of Alexandria* (4 Cranch, 384), is, in our judgment, decisive against this objection.

As to the second objection, it is conceded by both parties that the estate devised to the respondent, Sally C. Cutting, is worth several thousand dollars. If, then, the probate of the will had any legal operation and was not merely void, the controversy as to the validity of that probate was a matter in dispute equal to the value of the estate devised away from the heirs. It cannot be doubted that the Orphan's Court had jurisdiction to allow probate of wills made by persons in foreign states; and that probate, once allowed, operated as a sentence affirming the validity of such wills between the parties so far as the *lex loci* could give them operation. It is understood that a will regularly proved in another state in strict conformity with the laws of that state, acquires, if it possess the other legal requisites, a binding efficacy in Virginia, so that it may be admitted to record there. The estate devised is understood to be situated *in Virginia, and the [***253** title of the heirs thereto would consequently be affected by the probate in this district. The probate then not being merely void, but affecting the title to lands exceeding one hundred dollars in value, is a matter in controversy beyond that value within the purview of the act of 1801.

The decree of the Circuit Court dismissing the petition is reversed, and the cause is to be remanded to that court with directions to proceed to a hearing upon the merits.

Cited—19 Wall. 64.

THE VENUS, RAE, MASTER.

If a citizen of the United States establishes his domicile in a foreign country between which and the United States hostilities afterwards break out, any property shipped by such citizen before knowledge of the war, and captured by an American cruiser after the declaration of war, must be condemned as lawful prize.

Upon a shipment of goods to be sold, on joint account of the consignee and shipper, or of the latter alone at the option of the consignee, the right of property does not vest in the consignee until he has made his election under the option given him.

If two partners own jointly a commercial house in New York, and one of them obtains an American register for a ship by swearing that he, together with his partner, of the city of New York, merchant, are the only owners of the vessel for which the register is obtained, when in fact his partner is domiciled in England, the vessel is liable to forfeiture under the act of Congress of December 31st, 1792. (Laws U. S., vol. 2, p. 133.)

APPEAL from the sentence of the Circuit Court for the District of Massachusetts.

The following were the facts of the case, as stated by WASHINGTON, *J.*, in delivering the opinion of the court:

This is the case of a vessel which sailed from Great Britain, with a cargo belonging to the respective claimants, as was contended, before the declaration of war by the United States against Great Britain was or could have been known by the shippers. She sailed from Liverpool on the 4th of July, 1812, under a British license, for the port of New York, and was captured on the 6th of August, 1812, by the American privateer Dolphin, and sent into the District of Massachusetts, where the vessel and cargo were libeled in the District Court.

The ship, 100 casks of white lead, 150 crates of earthen ware, 35 cases and 3 casks of copper, 9 pieces of cotton bagging, and a quantity of coal, were claimed by Lenox and Maitland.

198 packages of merchandise and 25 pieces

of cotton bagging were claimed by Jonathan Amory, as the joint property of James Lenox, **254***] William Maitland and Alexander *McGregor; not distinguishing the proportious of each; but the 25 pieces of cotton bagging were afterwards claimed for McGregor as his sole property, and also 5 trunks of merchandise.

21 trunks of merchandise were claimed by James Magee, of New York, as the joint property of himself aud John S. Jones, residing in Great Britain.

The District Court, on the preparatory evidence, decreed restitution to Magee and Jones, and also to Lenox and Maitland, except as to the 100 casks of white lead; as to which, and as to the claim of McGregor, further proof was ordered.

From this decree, so far as it ordered restitution of the merchandise to Magee and Jones, and to Maitland, and of the ship to Lenox and Maitland, the captors appealed to the Circuit Court, where the decree was affirmed *pro forma*, and an appeal was taken to this court.

In April, 1813, the cause was heard on further proof in the District Court; and in August the claim of McGregor was rejected, as well as that of Lenox and Maitland to the white lead. But at another day, on a further hearing, the court ordered restitution to McGregor of one-fourth of the property claimed by him, and condemned the other three-fourths as belonging to his partners, being British subjects. Both parties appealed, as did also Leuox and Maitland in relation to the white lead. A *pro forma* decree of affirmance was made, from which an appeal was takeu to this court.

Maitland, M'Gregor and Jones were native British subjects, who came to the United States many years prior to the present war, and, after the regular period of residence, were admitted to the rights of naturalization. Some time after this, but long prior to the declaration of war, they returned to Great Britain, settled themselves there, and engaged in the trade of that country, where they were found carrying on their commercial business at the time these shipments were made, and at the time of the **255***] capture. Maitland is yet *in Great Britain, but has, since he heard of the capture, expressed his anxiety to return to the Uuited States; but has been prevented from doing so by various causes set forth in his affidavit. M'Gregor actually returned to the United States some time in May last; Jones is still in England.

Pitman, for the captors.

In relation to the several claims set up in this case, it will be contended, on the part of the captors, 1st. That they are to be determined, as it respects the capacity to claim, by the national character of the claimants at the time of the capture. If the claimants, at the time of capture, werc British subjects, the property is undoubtedly liable to condemnation.

It is admitted, on all hands, that the claimants, Maitland, M'Grcgor and Jones, had acquired a domicile in Great Britain at the time of the declaration of war; and were actually domiciled in that country at the time of the capture; they must, therefore, be considercd as British subjects in reference to the property claimed by them respectively. Nor will an iutention to return to the United States, if that intention be not manifcsted until after the capture, be of any avail; for it is a principle in prize law that the national character of property, during war, cannot be altered, *in transitu*, by any act of the party subsequent to the capture.

The following cases are considered as going to establish the foregoing positions: 1 Rob., 97, 115, *The Herstelder;* 1d., 90, 107, *The Donchebaar Africaan;* 5 Rob., 257, *The Boedes Lust;* 3 Rob., 17, 12, *The Indian Chief;* 1 Rob., 12, 14, Cases cited by Sir W. Scott in *The Vigilantia;* 2 Dallas, 42, *Sloop Chester* v. *Brig Experiment;* 3 Rob., 29, *The Indian Chief; Livingston et al.* v. *The Maryland Ins. Co.*, decided in the Supreme Court of the United States at the last term. 3 Bos. and Pul., 207, case of *The Franklin* cited in note; 3 Rob., 37, 38, *The Citto;* 5 Rob., 60, *The Diana;* 2 Rob., 265, 323, *The Harmony;* 5 Rob., 270, *The Jonge Classina*.

It appears that Maitland has, since he heard of the capture, expressed his anxiety to return to the United *States; and that M'Greg- [***256** or did actually return. But we contend, upon the principle above stated, that neither the intention of Maitland, although formerly naturalized in this country, nor the actual return of M'Gregor, iuasmuch as they did not take placc till after the capture, can avail for the purposes of their respective claims.

And even if it should be proved that Maitland's intention to return existed previous to the capture, it would not avail him if nothing more than intention could be proved. The case of the *President* (5 Rob., 277), is in point. It is thcre decided that an intentiou to return is of no avail, unless that intention be evidenced by some overt act. Here no such overt act, on the part of Maitland, is proved. The following cases go to establish the same point: 3 Rob., 37, 38, *The Citto; Curtisos'* case, cited in 5 Rob., 65; *The Diana*, and in 3 Rob., 17, 12, *The Indian Chief*. As to M'Gregor, *vid.* 3 Rob., 264, 322, *The Harmony*.

M'Gregor's return to America, after capture of the vessel, will uot avail him unless hc can prove,

1st. That he had, previous to thc capture, set himself in motion to return.

2d. That he had done so with a *bona fide* intention of remaining in America.

3d. That he had no intentiou of returning to England.

(*Vid.* the case of the *Indian Chief*, 3 Rob., 17. 12.)

But the national character of these partics, Maitland, M'Gregor and Jones, does not depeud upon domicile. They wcre originally native subjccts of Great Britain; and, after being naturalized in this country, they returned to England, and resumed their native allegiance, in violation of their oath of naturalization. By this conduct wc contend that they lost the character of American citizens, and could not, *flagrante bello*, resume it for the mere purpose of protecting their property. In a court of the law of nations, as well as by the navigation laws of the United States, they cannot but be cousidered *as British subjects. Iu the [***257** case of *La Virginie* (5 Rob., 98), Sir W. Scott said: "It is always to be remembered that the

"native character easily reverts, and that it re-
"quires fewer circumstances to constitute domi-
"cile in the case of a native subject, than to
"impress the national character on one who is
"originally of another country."

It is not necessary to contend against the doctrine of expatriation. We do not deny the right. We contend only that in order to render his naturalization valid for the purposes in question, a man must expatriate himself *bona fide*—must remove from his original country and not return to it, *animo manendi*. In support of this doctrine, *vid.*, the act of Congress of March 27, 1804; laws of U. S., vol. 7, p. 146; also act of 31st December, 1792, § 2; Laws U. S., vol. 2, p. 132; 3 Dallas, 153, *Talbot* v. *Janson*.

The British doctrine on this subject is well known. "Once a British subject, always a British subject," is an established rule in English law. Great Britain respects the naturalization laws of the United States only for commercial purposes. If one of her subjects be naturalized in this country, and afterwards return to a British territory, she considers him as still, to all intents and purposes, a British subject. She does not even require him to abjure his adopted allegiance.

It is to be presumed that Maitland, M'Gregor and Jones knew the laws of their own country; yet, with this knowledge they returned to England; and that, as it appears from their subsequent conduct, not for a temporary purpose merely, but *animo manendi*. They have established there a house of trade. They have placed themselves and their property under the protection of Great Britain, and cannot now, with any show of reason, claim protection from the United States, although the United States may still claim something from them. (2 Cranch, 120, *Murray* v. *Schooner Charming Betsy*.)

It is evident, from all the circumstances of the present case, that Maitland did not intend to return to the United States until he heard of **258***] the capture of the vessel; *on the contrary, it appears that, with a full knowledge of the war, he made his election to remain in England.

When M'Gregor left England for the United States, he embarked as a British subject. His passport was from the privy council, and signed by Lord Sidmouth; whereas, American citizens obtained their passports from the alien office. He is still a partner in a house of trade in England—he is engaged in a British trade. It remains for these parties to explain their conduct. We have stated the facts, and the burden of proof now lies on the claimants. Such would be the rule even if they were neutrals. (3 Rob., 37, 38, *The Citto;* 4 Rob., 191, 232, *The Dree Gebroeders;* 1 Rob., 88, 104, *The Bernon;* 1 Rob., 12, 15, *The Vigilantia;* 3 Rob., 40, 41, *The Portland;* 5 Rob., 91, *The Ocean;* 2 Rob., 264, 322, *The Harmony*.)

In attempting to establish the national character of these claimants as American citizens, it was said in the court below that they held landed property in this country. This argument is overthrown by the decision in the case of the *Dree Gebroeders* cited above. (4 Rob., 194, 235.)

2. It appears that M'Gregor has fraudulently attempted to cover the whole property in question; his claim, therefore, being false in part, he cannot recover even his own share, although we should admit him to be an American citizen. The whole, therefore, is justly liable to condemnation. (2 Rob., 212, 257, *The Susa;* 1 Rob., 210, 250, *The Odin*; 2 Rob., 281, 343, *The Rosalie and Betty*; 3 Rob., 92, 109, *The Graaf Bernstorf;* 4 Rob., 65, 74, *The Jonge Pieter*.)

3. As to the claim of Lenox and Maitland to the ship, we contend, 1st. That under the act of Congress of March 27, 1804, (Laws U. S., vol. 7, p. 146), she cannot be considered as an American vessel. By that act it is declared "that no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or, if registered, to the benefits thereof, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in *the country [***259** from which he originated, &c. But Maitland had been residing in England more than a year, and consequently was not entitled to an American register. 2d. That Lenox being found in violation of the law, as it respected the ship's register, he is not *reetus in curia* for the purpose of claiming the ship. (*Vid.* the cases cited in the *Rapid*, on this point, viz., 2 Rob., 72, 77, *The Walsingham Packet;* 5 Rob., 28, 32, *The Cornelis and Maria;* 6 Rob., 348, *The Recovery*.) 3d. That Lenox and Maitland having attempted to conceal enemies property (the 100 casks of white lead), and to withdraw the same from the belligerent rights of the United States by a fraudulent shipment and claim, their claims to the property captured therewith must be rejected, and the penalty of confiscation attaches to the same. This principle is intended to be applied to the claim of Maitland as well to the cargo as to the ship.

There can be no reasonable doubt that the lead belonged to some person or persons other than the claimants. The following facts are considered as conclusive on this point.

1. The original bill of parcels enclosed in a letter dated 3d July, 1812, from Wm. Maitland & Co. to Lenox and Maitland, is headed thus: "Thomas Holloway bought of Thomas Walker, Malby & Co., lead merchants," and is dated at Liverpool, June 2d, 1812.

2. In the bill of lading of the goods claimed as the property of Lenox and Maitland, in which the white lead is included, the freight and primage is cast upon the lead in the margin of the bill of lading, and not upon the crates, copper, bagging or coal.

3. To a letter from Maitland to Lenox of 22d August, 1812, found on board the Lady Gallatin, is annexed a list of goods shipped by Wm. Maitland & Co., by the Venus, on account of and consigned to Messrs. J. Lenox and Wm. Maitland. In this list all the goods claimed by Lenox and Maitland, and by Lenox, Maitland and M'Gregor, are enumerated, except the white lead.

4. Upon the order for further proof in the District *Court, no further proof was [***260** offered respecting the lead. Maitland, in his affidavit made January 7th, 1813, in Liverpool, swears that the copper, crates, coals and bagging were purchased and shipped on board the Venus, on the sole account and risk of himself and Lenox; he also swears as to their joint prop-

erty with M'Gregor, but says not a word about the lead.

From these circumstances we must conclude that the white lead was the property of Thomas Holloway, an acknowledged British subject; that it is therefore liable to condemnation, and subjects the property captured with it to the same fate.

4. In respect to the claim of Magee and Jones, we contend that at the time of capture the property belonged solely to Jones, a British merchant and subject, and is therefore to be condemned as enemy property.

In the bill of lading of these goods they are expressed to be shipped by M'Gregor & Co. unto and on account of James Magec & Co., of New York. The invoice is signed by Jones, at Manchester, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co., of New York; but does not specify on whose account and risk. It is therefore to be considered as at the risk of Jones. (*Vid.*, on this point, the case of *The Marianna*, 6 Rob., 27.)

In a letter from John S. Jones to James Magee & Co., dated at Manchester, 1st July, 1812, he says: "This serves to hand you invoice of 21 trunks prints per Venus, amount £1,323. 13*s.* *0d.* subject to the same terms as the goods per Aristomenes; that is, to be sold on joint account or on mine at your option." Now, to effect a change of property, it is essential that there be a contract of sale agreed to by both parties. Here appears to have been no such contract. The property, therefore, at the time of capture, was exclusively in Jones.

If Jones had a right to stop these goods *in transitu*, so had the United States, who, by the laws of war, succeeded to his rights. 6 Rob., 127, *The Constantia; The Copenhagen* (1 Rob., 245, 291), is an analogous case.

261*] **Stockton*, contra, for M'Gregor, contended,

1st. That M'Gregor, to the exclusion of his partners, Lenox and Maitland, was owner of one-half of 198 packages of Manchester goods, and one-half of 25 pieces of cotton bagging, and to the whole of five trunks of goods.

2d. That these good were not the goods of an enemy, and ought to be restored to M'Gregor as an American citizen.

In support of the first point he relied on the ship's papers, on certain letters of Maitland & Co., and of M'Gregor himself, on the affidavits of M'Gregor in the court below, &c. He contended that the testimony on this point, introduced since the evidence *in præparatorio*, was incompetent; but if competent, not important. The cause was heard in September, 1812, and further proof allowed for the claimants; but no such order on the part of the captors, nor any order to proceed by plea and proof. The cause stood, on their side, on the proof taken *in præparatorio*. The evidence introduced by them is upon simple affidavit. (1 Rob., 263, 313, *The Adriana;* Letter from Sir W. Scott and Sir J. Nicholl to Mr. Jay, 1 Rob., Amer. ed. p. 8.)

Second point. As to the national character of M'Gregor. He came to the United States a minor; was an established merchant in New York before 1795; he was then naturalized; he married in New York, and purchased a house there before his departure for England, which he still retains. He has also purchased large tracts of land in the states of New York and New Jersey, which he yet owns. He resided about twelve years in New York. His return to England was produced by temporary causes. In 1798 he returned thither on account of the sickness of his wife, who died in Scotland. His second return was for his own health. In 1805 he commenced business in Liverpool as an American merchant. His employment was that of an American merchant shipping goods from England, and receiving American produce to sell there on commission. His residence in England was in time of peace; it was lawful, and could in no manner impair his rights as a citizen *of the United States. He had no [***262** intention to abandon his American rights, or to remain permanently in England; but intended to return to the United States whenever his duty should require him to return. Such a residence, in time of peace, could not stamp a hostile character upon him; and, at the breaking out of war, he was entitled to a reasonable time to depart from the British dominions, before he could forfeit his American character and become identified with the enemy. He did depart therefrom, and returned to the United States with his family within a year after the declaration of war. His having formed a connection in trade with British partners was a lawful act, which did not derogate from his American character, but extended and facilitated his business as an American merchant.

Congress did not mean to authorize the capture of property belonging to mere inhabitants of the hostile country. When the bill to authorize the President to issue letters of marque was brought into the senate of the United States, in June, 1812, it authorized him to issue them against all persons inhabiting in Great Britain or its territories or possessions; but was amended in the senate so as to authorize him to issue them only against the united kingdom of Great Britain and Ireland and the subjects thereof. (See the secret journal of the senate for June, 1812.)

Many cases have been cited by the counsel for the captors in his endeavor to prove this a case for condemnation. The answer to most of them is, that the controversy in those cases was between neutrals and belligerents; not between Great Britain and her subjects. The two cases are entirely different in principle. The connection between a citizen and his government depends on the municipal law of the land. The rights of a neutral depend upon the law of nations.

With regard to the doctrine of naturalization, it is well known that, by the law of England, a person naturalized by act of parliament is as much a subject, to all intents and purposes, as a native. (Co. Lit., 129, a; Bl. Com., B. 1, c. 10, p. 374.) M'Gregor, we have seen, was naturalized in the United States. But it is said that he has returned to his former allegiance, and thereby *lost his American char- [***263** acter. This we deny. He returned to England in time of peace, by which we contend he neither forfeited nor abandoned his character as an American citizen. Our act of naturalization contains nothing to authorize the opinion that he did. Nor could he throw off his adopted

allegiance if he would. If found in arms against us he would be punished as a traitor.

The act of March, 1804, which has been cited by the captors, merely declares that a naturalized citizen shall lose one particular privilege of his citizenship by residing for more than a year in the country from which he originated; from which the implication is clear, that he shall retain all his other privileges.

In the case of the *Charming Betsy* (2 Cranch, 64), and in the case of *M'Ilvaine* v. *Coxe's lessee* (decided in 4 Cranch, 211), the decision of this court was, that residence in a foreign country does not deprive an American citizen of his rights as such. It has been decided, also, that by such residence in time of peace, the national character is not changed upon the sudden breaking out of a war. Residence in time of peace is lawful; and if the person so residing return to his own country in a reasonable time after the breaking out of the war, he does not lose his original national character. (1 Bos. and Pul., 442, *Marryat* v. *Wilson;* Vattel, B. 1, c. 19, § 218, p. 169.) Sir W. Scott has never said that such a residence would, on the sudden breaking out of a war, give a hostile character to the resident; he has never gone so far as to condemn property situated like that now in question. (5 Rob., 90; *The Oecan.*)

Vattel (B. 3, c. 4, § 63, p. 477) says, that the sovereign declaring war is to allow those subjects of the enemy who are within his dominions at the time of the declaration a reasonable time for withdrawing with their effects; and certainly a nation ought not to grant less indulgence to its own citizens than the enemy allows them. I trust this court is not yet prepared to adopt, even with respect to neutrals, much less with regard to American citizens, the rigid rules of the British Court of Admiralty—a mere political court—a prerogative court regulated by the **264***] King's orders in council, *designed to give Great Britain the sovereignity of the ocean, to subject the whole commerce of the world to her grasp, and to make the law of nations just what her policy would wish it to be.

It is doubtful whether the court ought to condemn, under the circumstances of the present case, although it should be proved that the property in question was enemy property.

The shipment, in the present case, was made on the faith of the representations of the American *charge d'affaires*, Mr. Russel; who had given it as his opinion that property shipped after the repeal of the British orders in council, and before knowledge of the war, would be admitted into the United States. Under these circumstances the conduct of the owners of this property was perfectly justifiable. It has been decided in a British court that property which comes into the possession of a nation under the public faith is not liable to forfeiture, and Congress has virtually acknowledged the same principle by passing the act of 27th February, 1813, remitting the forfeitures which had accrued under the non-intercourse act of March 1, 1809. (Laws U. S., vol. 11, p. 388.) *Vid.* Mr. Russel's statement in the report of the committee of Congress; journal of H. of Rep., and the case of the *Althea*, cartel, which was captured at Halifax as American property, and discharged by Judge Croke, because it came into the possession of the British under the public faith.

Pitman, as to the objection to the invocation of papers from other courts, cited the following authorities: 14th *Interrogate*, 1 Rob., Amer. ed., 323; 6 Rob., 351, *The Romeo;* 4 Rob., 170, 205, *The Convenientia;* 1 Rob., 27, 31, *The Magnus;* 2 Rob., 2. 3, *The Eenrom;* Id. 211, 254, *The Susa;* Id. 281, 343, *The Rosalie and Betty.* He observed that there was an order, in the Circuit Court, for further proof on the part of the captors, saving the question whether it were a case for further proof.

Harper, for Lenox & Maitland and Jones & Magee.

Lenox & Maitland claim,

*1st. The ship Venus. [***265**

2d. As their joint property, the white lead, crates, copper, cotton bagging and coal.

3d. One moiety of 198 packages of merchandise and cotton bagging, as the joint property of Lenox & Maitland and Alexander M'Gregor, and shipped by them.

Magee and Jones claim 21 trunks of prints, part of the cargo of the Venus, as their joint property.

Lenox and Maitland are natives of Scotland. They removed many years since to New York, where the former was naturalized on the 10th of November, 1794, and the latter on the 8th of July, 1804. They entered into partnership in trade in 1797, and established their house in New York, in which they were alone interested, under the name and firm of J. Lenox & W. Maitland; which has continued to the present time. For fourteen years they both resided, without interruption, in the city of New York, carrying on the business of their American house, as American citizens; and, as such, they hold valuable real estate in the city and in the state of New York, and also hold American registered ships. Lenox still resides in New York; but Maitland, in July, 1810, to promote the interest of their commercial establishment in New York, by attending the sales of the shipments to Europe and the returns to America, went to Liverpool, in England, where, in 1811, he took a house and counting-room and transacted business for the said concern, under the name and firm of W. Maitland & Co., consisting only of said Lenox and Maitland. He has long since given up his counting-room and attempted to dispose of his house; and is still in England, detained there by sickness. In July, 1812, and long before and at the time of the capture of the Venus by the Dolphin, Lenox & Maitland were the sole owners of the said ship under an American register. The Venus sailed from Liverpool for New York, on the 4th of July, 1812, with a cargo of British produce and manufactures, the proceeds of the funds of Lenox & Maitland, with instructions to wait off the Hook, to know if the goods could be landed. Proceeding *with [***266** her cargo on this voyage, she was captured and libeled as has been before stated.

James Magee was naturalized 9th August, 1803, and has ever since resided and been established in New York.

John S. Jones was naturalized 10th December, 1795, and resided in New York thirteen years. In 1810, he went to Manchester, England, and arrangements were made for shipping goods to Magee, the partner in New York.

It has been contended, on the part of the

captors, with regard to the ship, that, by the laws of the United States, she is not to be deemed an American ship, nor entitled to the benefits of an American register, on account of the residence of Maitland in Liverpool for more than a year.

Admitting, for the sake of argument, that this position is correct, still we contend that the ship is not forfeited. She has merely incurred the disability attached to a foreign ship. Her owners are still American citizens, but have lost the privilege of availing themselves of the register. It is contended, however, that this very disability which attaches to the ship, renders her belligerent property. This is truly a novel doctrine. There is no law by which it can be supported.

As to the right of Lenox to his share of the ship, there can be no reasonable doubt. He is certainly an American citizen and has done nothing to forfeit that character. He has been naturalized in this country, and has continued to reside here ever since. It is said, however, that he has made a false claim to the white lead. This point will be considered in the course of the argument.

Maitland, it is true, has been residing in England for a considerable time past; and it is upon this ground that the ship and cargo are claimed by the captors. They contend that his residence in England (although an American citizen) clothes him with a hostile character.

267*] *To this it may be answered, that the residence which imparts a hostile character must be residence connected with some act of commerce blended with the commercial transactions of the enemy. Mere residence does not give a hostile character, so long as the resident refrains from all voluntary acts tending to the aid and comfort of the enemy. If he engages in the enemy's commerce, he must, to be sure, be considered as an enemy; but even then, only to the extent of the commercial property engaged in the hostile trade, which may chance to be captured. A man in an enemy's country may send home books or furniture purchased before the war for his own use, and they will not be hostile property. There must be a trading with the enemy to constitute an offense. Trading is essential; time is not. A mere continuation in an enemy's country after the commencement of hostilities, without any act of trade, has never been decided to constitute a man an enemy. Sir W. Scott himself allows a person found in the enemy's country, a reasonable time to withdraw his effects, and even to trade with the enemy so far as it may be necessary for the removal of his property. (3 Rob., 17, 12, *The Indian Chief;* 4 Rob., 161, 195, *Madonna delle Gracie;* 1 Rob., 165, 196, *The Hoop.*)

But it is said, that though an illegal act should be proved to have been committed by Maitland, yet that Lenox has been guilty of making a false claim to part of the cargo, which act of Lenox has criminally affected the property of Maitland.

We answer, that the doctrine on the subject of covering enemy property applies only to neutrals; but Lenox was a citizen of the United States. Besides, it does not by any means appear, that, in making this claim, Lenox was influenced by a fraudulent motive. His conduct was, in all probability, owing to mistake. He had not seen the letters and papers proving the property claimed by him to belong to the enemy, and therefore cannot be supposed to have known that fact.

It is further urged by the captors, that a letter by the Lady Gallatin, of 22d August, 1812, shows that a purchase of 100 bags of cotton was made by Maitland, after knowledge of the war.

*To the admissibility of the invoked [***268** papers, among which this letter is one, we have already objected, and must still insist upon the objection. Setting aside those papers, it does not appear that Maitland did purchase the cotton after knowledge of the war, and the presumption ought to be in his favor. But suppose this single purchase was made one day after war was known to exist (which is all the captors contended for), is this sufficient to fix a hostile character, especially under circumstances like those attending this transaction, when it was universally supposed that the repeal of the orders in council would have put an end to the war?

With regard to Jones, it has only been proved that he was residing in England a few months after the commencement of hostilities; but there is no evidence that he has not returned; nor is there any evidence of his having traded with the enemy. The burden of proof lies on the captors.

Dexter, in reply.

In cases like that now before the court, the advantage in obtaining evidence is clearly on the side of the claimants. They have in their power the knowledge of all the facts relative to the case. The evidence *in præparatorio* consists of the documents on board the ship, and the testimony of the crew. They may make out their own case. If the evidence in their favor be deficient, they may have an order for further proof, which does not give the captors any opportunity of introducing further evidence on their part. Under circumstances so manifestly advantageous, if the claimants do not fully prove their case, the presumption must be against them. Whether the claimants in the present case have satisfactorily done so, it is for the court to decide.

With regard to the question of domicile. Sir W. Scott has decided that the *animus manendi* is to be presumed under circumstances perfectly analogous to those of the present case. What are the facts with regard to the several parties whose claims are now disputed? M'Gregor, it appears, is a native of Scotland: he became a citizen of the United States by naturalization, in 1795, and resided at New York until 1802, except a temporary *visit to [***269** his native country, for the health of his wife. In 1802 he left New York for his own health, and in 1804 established himself in a house of trade in Liverpool, England, in connection with James Dennistown, a British subject. Two other partners were afterwards admitted, both British subjects. M'Gregor was the only one of the partners who resided in Liverpool, and was the acting partner of the concern. He married a second wife in Great Britain, and had several children there, during his residence in Liverpool.

These facts are abundantly sufficient to establish his domicile.

The question, then, remains: did he take timely and sufficient steps, after knowledge of the war, to divest himself of his British character, and return to the United States? This does not appear. On the contrary, it appears from papers invoked and introduced into this cause, and it is not contradicted, that he continued his connection with his British partners ten months after the declaration of war, and, as acting partner of the house, made a shipment to Halifax. He has not, in any of his affidavits, declared that he did not continue his trade. The testimony on his part does not deny all secret trusts. He comes into court well informed of the suit, yet without the books, articles of partnership, original bills of parcels, and the other papers connected with the transactious under consideration.

It has been urged in his defense, that being a commission merchant, having the property of others in his hands, and being the only acting partner of the firm, he was justified in remaining in England till he could wind up his business. But this is no sufficient justification. The contracts of a citizen residing abroad, must be consistent with the interests of his country. If the good of his country requires his return, as in the event of war, it is his duty to leave his business in other hands. M'Gregor might have left his affairs to the care of his partners.

Most of the facts with regard to Maitland have been already stated. It may be added, however, that he continued to reside in England **270***] and was transacting business *there as late as April, 1813; whereas, the war was known on the 24th or 26th of July, 1812. In his letter of the 22d of August, 1812, in which he informs his partner of a purchase of cotton wool he had just made, he says nothing of any intention of returning to the United States.

His continuance in England is defended on nearly the same grounds as that of M'Gregor; viz., his extensive mercantile concerns. Sickness was not alleged by him as an excuse, till 13th April, 1813.

As to the goods shipped by Jones, it has already been observed that, in his letter to Magee of 1st of July, 1812, he gives him his option either to be interested in them or not. Of course, at the time of the shipment, they were the sole property of Jones; and before the letter was received by Magee—before there was a possibility of his making an election—the goods were captured; but it is an acknowledged rule of prize law, that the character of goods cannot change *in transitu;* at the time of capture, therefore, they were the sole property of Jones, and must, we contend, be condemned *in toto.*

Besides the particular circumstances which have been urged in justification of the individuals concerned in this cause, a general defense has been set up, viz.: That though the property in question should be determined to be British, yet it came here under the faith of the nation; and is therefore entitled to protection. Vattel, it is said, lays down this doctrine. This is not denied. But did the property in controversy come into the country under the national faith? It was not here at the breaking out of hostilities. It was not brought into the country until after the declaration of war; and then it was brought in as a prize of war. Besides, if it was considered as protected on this principle, why was the attempt made to cover it under the name of M'Gregor? This has a suspicious appearance, and shows clearly that the claimants themselves placed little reliance on the circumstance which is now urged in their defense.

As to the objection to the admission of the invoked papers, it need only be observed that the counsel for the *claimants is under a [**271** mistake on the subject. There was an order for further proof on the part of the captors; and under that order these papers were invoked.

The great question of law on the subject of domicile yet remains to be examined.

Three classes of residents are recognized by the law of nations.

1st. Mere residents.

2d. Domiciled residents.

3d. Natural born subjects.

Before entering upon the discussion of the main question, I would remark, with regard to some observations which have fallen from the counsel for the claimants respecting the severity of the rules adopted by the British Court of Admirality, that these rules have been applied by Sir W. Scott with equal rigor to British subjects as to neutrals; which is a sufficient answer to the allegation that they have been introduced merely to subserve the grasping policy of the British nation, and destroy all neutral commerce.

With regard, then, to the first class of residents. It is admitted that mere residence in a foreign country, for a particular temporary purpose, without engaging in the commerce of the country, is not sufficient to change the national character.

2d. Residence in a foreign country connected with the carrying on a general trade and mixing in the commercial affairs of the nation, constitutes domicile; thereby making a man, *sub modo,* a subject of that foreign country; and in case of war breaking out between his original and adopted country, if he continues, notwithstanding, to reside and trade in the latter, he is to be considered by his original country, as invested with a hostile character to all intents and purposes. He ought not, it will be admitted, to be considered in this light immediately on the declaration of war; he ought, perhaps to be allowed a reasonable time to make his election whether to remain *where he is or re- [**272** turn to his own country. Respectable authorities, however, have said that, if required, he is bound to return. Sir W. Scott says he is bound immediately to put himself in motion to return.

3d. As to mere native subjects it is needless to make any remarks. The persons whose national character is now in question are natural born subjects of Great Britain, naturalized in the United States, and who afterwards returned to the country of their nativity. These persons, we contend, are, even without the intervention of a war, as much British subjects as if they had never been naturalized in another country. The British government had a right to prevent their return to the United States. In saying this, we would not be understood as admitting the legality of impressment; the cases are materially different.

The naturalization law of the United States requires permanent residence; and no longer

than that residence continues can a man claim the privileges of naturalization. Before he can be admitted to those privileges, he must abjure all allegiance to the state of which he was before a citizen. By so doing, he binds himself not to return to that state. By returning he violates his oath; and can thereafter claim no protection from the country which he has thus abandoned. Abjuration does not absolve him from his former allegiance; he may incur new duties, but he cannot swear away his old obligations. It is for this court to explain the true meaning of the law of naturalization. It may, however, be observed, that neither the constitution nor the laws of the United States consider a naturalized citizen in the same light as a native. The laws of Great Britain, also, and indeed the laws of every country, make a distinction between the two. A native is considered as a citizen wherever he goes; but a person naturalized is no longer looked upon as a citizen than while he continues in his adopted country. No nation confers the privilege of naturalization without an equivalent. No nation extends its protection to naturalized subjects, if they return to their former country. And shall we be an exception? Shall we be the first to extend to naturalized foreigners this Quixotic protection?

273*] *The expression "*ad fidem utriusque regis,*" from *Calvin's* case, has been mistranslated, "the faith of both kings." Had that been the meaning of the phrase it would have been *utrumque regum*, in the plural. The meaning is, that a man may be the subject of either power according to his residence. Were the doctrine, that he may be the subject of both, correct, he would have it in his power to enjoy the privileges of both governments, without being subject to the duties of either.

With regard to the false claim of Lenox. It is a rule of prize law, that a man who makes a false claim to protect enemy property, forfeits any property of his own that may be captured with it. This Lenox appears to have done with respect to the white lead. If he has, not only his own property is forfeited, but that of Maitland, his partner, must share the same fate. What has been said by the counsel for the claimants to exculpate Lenox is mere conjecture.

As to the ship. It is clear that the register was improperly obtained—not to say fraudulently. Maitland, by residing in England, was not entitled to an American register. Lenox, by concealing, when on oath, the fact of Maitland's residence in England, becomes *particeps criminis*, and if he mixes his interest with that of his partner, the same decree must be rendered as to the property of both.

Stockton, with regard to the withholding of papers with which M'Gregor was taxed by the counsel on the opposite side, stated that the decree of the court below was only rendered in October last, when M'Gregor had the first intimation that the papers were required; since which, there had not been time to obtain them.

Saturday, March 12th. *Absent*—LIVINGSTON, *J.*

WASHINGTON, *J.*, after stating the facts of the case, delivered the opinion of the majority of the court as follows:

The claims of Maitland, M'Gregor & Jones are resisted, *in toto*, upon an objection to the national character of the claimants. The general question affecting *these parties [***274** will, for the present, be postponed in order to dispose of particular objections which are made to all the claims, either in whole or in part, and which will depend on the particular circumstances applying to those cases.

1. The first claim that will be considered will be that of Lenox & Maitland to the 100 casks of white lead, which, it is contended, is the property of Thos. Holloway, an acknowledged British subject, but shipped in June, 1812, by Wm. Maitland & Co. (a house established in Liverpool, and composed of Wm. Maitland and James Lenox) to Lenox & Maitland, a house established at New York, and composed of the same parties. To establish the fact of property in Thos. Holloway, the captor relies upon the following evidence: The original bill of parcels, inclosed in a letter under date of the 3d of July, 1812, from Wm. Maitland & Co. to Lenox & Maitland, which is headed thus: "Thos. Holloway bought of Thomas Walker & Co., lead merchants," dated June 2d, 1812. In corroboration of this *prima facie* evidence of property in Holloway, the freight and primage of this lead is cast in the margin of the bill of lading, but not so upon the acknowledged property of Lenox and Maitland, the owners of the ship, and included in the same bill of lading; from which circumstance it is argued that this article did not belong to Lenox and Maitland; since, if it did, no freight could have been charged on it, any more than upon the other parts of the cargo claimed by them. In addition to this, in a list of goods shipped by Wm. Maitland & Co., by this vessel, on account of and consigned to Lenox & Maitland, and inclosed in a letter of the 22d August, 1812, from the former to the latter, by the Lady Gallatin, all the goods claimed by that house separately, and also by them and M'Gregor jointly, are enumerated, except this parcel of white lead. This evidence is certainly very strong to fix a hostile character on this property; and is rendered conclusive by the omission of Maitland, in his affidavit made under the order for further proof, to say anything in relation to the white lead, although he is very particular as to all the other property claimed by Lenox & Maitland, and by that house jointly with M'Gregor. This court is *therefore of opinion that the [***275** court below did right in rejecting this claim.

2. The next claim to be considered is that of Magee & Jones to a part of the cargo on board of this vessel. Magee is a citizen of the United States, settled in New York, and connected with Jones in a house of trade. It is urged by the captors that the whole of this property ought to have been condemned as the sole property of Jones. The bill of lading of these goods expresses them to be shipped by M'Gregor & Co., unto and on account of James Magee & Co., of New York. The invoice is signed by Jones, at Manchester, in England, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co., of New York; but it does not specify on whose account and risk. In a letter from Jones to Magee, dated the 1st of

July, 1812, covering an invoice of these goods, he says "they are to be sold on joint account or on mine at your option." The whole question as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is, in whom the right of property was at the time of capture. To effect a change of property as between seller and buyer, it is essential that there should be a contract of sale agreed to by both parties; and if the thing, agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract that it should be delivered to the purchaser or to his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee; who states that, in 1810, he was in England, and agreed with Jones that the latter should ship goods on joint account, when the intercourse between the two countries should be opened; and that, in consequence of this agreement the present shipment was made. Now, admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the use of the shipper solely; and, consequently, it amounted to nothing so as to divest the property out of the shipper, until Magee should elect to take them [*276] on joint account, or *to act as the agent of Jones. Until this election was made, the goods were at the risk of the shipper, which is conclusive as to the right of property.

3. The next claim is that of Lenox & Maitland to the ship. The facts in relation to this subject are, that James Lenox, as joint owner with W. Maitland of this ship, obtained, in November, 1811, a register for her, which was granted upon his oath that he, together with W. Maitland, of the city of New York, merchant, were the only owners. At this time Maitland was domiciled in Great Britain; and it is contended that the statement that Maitland was of New York was untrue, and subjected the vessel to forfeiture, under the act of Congress of the 31st of December, 1792; and that although no claim is interposed for the United States, still the forfeiture produced by the misconduct of Lenox is sufficient to turn him out of court, whatever disposition may ultimately be made of the property. The rule of the prize court is correctly stated in this argument; and the only question is, whether a forfeiture did accrue to the United States. The act of Congress directs that the owner who takes the oath, in case there are more than one owner, shall, in his oath, specify the names and places of abode of such owners, and that they are citizens of the United States, if such be the fact; and if one or more of them reside abroad, as a partner or partners in a copartnership consisting of citizens, and carrying on trade with the United States, that such is the case. The law then proceeds to declare, that if any of the matters of fact in the said oath alleged, within the knowledge of the party swearing, shall not be true, the ship shall be forfeited to the United States. It cannot be denied that, at the time this oath was taken, W. Maitland was a resident merchant of Great Britain, carrying on trade with the United States; a fact totally inconsistent with that alleged in the oath, that he was of the city of New York. It is probable, and the court is willing to believe, that this statement was innocently made, under a misconception of the real character which the foreign domicile of Maitland had impressed upon him. But, still the law required explicitness on this point, and marked the distinction between a person residing abroad and one residing within the United States. It must be admitted, in point of law, *that the fact sworn to [*277 by Lenox was not true; and the consequence is a forfeiture of the ship to the United States. The claim, therefore, of Lenox & Maitland to this vessel must be rejected. What order shall be made as to the ultimate disposition of the property, must depend upon the opinion which this court may give in some other cases touching this subject.

The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruiser, ought to be condemned as lawful prize. It is contended by the captors that as these claimants had gained a domicile in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and, consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it is then insisted that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there resettled themselves, they became redintegrated British subjects, and ought to be considered by this court in the same light as if they had never emigrated. On the other side it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there or to return to the United States; and that, until such election was, *bona fide*, made, the courts of this country are bound to consider them as American citizens, and their property shipped before they had an oportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicile of these claimants is asserted, the questions of law alone remain to be considered. They are two. First, By what means and to what extent a national character may be impressed upon a person, different from *that which permanent allegiance gives [*278 him? and secondly, What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to

make it a permanent place of abode. The latter is styled by Vattel, *domicile*, which he defines to be, "a habitation fixed in any place, with an intention of always staying there." Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicile, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. (Vatt., p. 92, 93.) Grotius nowhere uses the word domicile, but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates strangers, and the latter, subjects; and it will presently be seen, by a reference to some author, what different consequences these two characters draw after them.

The doctrine of the prize courts, as well as of the courts of common law, in England, which, it was hinted, if not asserted, in argument, had no authority of universal law to stand upon, is the same with what is stated by the above writers; except that it is less general, and confines the consequences resulting from this acquired character to the property of those persons engaged in the commerce of the country in which they reside.

It is decided by those courts, that whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and **279***] is to be considered (even *by his own or native country, in the former case) as having a hostile character impressed upon him.

In deciding whether a person has obtained the right of an acquired domicile, it is not to be expected that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicile had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is that the courts of England have decided that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. (*The Bernon*, 1 Rob., 86, 102.) As to some other rules of the prize courts of England, particularly those which fix a national character upon a person on the ground of constructive residence, or the peculiar nature of his trade, the court is not called upon to give an opinion at this time; because, in this case, it is admitted that the claimants had acquired a right of domicile in Great *Britain at the time of the break- [***280** ing out of the war between that country and the United States.

2. The next question is, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*, 3 Rob., 17, 12, *The Indian Chief*. The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his *native coun- [***281** try or to that where he was naturalized, or by commencing his removal, *bona fide*, and without an intention of returning. If anything short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bona fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought

never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal as to put it in his power to claim which ever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and, therefore, that, as a neutral, the trade was lawful? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted. Upon what sound principle can a distinction be framed between the case of a neutral and the subject of one belligerent domiciled in the country of the other at the breaking out of the war? The property of each, found engaged in the commerce of their adopt-
282*] ed country, belonged to them, *before the war, in their character of subjects of that country, so long as they continued to retain their domicile; and when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common law and prize courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by Grotius (p. 563), "that all "the subjects of the enemy who are such from "a permanent cause, that is to say, settled in "the country, are liable to the law of repris-"als, whether they be natives or foreigners; "but not so if they are only trading or sojourn-"ing for a little time." And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicile, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, in regard to other states. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens which make a part of the sum total of its riches, and augment its power. (Vatt. 147, and also B. 1, c. 14, § 182.) In reprisals, continues the same author, we seize on the property of the subject just as we would that of the sovereign; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. (B. 2, c. 18, § 344.) Now, if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the *nation, it would seem [***283** difficult to maintain that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation. If, then, nothing but an actual removal, or a *bona fide* beginning to remove, can change a national character acquired by domicile, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person in his character of a subject, what is there that does, or ought to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled by a declaration of war, ought to have time to make his election to continue there or to remove to the country to which he owes a permanent allegiance; and that, until such election is made, his property ought to be protected from capture by the cruisers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove before it can possibly be known whether he may elect to do so or not. It is said that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor will any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce

those subjects either to remove or to remain. They are left free to choose for themselves; and when they have made their election, they claim **284***] the right of enjoying *it under the treaty. But until the election is made, their former character continues unchanged.

Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruisers of the other belligerent, to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done in case the owner of it should afterwards elect to remain where he is? or, if captured and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe; and if he finds it best to return, it is safe of course. It is safe whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this court. The rule there is, that the character of property, during war, cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed goes farther: as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed that this change cannot and ought not to be effected by an election of the owner and shipper of it made subsequent to the capture, and, more especially, after a knowedge of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, **285***] to the period of his election to *remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.

It will be observed, that in the foregoing opinion respecting the nature and consequences of domicile, very few cases have been referred to. It was thought best not to interrupt the chain of argument by stopping to examine cases; but faithfully to present the essential principles to be extracted from those which were cited at the bar, or which have otherwise come under the view of the court, and which applied to the subject. With what success this has been executed, is not for me to decide. But there are two or three cases which seem to be so applicable, and at the same time so conclusive on the great points of this question, that it may not be improper briefly to notice them. In support of the general principles, that the national character of the owner at the time of capture must decide his right to claim, and that a subject is condemned by it, even in the courts of his native country, without time being allowed to him to elect to remove, the following cases may be referred to. In *The Boedes Lust* (5 Rob., 247), it was decided that the property of a resident of Demarara, shipped before hostilities of any kind had occurred between Holland and Great Britain, but which was captured under an embargo declared by England upon Dutch property, as preparatory to war which ensued soon after the seizure, was, by the retroactive effect of the war applied to property so seized, to be *considered [***286** as the property of an enemy taken in war. In this case, Sir W. Scott lays it down, that, where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. This case is somewhat stronger than the present, in the circumstance that in that, the state of hostility, alleged to have existed at the time of capture was made out by considering the subsequent declaration of war as relating back to the time of seizure under the embargo, by which reference it was decided to be a hostile embargo, and of course tantamount to an actual state of war. But this case also proves, not only that the hostile character of the property at the time of the capture establishes the legality of it, but that no future circumstance changing the hostile character of the claimant to that of a friend or subject, can entitle him to restitution. Whether the claimant, in this case, was a neutral or a British subject, does not appear. But if the former, it will not, it is presumed, be contended that he is, upon the principles of national law, less to be favored in the courts of the belligerent than a subject of that nation domiciled in the country of the adverse belligerent. *Whitehill's* case, however, referred to frequently in Rob. reports, comes fully up to the present, because he was a British subject who had settled but a few days in the hostile country, but before he knew or could have known of the declaration of war; yet, as he went there with an intention to settle, this, connected with his residence, short as it was, fixed his national character, and identified him with the enemy of the country he had so recently quitted. The want of notice, and of an opportunity to extricate himself from a situation to which he had so recently and so innocently

exposed himself, could not prevail to protect his property against the belligerent rights of his own country, and to save it from confiscation. There are many other strong cases upon these points, which I forbear to notice particularly, from an unwillingness to swell this opinion already too long.

The sentence of the court is as follows:

This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is decreed and **287***] ordered that the sentence of *the Circuit Court of Massachusetts condemning the one hundred casks of white lead claimed by Lenox & Maitland be, and the same is hereby affirmed with costs. And that the sentence of the said Circuit Court as to the claim of Magee & Jones to twenty-one trunks of merchandise be, and the same is hereby reversed and annulled; and that the said twenty-one trunks of merchandise be condemned to the captors; and that the sentence of the said Circuit Court as to the ship Venus claimed by Lenox & Maitland be, and the same is hereby reversed; and that the said ship Venus be condemned, the one-half thereof to the captors, the other half to the United States, under the order of the said Circuit Court. That the sentence of the said Circuit Court as to the claim of Wm. Maitland to one-half of one hundred and fifty crates of earthen ware, thirty-five cases and three casks of copper, nine pieces of cotton bagging and twenty and four-twentieths tons of coal, be, and the same is hereby reversed, and that the same be condemned to the captors; and that the sentence of the said Circuit Court, as to the claim of Alexander M'Gregor to one-half of one hundred and ninety-eight packages of merchandise as the joint property of himself and Lenox & Maitland, and of the claim of Wm. Maitland for one-fourth of the same goods, and of the claim of Alexander M'Gregor to twenty-five pieces of cotton bagging and five trunks of merchandise, be, and the same is hereby reversed and annulled, and that the same be condemned to the captors; and that the said cause be remanded to the said Circuit Court for further proceedings to be had thereiu.

JOHNSON, *J.*, declined giving an opinion.

STORY, *J.* I do not sit in this cause; but the great question involved in it, respecting the effect of domicile on national character, forms the leading point in many cases before the court. Those cases have been ably and fully argued, and I have listened, with great solicitude and attention, to the discussion. On so important a question, where a difference of opinion has been expressed on the bench, I do not feel at liberty to withdraw myself from the responsibility which the law imposes on me. The parties in the other cases have a right to my opiuion; and, however painful it is, in the **288***] embarrassing *situation in which I stand, to declare it, I shall not shrink from what I deem a peremptory duty. The question is not new to me. It has beeu repeatedly before me in the Circuit Court, and has been applied sometimes to relieve and sometimes to condemn the claimant. I shall not pretend to go over the grounds of argument, but content myself with declaring my entire concurrence in the opinion expressed by Judge Washington on this point.

MARSHALL, *Ch. J.* I entirely concur in so much of the opinion delivered in this case as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy; and I subscribe implicitly to the reasoning urged in its support. But from so much of that opinion as subjects to confiscation the property of a citizen shipped before a knowledge of the war, and which disallows the defense founded on an intention to change his domicile and to return to the United States, manifested in a sufficient manner, and within a reasonable time after knowledge of the war, although it be subsequent to the capture, I feel myself compelled to dissent.

The question is undoubtedly complex aud intricate. It is difficult to draw a line of discrimination which shall be at the same time precise and equitable. But the difficulty does not appear to me to be sufficient to deter courts from making the attempt.

A merchant residing abroad for commercial purposes may certainly intend to continue in the foreign country so long as peace shall exist, provided his commercial objects shall detain him so long, but to leave it the instant war shall break out between that country and his own. This intention, it is not uecessary to manifest during peace; and when war shall commence, the belligerent cruiser may find his property on the ocean, and may capture it, before he knows that war exists. The question whether this be enemy property or not depends, in my judgment, not exclusively on the residence of the owner at the time, but on his residence taken in connection with his national character as a citizen, and with his intention to continue or to discontinue his commercial domicile in the event of war.

*The evidence of this intention will [***289** rarely, if ever, be given duriug peace. It must, therefore, be furnished, if at all, after the war shall be kuown to him; and that knowledge may be preceded by the capture of his goods. It appears to me, then, to be a case in which, as in many others, justice requires that subsequent testimony shall be received to prove a pre-existing fact. Measures taken for removal immediately after a war, may prove a previous intention to remove in the event of war, and may prove that the captured property, although, *prima facie*, belonging to an enemy, does in fact belong to a friend. In such case, the citizen, in my opinion, has a right, in the nature of the *jus postliminii*, to claim restitution.

As this question is not only decisive of many claims now depending before this court, but is also of vast importance to our merchants generally, I may be excused for stating, at some length, the reasons on which my opinion is founded.

The whole system of decisious applicable to this subject, rests on the law of nations as its base. It is, therefore, of some importance to inquire how far the writers on that law consider the subjects of oue power residing within the territory of another, as retaining their original character, or partaking of the character of the nation in which they reside.

Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into

my hands, says, "the citizens are the members "of the civil society; bound to this society by "certain duties, and snbject to its authority, "they eqnally participate in its advantages. "The nativcs, or indigenes, are those born in the "country, of parents who are citizens. Society "not being able to subsist and to perpetuate it- "sclf bnt by the children of the citizens, those "children naturally follow the condition of "their fathers, and succeed to all their rights."

"The inhabitants, as distingnished from citi- "zens, are strangers who are permitted to set- "tle and stay in the country. Bonnd by "their residence to the society, they are sub- "ject to the laws of the state, while they re- "side there, and they are obliged to defend it, **290***] "because it grants *them protection, "though they do not participate in all the rights "of citizens. They enjoy only the advantages "which the laws or custom gives them. The "perpetnal inhabitants are those who have re- "ceived the right of perpetual residence. These "are a kind of citizens of an inferior order, "and are united and subject to the society, "without participating in all its advantages."

"The domicile is the habitation fixed in any "place, with an intention of always staying "there. A man does not, then, establish his "domicile in any place, unless he makes snf- "ficiently known his intention of fixing there, "either tacitly or by an express declaration. "However, this declaration is no reason why, if "he afterwards changes his mind, he may not "remove his domicile elsewhere. In this sense, "he who stops, even for a long time, in a place, "for the management of his affairs, has only "a simple habitation there, but has no domicile."

A domicile, then, in the sense in which this term is used by Vattel, requires not only actual residence in a foreign country, but "an inten- tion of always staying there." Actnal residence without this intention, amounts to no more than "simple habitation."

Although this intention may be implied with- ont being expressed, it ought not, I think, to be implied, to the injury of the individual, from acts entirely eqnivocal. If the stranger has not the power of making his residence perpetual, if circnmstances, after his arrival in a country, so change as to make his continnance there dis- advantageous to himself, and his power to con- tinue, doubtful; "an intention always to stay there" onght not, I think, to be fixed upon him, in consequence of an unexplained residence previous to that change of circumstances. Mere residence, nnder partienlar circumstances, would seem to me, at most, to prove only an in- tention to remain so long as those circumstances continue the same, or equally advantageons. This does not give a domicile. The intention which gives a domicile is an unconditional in- tention "to stay always."

The right of the citizens or subjects of one country to remain in another, depends on the **291***] will of the sovereign, *of that other; and if that will be not expressed otherwise than by that general hospitality which receives and af- fords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there.

Vattel says, "enemies continue such wher- "ever they happen to be. The place of abode "is of no accont here. It is the political ties "which determine the quality. While a man "remains a citizen of his own country he re- "mains the enemy of all those with whom his "nation is at war."

It would seem to me to require very strong evidence of an intention to become the perma- nent inhabitant of a foreign country to justify a court in presnming such intention to continne, when that residence must expose the per- son to the inconvenience of being considered and treated as an enemy. The intention to be inferred solely from the fact of residence dur- ing peace, for commercial purposes, is, in my judgment, necessarily conditional, and depend- ent on the continnance of the relations of peace between the two countries.

So far is the law of nations from considering residence in a foreign country in time of peace as evidence of an intention "always to stay there," even in time of war, that the very con- trary is expressed. Vattel says, "the sovereign "declaring war can neither detain those sub- "jects of the enemy who are within his domin- "ions at the time of the declaration, nor their "effects. They came into his country on the "public faith. By permitting them to enter "his territory and to continue there, he tacitly "promised them liberty and security for their "return. He is therefore to allow them a rea- "sonable time for withdrawing with their "effects; and if they stay beyond the time pre- "scribed, he has a right to treat them as ene- "mies, though as enemies disarmed."

The stranger merely residing in a country during peace, however long his stay, and what- ever his employment, provided it be such as strangers may engage in, cannot, on the princi- ples of national law, be considered *as [**292** incorporated into that society, so as, immedi- ately on a declaration of war, to become the enemy of his own. "His property," says Vattel, "is still a part of the totality of the wealth of "his nation." "The citizen or subject of a "state, who absents himself for a time, without "any intention to abandon the society of which "he is a member, does not lose his privilege by "his absence; he preserves his rights, and re- "mains bound by the same obligations. Being "received in a foreign country, in virtue of the "natural society, the communication and com- "merce, which nations are obliged to cultivate "with each other, he ought to be considered "there as a member of his own nation, and treat- "ed as such."

The subject of one power inhabiting the country of another, ought not to be considered as a member of the nation in which he resides, even by foreigners; nor ought he, on the first commencement of hostilities, to be treated as an enemy by the enemies of that nation.

Burlamaqui says, "as to strangers, those who "settle in the enemy's country after a war is "begun, of which they had previous notice, "may justly be looked upon as enemies and "treated as such. But in regard to such as "went thither before the war, justice and hu- "manity require that we should give them a "reasonable time to retire; and if they neglect "that opportunity, they are accounted ene- "mies."

If this rule be obligatory on foreign nations, much more ought it to bind that of which the individual is a member.

I think I cannot be mistaken when I say that, in all the views taken of this subject by the most approved writers on the law of nations, the citizen of one country residing in another is not considered as incorporated in that other, but is still considered as belonging to that society of which he was originally a member. And if war break out between the two nations, he is to be permitted, and is expected, to return to his own. I do not perceive in those writers any exception with regard to merchants.

It must, however, be acknowledged that the **293***] great extension *of commerce has had considerable influence on national law. Rules have been adopted, perhaps by general consent, principles have been engrafted on the original stalk of public law, by which merchants, while belonging politically to one society, are considered commercially as the members of another. For commercial purposes the merchant is considered as a member of that society in which he has his domicile; and less conclusive evidence than would seem to be required in general cases, by the law of nations, has been allowed to fix the domicile for commercial purposes. But I cannot admit that the original meaning of the term is to be entirely disregarded, or the true nature of this domicile to be overlooked. The effects of the rule ought to be regulated by the motives which are presumed to have induced its establishment, and by the convenience it was intended to promote.

The policy of commercial nations receives foreign merchants into their bosom; and permits their own citizens to reside abroad for the purposes of trade without injury to their rights or character as citizens. This free intercommunication must certainly be believed, by the nations who allow it, to be promotive of their interests. Nor is this opinion ill founded. Nothing can be more obvious than that the affairs of a commercial company will be transacted to most advantage by being conducted, as it respects both purchase and sale, under the eye of a person interested in the result. The nation which takes an interest in the prosperity of its commerce can feel no inclination to restrain its citizens from residence abroad for the purposes of commerce; nor will it hastily construe such residence into a change of national character, to the injury of the individual. It is not the policy of such a nation, nor can it be its wish, to restrain its citizens from pursuing abroad a business which tends to enrich itself. It ought not, then, to consider them as enemies in consequence of their having engaged in such pursuit in the country of a friend, who, before their removal, becomes an enemy.

If, indeed, it be the real intention of the citizen permanently to change his national character, if it be his choice to remain in the country **294***] of the enemy during *war, there can be no harshness—no injustice in treating him as an enemy. But if, while prosecuting his business in a foreign country, he contemplates a return to his own; if, in the prosecution of that business, he is promoting rather than counteracting the interests and policy of the country of which he is a member, it would seem to me to be pressing the principle too far, and to be drawing conclusions which the premises will not warrant, to infer, conclusively, an intention to continue in a country which has become hostile, from a residence and trading in that country while it was friendly; and to punish him by the confiscation of his goods, as if he was fully convicted of that intention.

It is admitted to be a general rule, that, while the state of things remains unaltered, while the motives which carried the citizen abroad continue, while he still prosecutes a business of uncertain duration, his capacity to prosecute which is not impaired, his mercantile character is confounded with that of the country in which he resides, and his trade is considered as the trade of that country.

It will require but a slight examination of the subject to perceive the reason of this rule; and that, to a certain extent, it is convenient without being unjust.

In times of universal peace, the question of national character can arise only when some privilege or some disability is attached to it, or in cases of insurance. A particular trade may be allowed or be prohibited to the merchants of a particular nation, or property may be warranted to be of a particular nation. If, in such cases, the residence of the individual be received as evidence of his national mercantile character, the subjects of inquiry are simplified, the questions are reduced to a plain one, and the various complex inquiries, which might otherwise arise, are avoided. There is, therefore, much convenience in adopting this principle in such a state of things; and it is not perceived that any injustice can grow out of it; since the individual to whom the rule is applied is not surprised by any new or unlooked-for event.

So if war exists between two nations. Each belligerent *having a right to capture [***295** the property of the other found on the ocean, each being intent on detroying the commerce of the other, and on depriving it of every cover under which it may seek to shelter itself, will certainly not allow the advantages of neutrality to a merchant residing in the country of his enemy. Were this permitted, the whole trade of the enemy could assume, and would assume, a neutral garb.

There is, in general, no reason for supposing that a merchant residing in a foreign country, and carrying on trade, means to withdraw from it, on its engaging in war with any other country to which he is bound by no obligation. By continuing, during war, the domicile acquired in peace, he violates no duty, offends against no generally acknowledged principle, and retains all his rights of residence and commerce. The war, then, furnishes no motive for presuming that he is about to change his situation, and to resume his original national character.

These reasons appear to me to require the rule as a general one, and to justify its application to general cases. But they do not, in my opinion, justify its application to the case of a merchant whom war finds engaged in trade in a country which becomes the enemy of his own. His country ought not, I think, to bind him by his residence during peace; nor to consider him as precluded by it from showing an intention that it should terminate with the relations of peace.

When it is considered that his right to remain and prosecute that trade in which he had been engaged during peace is forfeited; that his duty, and most probably his inclinations, call him home; that he has become the enemy of the country in which he resides; that his continuance in it exposes him to many and serious inconveniences; that his person and property are in danger; it is not, I think, going too far to say that this change in his situation may be considered as changing his intention on the subject of residence, and as affording a presumption of intending to return.

Let it be remembered that, according to the law of nations, domicile depends on the inten-
296*] tion to reside permanently *in the country to which the individual has removed; and that a change of this intention is, at any time, allowable. If, upon grounds of general policy and general convenience, while the circumstances under which the residence commenced, continue the same, residence and employment in permanent trade be considered as evidence of an intention to continue permanently in the country, and as giving a commercial national character, may not a total change in circumstances—a loss of the capacity to carry on the trade—be received, in the absence of all conflicting proof, as presumptive evidence of an intention to leave the country, and as extricating the trade, carried on in the time of supposed peace, from the national character, so far as to protect it from the perils of war? At any rate, do not reason and justice require that this change of circumstances should leave the question open to be decided on such other evidence as the war must produce?

The great object for which an American merchant fixes himself in a foreign country is, most generally, to carry on trade between that country and his own. In almost every case of this description before the court, the claimant is a member of a house established in the United States; and his business abroad is subservient to the business at home. This trade is annihilated by the war.

If, while peace subsists between the United States and Great Britain, while the American merchant possesses there all the commercial rights allowed to the citizens of a friendly nation, and may carry on uninterruptedly his trade to his own country, he is presumed, his intentions being unexplained, to intend remaining there always, and may, for general convenience, be clothed with the commercial character of the nation in which he resides, ought this presumption to be extended, by his own government, beyond the facts out of which it grows, if the interest of the individual be materially affected by that extension? Do not reason and justice require that we should consider his original intention as being only coextensive with the causes which carried him to and detained him in the country, as being, in its nature, conditional, and dependent on the continuance of those causes?

297*] *If such a person were required, on his arrival in a foreign country, to declare his real intentions on the subject of residence, he would, most probably, say, if he spoke honestly, "I come for the purpose of trade. I shall remain while the situation of the two countries permits me to carry on my trade lawfully, securely, and advantageously. When that situation so changes as to deprive me of these rights, I shall return." His intention, then, to reside in the country, his domicile in it, and, consequently, his commercial character, unless he continued his trade after war, would be clearly limited by the duration of peace. It would not, I think, be unreasonable to say, that the intention, to be implied from his conduct, ought to have the same limitation.

To me it seems that a mere commercial domicile acquired in time of peace, necessarily expires at the commencement of hostilities. Domicile supposes rights incompatible with a state of war. If the foreign merchant be not compelled to abandon the country, it is not because his commercial character confers on him a legal right to stay, but because he is specially permitted to stay. If in this I am correct, it would seem to follow that, if all the legal consequences of a residence in time of peace do not absolutely terminate with the peace, yet the national commercial character which that residence has attached to the individual, is not so conclusively fixed upon him as to disqualify him from showing that, within a reasonable time after the commencement of hostilities, he made arrangements for returning to his own country. If a residence and trading after the war be not indispensably necessary to give the citizen merchant or his property a hostile character, yet removal, or measures showing a determination to remove, within a reasonable time after the war, may retroact upon property shipped before a knowledge of the war, and rescue that property from the hostile character attached to the property of the nation in which the individual resided.

The law of nations is a law founded on the great and immutable principles of equity and natural justice. To draw an inference against all probability, whereby a citizen, for the purpose of confiscating his goods, is clothed, against his inclination, with the character of an enemy, in consequence of an act which, when committed, *was innocent in itself, was [***298**
entirely compatible with his political character as a citizen, and with the political views of his government, would seem to me to subvert those principles. The rule which, for obvious reasons, applies to the merchant in time of peace or in time of war, the national commercial character of the country in which he resides cannot, in my opinion, without subverting those principles, apply a hostile character to his trade carried on during peace, so conclusively as to prevent his protecting it by changing that character within a reasonable time after a knowledge of the war.

My opinion, then, is, that a mere commercial domicile acquired by an American citizen in time of peace, especially if he be a member of an American house, and is carrying on trade auxiliary to his trade with his own country, ought not to be considered positively as continuing longer than the state of peace. The declaration of war is a fact which removes the causes that induced his residence in the foreign country. They no longer operate upon him. When they cease, their effects ought to cease. An intention which they produced ought not to be supposed to continue. The character of his property shipped before a knowledge of the war, ought

not to be decided absolutely by his residence at the time of shipment or capture, but ought to depend on his continuing to reside and trade in the enemy country, or on his taking prompt measures for returning to his own.

This is the conclusion to which my mind would certainly be conducted, might I permit it to be guided by the lights of reason and the principles of natural justice. But it is said that a course of adjudications has settled the law to be otherwise—that we cannot, without overturning a magnificent system bottomed on the broad base of national law, and of which the parts are admirably adjusted to each other, yield to the dictates of humanity on this particular question. Sir William Scott, it is argued at the bar, has, by a series of decisions, developed the principles of national law on this subject, with a perspicuity and precision which mark plainly the path we ought to tread.

299*] *I respect Sir William Scott, as I do every truely great man; and I respect his decisions; nor should I depart from them on light grounds; but it is impossible to consider them attentively without perceiving that his mind leans strongly in favor of the captors. Residence, for example, in a belligerent country, will condemn the share of a neutral in a house, trading in a neutral country; but residence in a neutral country will not protect the share of a belligereut or neutral in a commercial house established in a belligerent country. In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced; and, on this account, it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them where such extension may produce injustice.

While I make this observation, it would betray a want of candor not to accompany it with the acknowledgment that I perceive in the opinions of this eminent judge no disposition to press this principle with peculiar severity against neutrals. He has certainly not mitigated it when applying it to British subjects.

With this impression respecting the general character of British admiralty decisions, I proceed to examine them so far as they bear on the question of domicile

The case of *The Vigilantia* does not itself involve the point. But in delivering his opinion, the judge cited two cases of capture which have been quoted and relied on at bar. In each of these, the share of the partner residing in the neutral country was restored, and that of the partner residiug in the belligerent country was condemned. But these decisions applied to a trade continued to be carried on during war.

In a subsequent case, the share of the partner residing in the neutral country also was condemned; and the lords commissioners said that the principle on which restitution was decreed in each of the first-mentioned cases, was, "that they were merely at the commencement **300***] *of a war." They said that "a person "carrying on trade habitually in the country "of the enemy, though not resident there, "should have time to withdraw himself from "that commerce; that it would press too heavily on neutrals to say that, immediately, on "the first breaking out of a war, their goods "would become subject to confiscation."

On these cases it is to be observed, that, although the two first happened at the commencement of the war, yet they happened during a war; and the partners whose interest was condemned, do not appear to have discontinued their residence and tradiug in the country of the enemy after war had taken place. The declaration "that it would press too heavily on neutrals to say that, immediately on the first breaking out of a war their goods would become subject to confiscation," though applied to a neutral not residing in the belligerent country, clearly discriminates, in a case of capture, between the rights of parties at the commencement of a war, and at a subsequent period. But it is sufficient to say that neither the case itself, nor the cases and opinions cited in it, apply directly to the questiou before this court.

In the case of *The Harmony*, the property of Mr. Murray, an American citizen residing in France, was condemned on account of that residence. But Mr. Murray had removed to France during the war, and had continued there for four years.

The scope of the argument of Sir William Scott goes to show that the single circumstance of residence in the enemy country, if not intended to be permanent, will not give the enemy character to the property of such resident captured in a trade between his own country and that of the enemy. It is material that the conduct of Mr. Murray, subsequent to the capture, had great influence in determining the fate of his property. Had he returned to the United States immediately after that event, I do not hazard much in saying that restitution would have been decreed.

In the case of *The Indian Chief*, Mr. Johnson, an American citizen domiciliated in England, had engaged *in a mercantile en- [***301** terprise to the British East Indies—a trade allowed to an American citizen, but prohibited to a British subject. On its return, the vessel came into Cowes, and was seized for being concerned in illicit trade. Mr. Johnsou had then left England for the United States. He was considered as not being a British subject at the time of capture, and restitution was decreed.

In delivering his opinion in this case, Sir William Scott said: "Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that, from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by non-residence. It is an adventitious character that no longer adheres to him from the moment that he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*."

This case undoubtedly proves, affirmatively, that the national character gained by resi-

dence ceases with that residence; but I cannot admit it to prove, negatively, that this national character can be laid down by no other means. I cannot, for instance, admit that an American citizen, who had gained a domicile in England during peace, and was desirous of returning home on the breaking out of war, but was detained by force, could, under the authority of this opinion, be treated as a British trader, with respect to his property embarked before a knowledge of the war.

In the case of *La Virginie*, the property of a Mr. Lapierre, who was probably naturalized in the United States, but who had returned to St. Domingo, and had shipped the produce of that island to France, was condemned. But he was considered as a Frenchman, was residing at the time in a French colony, and was engaged in a trade between that colony and the mother country. The case, the judge observed, might have been otherwise decided, had the shipment been made to the United States.

302*] *In the case of *The Jonge Clarissa*, Mr. Ravie had a license to make certain importations as a British subject. He had a house in Amsterdam, went there in person during the war, and made the shipment under his own inspection and control. It was determined that, in this transaction, he acted in his character as a Dutch merchant, and was not protected by his license. This was a trading during war.

In the case of *The Citto*, the property of Mr. Bowden, a British subject residing in Holland, was condemned. It appeared that he had settled in Amsterdam, where he had resided, carrying on trade, for six years. In 1795, when the French troops took possession of that country, he left it and settled in Guernsey. The Citto was a Danish vessel captured in April, 1796, on a voyage from a Spanish port to Guernsey, where Mr. Bowden then resided. In June, 1796, after the capture of the Citto, he returned to Holland. In argument, it was contended, that it appeared that British subjects might reside in Holland without forfeiting their British character, from the proclamation of the 3d of September, 1796, which directs the landing of goods, imported under that order into the united provinces, to be certified by British merchants resident there.

The judge was desirous of knowing the nature of Mr. Bowden's residence in Holland—whether he had confined himself to the object of withdrawing his property, or had been engaged in the general traffic of the place. If the former, "he may," said the judge, "be "entitled to restitution, more especially ad- "verting to the order in council, which is cer- "tainly so worded as not to be very easy to be "applied."

The cause stood for further proof.

It is plain that, in this opinion, the residence of the claimant at the time of capture was not considered as conclusive. Had it been so, restitution must have been decreed, because Mr. Bowden was a British subject, and, at that time, resided in Guernsey. It is equally apparent that, had his subsequent residence in the enemy country been for the sole purpose of withdrawing his property, the law was not un-

303*] derstood to forbid restitution. *The language of Sir William Scott certainly ascribes considerable influence to the proclamation, but does not rest the right of the claimant altogether on that fact.

On the 17th of March, 1800, an affidavit of Mr. Bowden, made the 6th of August, 1799, was produced, in which he stated his residence in Holland previous to the invasion by the French. That he quitted Holland and landed in England the 20th of January, 1795, whence he proceeded to Guernsey, where he resided with his family. That, in the month of June, 1796, he was under the absolute necessity of returning to Holland, for the purpose of recovering debts due and effects belonging to the partnership, his partner remaining in Guernsey.

The affidavit then proceeded to state many instances of his attachment to his own government, and concluded with averring that he was still under the necessity of remaining in Holland, for the purpose of recovering part of the said debts and effects, which would be impossible were he to leave the country; but that it was his intention to return to his native country, so soon as his affairs would permit, where his mother and his relations reside.

The court observed that it appeared, from the affidavit, that Mr. Bowden was, at that time, in Holland; and added, "it would be a strange "act of injustice if, while we are condemning "the goods of persons of all nations resident "in Holland, we were to restore the goods of "native British subjects resident there. An "Englishman residing and trading in Holland "is just as much a Dutch merchant as a Swede "or a Dane would be."

This case was decided in 1800. Mr. Bowden had returned to Holland in 1796, during the war, and had continued in the country of the enemy. It is not denied that he continued his trade, and the fact that he did continue it is fairly to be inferred, not only from his omitting to aver the contrary, but from the language of Sir William Scott. "An Englishman resid- "ing and trading in Holland," says that judge, "is just as much a Dutch merchant as a Swede "or a Dane would be." The case of Mr. Bowden, then, is the case of a British subject who continued to reside and trade in the enemy country four years after the commencement of hostilities. His *property must have [***304** been condemned on one of two principles. Either the judge must have considered his residence in Guernsey, from January, 1795, to June, 1796, as a temporary interruption of his permanent residence in Holland, and not as a change of domicile, since he returned to that country, and continued in it, as a trader, to the rendition of the final sentence; or he must have decided that, although Mr. Bowden remained and intended to remain in fact a British subject, yet the permanent national commercial character which he acquired after this capture, retroacted on a trade which, at the time of capture, was entirely British, and subjected the property to confiscation. On whichsoever of these principles the case was decided, it is clear that the hostile character attached to the property of Mr. Bowden in consequence of his residing and trading in the country of the enemy during the war. This case is, I think, materially variant from one in which the residence and trading took place during peace, and the cap-

ture was made before a change of residence could be conveniently effected.

The Diana is also a case of considerable interest, which contains doctrines entitled to attentive consideration.

During the war between Great Britain and Holland, which commenced in 1795, the island of Demarara surrendered to the British arms. By the treaty of Amiens, it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their property acquired and possessed before or during the war, in which term they may have the full exercise of their religion and enjoyment of their property.

Previous to the declaration of war against Holland, in 1803, the Diana and several other vessels, loaded with colonial produce, were captured on a voyage from Demarara to Holland. Immediately after the declaration of war, and before the expiration of three years from the notification of the treaty of Amiens, Demarara again surrendered to Great Britain. **305***] Claims to the captured *property were filed by original British subjects, inhabitants of Demarara, some of whom had settled in the colony while it was in possession of Great Britain, others before that event. The trial came on after the island had again become a British colony.

Sir William Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held, that their settling in Demarara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power; which presumption, recognized in the treaty, relieved those claimants from the necessity of proving such intention. He thought it highly reasonable that they should be admitted to their *jus postliminii*, and be held entitled to the protection of British subjects.

But the property of those claimants who had settled before it came to the possession of Great Britain, was condemned. "Having settled "without any faith in British possession, it "cannot be supposed," he said, "that they "would have relinquished their residence, be- "cause that possession had ceased. They had "passed from one sovereign to another with "indifference; and if they may be supposed "to have looked again to a connection with "this country, they must have viewed it as a "circumstance that was in no degree likely "to affect their intention of continuing there." "On the situation of persons settled there pre- "vious to the time of British possession, I feel "myself," said the judge, "obliged to pro- "nounce that they must be considered in the "same light as persons resident in Amsterdam. "It must be understood, however, that if there "were among these, any who have been actual- "ly removing, and that fact is properly ascer- "tained, their goods may be capable of restitu- "tion. All that I mean to express is, that "there must be evidence of an intention to "remove, on the part of those who settled "prior to British possession, the presumption "not being in their favor."

This having been a hostile seizure, though made before the declaration of war, the property is held equally *liable to condemna- [***306** tion as if captured the instant of that declaration.

So much of the case as relates to those claimants who had settled during British possession, proves that other circumstances than an actual getting into motion for the purpose of returning to his own country, may create a presumption of intending to return; and may put off that hostile commercial character which a British subject residing and trading in the country of an enemy is admitted to acquire. The settlement having been made in a country which, at the time, was in possession of Great Britain, though held only by the right of conquest—a tenure known to be extremely precarious, and rarely to continue longer than the war in which the acquisition is made—is sufficient to create this presumption; but the case does not declare negatively that no other circumstances would be sufficient.

I am aware that the part of the case which applies to claimants who had settled previous to British possession, will, at first view, appear to have a strong bearing on the question before the court. The shipment was in time of peace, and the seizure was made before the declaration of war. The trade was one in which a British subject, in time of peace, might lawfully engage. However strong his intention might be to return to his native country in the event of war, he could not be expected to manifest that intention before the actual existence of war. The reconquest of the island followed the declaration of war so speedily as scarcely to leave time for putting in execution the resolution to return, had one been formed. Taking these circumstances into view, the condemnation would seem to be one of extreme severity. Yet even this case, admitting the decision to be perfectly correct, does not, I think, when accurately examined, go so far as to justify a condemnation under such circumstances as belong to some of the cases at bar.

The island having surrendered during war, such of its inhabitants as were originally British subjects were not allowed to derive, from this re-annexation to the dominions of Great Britain, the advantages to which a voluntary return to their own country, of the same *date, would have entitled them. They [***307** were considered as if they had been "residents of Amsterdam."

But Sir William Scott observes, that "if "there are among these any who have been act- "ually removing, and that fact is properly as- "certained, their goods may be capable of "restitution." "Actually removing." When? Not, surely, before the seizure; for that was made in time of peace. Not before the declaration of war, when the original seizure was converted into a belligerent capture; for until that declaration was known, a person whose intention to remain or return was dependent on peace or war, would not be "actually removing." On every principle of equity, then, the time to which these expressions refer, must be the surrender of Demarara, or a reasonable time after the declaration of war was known there. The one period or the other would be subsequent to that event which was deemed equivalent to capture.

It is not unworthy of remark that Sir William Scott adds explanatory words which qualify and control the words "actually removing," and show the sense in which he used them. "All," says the Judge, "that I mean to ex- "press is, that there must be evidence of an "intention to remove, on the part of those who "settled prior to British possession, the pre- "sumption not being in their favor."

It would, then, I think, be rejecting a part, and a material part, of the opinion, to say that an intention to remove clearly proved, though not accompanied by the fact of removal, would have been deemed insufficient to support the claim for restitution.

Were there no other circumstances of real importance in this case—did it rest solely on the sentiments expressed by the Judge, unconnected with those circumstances—I should certainly consider it as leaving open to the claimants before this court the right of proving an intention to return within a reasonable time after the declaration of war, by other overt acts than an actual removal.

But there are other circumstances which I **308***] cannot *deem immaterial; and, as the opinions of a judge are always to be taken with reference to the particular case in which they are delivered, I must consider these expressions in connection with the whole case.

The probability is, that the claimants were not merely British merchants. Though the fact is not expressly stated, there is some reason to believe that they had become proprietors of the soil, and were completely incorporated with the Dutch colonists. They are not denominated merchants. They are spoken of, through the case, not as residents, but as settlers. "They had passed," said Sir William Scott, "from one sovereignty to another with "indifference." This mode of expression appears to me to indicate a more permanent interest in the country—a more intimate connection with it than is acquired by a merchant removing to a foreign country, and residing there in time of peace, for the sole purpose of trade. And in another of the same class of cases it is said that, previous to the last war, the principal plantations of the island were in possession of British planters from the other British islands.

The voyage, too, in making which the Diana was captured, was a direct voyage between the colony and the mother country. The trade was completely Dutch; and the property of any neutral, wherever residing, if captured in such a voyage during war, would be condemned.

But it is still more material that those who settled in Demarara before British possession, must have settled during the war which was terminated by the treaty of Amiens; or, if they settled in time of peace, must have continued there while the colony was Dutch, and while Holland was at war with Great Britain. Whichever the fact might be, whether they had settled in an enemy country during war, or had continued, through the war, a settlement made in time of peace, they had demonstrated that war made no change in their residence. In their case, then, it might be correctly said, "that war created no presumption of an in- "tention to return"—"that they passed from "one sovereignty to another with indifference."

*I cannot consider claims under these [***309** circumstances as being in the same equity with claims made by persons who had removed into a foreign country, in time of peace, for the sole purpose of trade, and whose trade would be annihilated by war.

The case of the *Boedes Lust* differs from the *Diana* only in this: the claimants are not alleged to have been originally British subjects. Restitution was asked, because the property did not belong to an enemy at the time of shipment, nor at the time of seizure, nor at the time of adjudication. These grounds were all declared to be insufficient. The original seizure was provisionally hostile; and the declaration of war consummated the right to condemn, and vested the property in the crown as enemy property. The subsequent change in the character of the claimants, who became British subjects by the surrender of Demarara, could not divest it. "Where property is taken "in a state of hostility," said Sir William Scott, "the universal practice has ever been to hold "it subject to condemnation, although the "claimants may have become friends and sub- "jects prior to adjudication." "With as little "effect," he added, "can it be contended that "a *postliminium* can be attributed to these par- "ties. Here is no return to the original char- "acter, on which only a *jus postliminii* can be "raised. The original character at the time of "seizure, and immediately prior to the hostil- "ity which has intervened, was Dutch. The "present character, which the events of war "have produced, is that of British subjects; "and, although the British subject might, un- "der circumstances, acquire the *jus postliminii*, "upon the resumption of his native character, "it never can be considered that the same priv- "ilege accrues upon the acquisition of a char- "acter totally new and foreign."

This opinion is certainly not decisive; but it appears to me rather to favor than oppose the idea that a merchant residing abroad, and taking measures to return on the breaking out of war, may entitle himself to the *jus postliminii*, with respect to property shipped before a knowledge of the war.

The President was captured on a voyage from the * Cape of Good Hope to Eu- [***310** rope. Mr. Elmslie, the claimant, was born a British subject, but claimed as a citizen of the United States. He had removed to the Cape of Good Hope, during the preceding war, and still resided there. The property was condemned. In delivering his opinion, Sir William Scott observed: "It is said the claimant is "entitled to the benefit of an intention of re- "moving to Philadelphia in a few months. A "mere intention to remove has never been "held sufficient without some overt act, being "merely an intention residing secretly and un- "distinguishably in the breast of the party, "and liable to be revoked every hour. The "expressions of the letter in which this inten- "tion is said to be found, are, I observe, very "weak and general, of an intention merely in "*futuro*. Were they even much stronger than "they are, they would not be sufficient. Some- "thing more than mere verbal declaration, "some solid fact showing that the party is in "the act of withdrawing, has always been held "necessary in such cases."

It is to be held in mind that this opinion is delivered in the case of a person who had fixed his residence in an enemy country, during war, and that he claimed to be the subject of a neutral state. For both these reasons, the war afforded no presumption of his intending to return either to his native or adopted country. To the vague expression of an intention to return at some future indefinite time, no influence can be ascribed. When the judge says that "something more than mere verbal declaration, some solid fact showing that the party is in the act of withdrawing, has always been held necessary in such cases," I do not understand him to say that the person must have put himself in personal motion to return, must have commenced his voyage homeward, in order to be considered as in "the act of withdrawing." Many other overt acts, as selling a commercial establishment, stopping business, making preparations to return, accompanied by declarations of the intent, and not opposed by other circumstances, may, in my opinion, be considered as acts of withdrawing.

In the case of *The Ocean*, Sir William Scott said "This claim relates to the situation of **311***] "British subjects settled *in a foreign "state, in time of amity, and taking early "measures to withdraw themselves, on the "breaking out of war. The affidavit of claim "states that this gentleman had been settled as "a partner in a house of trade in Holland, but "that he had made arrangements for the dis-"solution of the partnership, and was only "prevented from removing personally, by the "violent detention of all British subjects who "happened to be within the territories of the "enemy, at the breaking out of the war. It "would, I think, under these circumstances, "be going further than the principle of law re-"quires, to conclude this person by his former "occupation, and by his present constrained "residence in France, so as not to admit him "to have taken himself out of the effect of "supervening hostilities, by the means which "he had used for his removal."

If other means for removal were taken than arrangements for the dissolution of the partnership, they are not stated; and it is fairly to be presumed that these arrangements were the most prominent of them, since that fact is alone selected and particularly relied upon. In his statement of the case, the reporter says that the claimant had actually made his escape and returned to England, in July, 1803 (the trial was in January, 1804); but this must be a mistake, or is a fact not adverted to by the judge, since he says, in his opinion, that the claimant is, at the time, "a constrained resident of France."

I shall notice two other cases, which are frequently cited, though I have seen no full report of either of them.

The first is the case of *Mr. Curtissos*. This gentleman, who was a British subject, had gone to Surinam in 1766, and from thence to St. Eustatius, where he remained till 1776. He then went to Holland to settle his accounts, and with an intention, "as was said," of returning afterwards to England to take up his final residence. In December, 1780, orders of reprisal were issued by England against Holland. On the first of January, 1781, *The Snelle Zeylder* was captured, and, on the 5th of March and 10th of April, 1781, the vessel and cargo were condemned as Dutch property. On the 27th *of April, 1781, Mr. Curtissos returned [***312** to England; and, on an appeal, the sentence of condemnation was reversed by the Lords of Appeals, and restitution decreed,

Other claims of Mr. Curtissos were brought before the Court of Admiralty; and, on a full disclosure of these circumstances, restitution was decreed, before the decree of the lords in the case of *The Snelle Zeylder* was pronounced.

The principle of this decree is said to be, that Mr. Curtissos was *in itinere*, and had put himself in motion, and was in pursuit of his original British character.

I do not mean to find fault with this decision; but certainly it presents some strong points more unfavorable to the claimant than will be found in some of the cases now before this court. Mr. Curtissos had obtained a commercial domicile in the country of the enemy. At the time of the sailing, capture and condemnation of *The Snelle Zeylder*, he still resided in the country of the enemy. But it is said he was *in itinere;* he was in motion in pursuit of his original British character. What was this journey he is said to have been performing in pursuit of his original character? He had passed from one part of the dominions of the united provinces to another. He had moved his residence from St. Eustatius to Holland, where he remained from the year 1776 till 1781 —a time of sufficient duration for the acquisition of a domicile, had he not previously acquired it. This change of residence, to make the most of it, is an act too equivocal in itself to afford a strong presumption that it was made for the purpose of returning to England. Had his stay in Holland even been short, a colonial merchant trading to the mother country, may so frequently be carried there on the business of his trade that the fact can afford but weak evidence of an intention to discontinue that trade; but an interval of between four and five years elapsed between his arrival in Holland and his departure from that country, during which time he is not stated to have suspended his commercial pursuits, or to have made any arrangements, such as transferring his property to England, or making an establishment there, which might indicate, by overt *acts, the intention of returning to his [***313** native country. This journey to Holland, connected with this long residence, would seem to me to be made as a Dutch merchant for the purpose of establishing himself there, rather than as preparatory to his return to England. But it was said that he intended to return to England. How was this intention shown? If not by his journey to Holland and his long residence there, it was only shown by his being employed in the settlement of his accounts while a merchant at St. Eustatius, a business in which he would, of course, engage, whatever his future objects might be. This equivocal act does not appear to have been explained, otherwise than by his own declarations; nor does it appear that these declarations were made previous to the capture.

But could I even admit that the journey from St. Eustatius to Holland was made with a view of passing ultimately from Holland to Eng

land, yet the intention was not to be immediately executed. The time of carrying it into effect was remote and uncertain; subject to so many casualties that, had not the war supervened, it might never have been carried into effect.

But laying aside these circumstances, the case proves only that being *in itinere*, in pursuit of the native character, divests the enemy character acquired by residence and trading; it is not insinuated that this character can be divested by no other means.

Mr. Whitehill's case, though one of great severity, does not, I think, overturn the principle I am endeavoring to sustain. He went to St. Eustatius but a few days before Admiral Rodney and the British forces made their appearance before that place. But it was proved that he went for the purpose of making a permanent settlement there. No intention to return appears to have been alleged. The recency of his establishment seems to have been the point on which his claim rested.

This case, in principle, bears on that before the court, so far only as it proves that war does not, under all circumstances, necessarily furnish a presumption that the foreigner residing in the enemy country intends to return to his **314*** own. The circumstances of this *case, so far as we understand them, were opposed to the presumption that war could affect Mr. Whitehill's residence. War actually existed at the time of his removal; and had that fact been known to him, there would have been no hardship in his case. He would have voluntarily taken upon himself the enemy character at the same time that he took upon himself the Dutch character. There is reason to believe that the court considered him in equal fault with a person removing to a country known to be hostile. St. Eustatius was deeply engaged in the American trade, which, from the character of the contest, was, at that time, considered by England as cause of war, and was the fact which drew on that island the vengeance of Britain. Mr. Whitehill could have fixed himself there only for the purpose of prosecuting that trade. "He went," says Sir William Scott, "to a place which had rendered itself particularly obnoxious by its conduct in that war." This was certainly a circumstance which could not be disregarded in deciding on the probability of his intending to remain in the country in the event of war.

These are the cases which appear to me to apply most strongly to the question before this court. No one of them decides, in terms, that the property of a British subject residing abroad in time of amity, which was shipped before a knowledge of war, and captured by a British cruiser, shall depend, conclusively, on the residence of the claimant at the time of capture, or on his having, at that time, put himself in motion to change his residence. In no case which I have had an opportunity of inspecting, have I seen a *dictum* to this effect. The cases certainly require an intention, on the part of the subject residing and trading abroad, to return to his own country, and that this intention should be manifested by overt acts; but they do not, according to my understanding of them, prescribe any particular overt act as being exclusively admissible; nor do they render it indispensable that the overt act should, in all cases, precede the capture. If a British subject residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country, and especially if he should actually return, his claim for the restitution of property shipped before his knowledge of *the war would, I think, [***315** be favorably received in a British court of admiralty, although his actual return, or the measures proving his intention to return, were subsequent to the capture. Thus understanding the English authorities, I do not consider them as opposing the principle I have laid down.

An American citizen having merely a commercial domicile in a foreign country, is not, I think, under the British authorities, concluded, by his residence and trading in time of peace, from averring and proving an intention to change his domicile on the breaking out of war, or from availing himself of that proof in a court of admiralty. The intrinsic evidence arising from the change in his situation, produced by war, renders it extremely probable that in this new state of things he must intend to return home, and will aid in the construction of any overt act by which such intention is manifested. Dissolution of partnership, discontinuance of trade in the enemy country, a settlement of accounts, and other arrangements obviously preparatory to a change of residence, are, in my opinion, such overt acts as may, under circumstances showing them to be made in good faith, entitle the claimant to restitution.

I do not perceive the mischief or inconvenience that can result from the establishment of this principle. Its operation is confined to property shipped before a knowledge of the war. For if shipped afterwards, it is clearly liable to condemnation, unless it be protected by the principle that it is merely a withdrawing of funds. Being confined to shipments made before a knowledge of the war, the evidence of an intention to change or continue a residence in the country of the enemy, must be speedily given. A continuance of trade after the war, unless, perhaps, under very special circumstances, and for the mere purpose of closing transactions already commenced, would fix the national character and the domicile previously acquired. An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile, and show that the intention to return had never been abandoned; that the intention to remain always had never *been formed. It is [***316** a case in which, if in any that can be imagined, justice requires that the citizen, having entirely recovered his national character by his own act, and by an act which shows that he never intended to part with it finally, should, by a species of the *jus postliminii*, be allowed to aver the existence of that character at the instant of capture. In the establishment of such a principle, I repeat, I can perceive no danger. In its rejection, I think I perceive much injustice. An individual whose residence abroad is certainly innocent and lawful, perhaps advantageous to his country, who never intended that residence to be permanent, or to continue in time of war,

finds himself, against his will, clothed with the character of an enemy, so conclusively that not even a return to his native country can rescue from that character and from confiscation, property shipped in the time of real or supposed peace. My sense of justice revolts from such a principle.

In applying this opinion to the claimants before the court, I should be regulated by their conduct after a knowledge of the war. If they continued their residence and trade after that knowledge, at any rate after knowing that the repeal of the orders in council was not immediately followed by peace, their claim to restitution would be clearly unsustainable. If they took immediate measures for returning to this country, and have since actually returned, or have assigned sufficient reasons for not returning, their property I think may be capable of restitution. Some of the claimants would come within one description, some within the other. It would, under the opinion given by the court, be equally tedious and useless to go through their cases.

My reasoning has been applied entirely to the case of native Americans. This course has been pursued for two reasons. It presents the argument in what I think its true light; and the sentence of condemnation makes no discrimination between native and other citizens.

The claimants are natives of that country with which we are at war, who have been naturalized in the United States. It is impossible to deny that many of the strongest arguments urged to prove the probability that war must determine the native American citizen to aban- **317** *] don *the country of the enemy and return home, are inapplicable, or apply but feebly, to citizens of this description. Yet I think it is not for the United States, in such a case as this, to discriminate between them.

I will not pretend to say what distinctions may or may not exist between these two classes of citizens in a contest of a different description. But in a contest between the United States and the naturalized citizen, in a claim set up by the United States to confiscate his property, he may, I think, protect himself by any defense which would protect a native American. In the prosecution of such a claim, the United States are, I think, if I may be excused for borrowing from the common law a term peculiarly appropriate, *estopped* from saying that they have not placed this adopted son on a level with those born in their family.

LIVINGSTON, *J.*, concurred in the opinion with the Chief Justice.

Cited—8 Cranch, 347, 371; 11 How. 60; 5 Wall. 408; 11 Wall. 306; 7 Otto, 50; 1 Woods. 65; Blatchf. Pr. 76; 2 Gall. 242, 296; Newb. 364; 1 Mason, 90; 1 Dill. 384; 2 Sprague, 131, 140, 145; 1 Wood. & M. 10, 12; 1 Low. 238; 1 Bank. Reg. 388; 3 Simm. 598.

THE MERRIMACK.

Goods purchased by British merchants before the war between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of the British merchants in the United States, also an American citizen, "on account and risk of an American citizen," and no circumstances of fraud or unfairness appearing in the transaction, were vested in the American citizens at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. Restitution.

But if the goods be purchased as above, though the accompanying invoices, bills of lading and letters be addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are inclosed in a letter from the consignors to their agent in the United States, though an American citizen, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash, the property in the said goods continued in the British consignors at time of capture. Condemnation.

Goods by the same ship, purchased as above, and consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading is made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property; vested in the American merchants at the time of shipment.

The circumstance that the goods continue, during the whole voyage, at the risk of the shippers, is immaterial. Restitution.

THIS was an appeal from the decree of the Circuit Court for the District of Maryland.

The following are the material facts of the case:

The ship Merrimack, owned by citizens of the United States, sailed from Liverpool for Baltimore, a few days after the declaration of war, by the United States against Great Britain, was known in that country, having on board a cargo of goods shipped by British subjects, and consigned to citizens of the United States. On the 25th of October, 1812, she was captured, in the Chesapeake Bay, between Annapolis and Baltimore, by the private armed vessel Rossie, Joshua Barney, commander.

The goods, being libeled as prize in the District *Court of Maryland, were several- [*318 ly claimed by sundry citizens of the United States.

These several claims, and the circumstances connected with them respectively, were thus stated by MARSHALL, *Ch. J.*, in delivering the opinion of the court:

1. William & Joseph Wilkins, merchants of Baltimore, claimed the goods contained in eleven cases and one bale marked W. J. W.

These goods were made up for them, in pursuance of their orders, before the war was known in Great Britain, by a manufacturing company, one member of which, Thomas Leich, resided in Leicester in Great Britain, and the other, Edward Harris, was an American citizen residing in the United States.

The bill of parcels was in the name of Messrs. William & Joseph Wilkins. This paper also served for an invoice, and there was no other on board for these goods.

The bill of lading was in the name of Edward Harris, who was the consignee.

The goods were accompanied by a letter from Thomas Leich to Edward Harris, dated Leicester, the 29th of July, 1812, in which he says: "With this you will receive bill of lading of 11 "cases of worsted and cotton hosiery for Messrs. "W. & J. Wilkins, Baltimore, and with in- "surance to 892*l.* 5*s.* It is a large sum, but, "from what I can learn, they are very respect- "able. Indeed, Mr. Brown, of the house of

"Chancellor & Co., came with him, and seemed "almost offended that did not send the cotton "hose he ordered before, and said he would "guarantee the amount of the worsted goods, "therefore must have offended him if did not "comply. Have not sent but about half the "cotton goods they ordered," &c. "Informed "them that we thought it necessary to secure "our property to ship all to you, as you could "prove that they were American property, by "making affidavit they are *bona fide* your prop-"erty. As our orders in council are repealed, hope "your government will be amicably inclined as **319***] "well, and *that trade will be on regular "footing again, but for fear there should be "some other points in dispute, I shall send you, "and our friends through your hands, all the "goods prepared for your market which you'll "perceive is very large." "Hope you will ap-"prove of my sending all, and as there may "have been some alterations in some of your "friends, shipping them to you gives the power "of keeping back to you."

There was also on board a letter dated Leicester, 22d July, 1812, signed Harris, Leich & Co., and addressed to Messrs. Wm. & Joseph Wilkins, merchants of Baltimore, in which they say: "The repeal of the orders in council hav-"ing been agreed on by our government, we "have availed ourselves of the opportunity of "sending the greater part of your spring and "fall orders," &c. "As we are not certain that "your government will protect British prop-"erty, we have thought it right to ship all ours "under cover to Mr. Harris, who can claim as "his own *bona fide* property, and he, being a "citizen of the United States, thought proper "to use every precaution, having received some "unpleasant accounts about your government "having agreed on war with this country, which "we hope will not be the case."

2. M'Kean & Woodland, citizens of the United States, claim sundry parcels of goods, part of the same cargo, as their property.

These goods were purchased by Baily, Eaton & Brown, merchants of Sheffield, in pursuance of orders from the claimants. They were shipped to Robert Holladay, also an American citizen. The bill of lading was to Robert Holladay, "on account and risk of an American citizen." The invoice was also headed to Robert Holladay.

A letter from Baily, Eaton & Brown to Samuel M'Kean, dated 11th July, 1812, says: "A few days ago we received a letter from Mr. "Rogerson, of New York, informing us that "the partnership of Messrs. M'Kean & "Woodland was dissolved, but he does not say "whether you or Mr. Woodland continue the "the business, or whether both of you decline it. "We have purchased about £3,000 sterling of **320***] "goods by order of *the late firm, and "on their account, most of which have been "purchased and paid for by us, from fifteen to "eighteen months ago, and have been on our "hands waiting for shipment. We have this "day given orders to our shipper at Liverpool "to put them on board a good American vessel "sailing for your port with a British license, "but from the uncertainty we are in respect-"ing the particulars of your dissolution of "partnership, and, in fact, not knowing "whether to consign them to you or Mr. "Woodland, we have finally concluded to "consign them to Mr. Holladay, with whom "you will be pleased to make the necessary ar-"rangements respecting them." "We have "addressed the invoice to Mr. Holladay to "your care; and directly on receiving it, if he "should not be in Baltimore, you will please "advise him of its arrival."

The residue of the letter contains their reasons for hoping that Mr. M'Kean will not insist on the usual credit, but will remit immediately on receiving the goods. This request is founded on their having been so long in advance for the purchase of them.

Messrs. Baily, Eaton & Brown addressed a letter to Mr. Holladay, dated the 10th of July, 1812, in which they say: "Inclosed you will "receive invoices of sundry goods for Messrs. "M'Kean & Woodland, which complete "their orders." They then assign the same reason for shipping the goods to Mr. Holladay that is given in their letter to Mr. M'Kean; and, after directing him to arrange with Mr. M'Kean, add: "We cannot view this consignment at all "in the light of an intercepted shipment com-"ing within the meaning of the articles of "agreement between you and us." This letter also contained a proposition for immediate remittance, founded on the time which had elapsed since the goods were purchased. This proposition, they say, is made to all their friends in the United States, and they hope none will refuse to accede to it. "But," they add, "in thus acting, we have left the "matter to the free and unbiassed will of our "friends, and they are certainly upon honor."

3. Messrs. Kimmel & Albert, merchants of Baltimore, claimed seven packages of goods on board the *Merrimack, which were [***321** purchased, in pursuance of their orders, by Baily, Eaton & Baily. The invoice, bill of lading, and letters, addressed (one by the consignors and the other by the shipper, who was their agent) to Messrs. Kimmel & Albert, concur in showing property in the claimants. But all these documents and letters are inclosed in a letter of the 5th of August, 1812, written by Baily, Eaton & Baily to Samuel M'Kean. In this letter the writer refers to a former letter of the 3d of July, in which they informed Mr. M'Kean that they should, on the recommendation of their general agent, Mr. Hollaway, inclose their invoices and bills of lading for the adjacent country to him, and requested him to make inquiries into the circumstances of their correspondents, and be regulated, as to putting the letters, &c., into the post-office so as to reach the persons to whom they might be addressed, by the result of those inquiries. Messrs. Baily, Eaton & Baily indulge the hope that the repeal of the British orders in council will restore peace between the two countries, in which event M'Kean is still to be governed by their letter of the 3d of July. "But," they add, "if, when you receive our "invoices and bills of lading, a state of war "should really continue, it will be proper not "to deliver these goods until you have received "the amount of the invoices from the consign-"ees, in cash."

4. John H. Browning & Co. were also claimants of part of the cargo.

This claim stood on precisely the same prin-

ciples with that of Kimmel & Albert. The documents given in evidence were, in effect, the same, and were inclosed in the same letter from Baily, Eaton & Baily to Samuel M'Kean.

It was contended by the captors, in the District Court, that, from the papers and letters on board, it appeared that the goods were not sold and delivered in England, so as to vest the property in the claimants, but were sent to the agents of the shippers in the United States, to be delivered or not, according to their discretion; consequently, that the property was not changed, and the goods, therefore, were liable to capture as British property.

322*] *Restitution was decreed in the District Court, and the decree was affirmed in the Circuit Court. An appeal was taken to this court, where the captors pray condemnation on the same grounds as in the courts below.

Harper, for the appellants,

After stating the facts of the case, argued that the claims of the captors to the several parts of the cargo in question all rested on the same principle, viz.: That no transfer of the property had taken place at the time of the capture. The shippers were British subjects.

1st. As to the property claimed by William & Joseph Wilkins.

It appears, from the evidence introduced into this part of the cause, that the goods were not to be delivered to the claimants until they had come first to the hands of the shippers' agent, who was to decide upon the solvency of W. & J. Wilkins, and to regulate himself accordingly, with regard to the delivery of the goods. He even had a power, under certain circumstances, to make them his own. W. & J. Wilkins were also to have an option, either to take the goods or not. But a more powerful argument than either is, that the shippers themselves, in their letters both to the consignee and the claimants, denominate these goods British property, and express their apprehensions that the American government will not protect it. Again, if these goods had been lost at sea, they could not have been charged to the Messrs. Wilkins, as goods sold and delivered. The loss would clearly have been the loss of the shippers. The property in this part of the cargo cannot, therefore, be considered as having been vested in W. & J. Wilkins. It was clearly in the British shippers, both at the time of shipment and at the time of capture. The claim of the Messrs. Wilkins ought, therefore, to be rejected.

2d. As to the claim of M'Kean & Woodland, *Harper* stated the facts, and prayed condemnation on the general principle that the property had not been transferred.

3d and 4th. In opposing the respective claims **323*]** of *Kimmel & Albert, and of John H. Browning & Co., the counsel for the captors argued on nearly the same grounds as in the case of W. & J. Wilkins; and, in addition thereto, he urged the condition of payment which was annexed to these two cases, and which was to be performed before the delivery of the goods to the claimants.

He also made a second point in regard to all the claims, viz.: That, admitting the goods to have been the property of American citizens, yet, since the declaration of war was known in Liverpool at the time of the shipment, the claimants are to be considered as having been engaged in a hostile trade, which gives the property an enemy character, and subjects it to condemnation. The shippers, on this supposition, must be looked upon as the agents of the claimants, and the acts of agents are, in law, the acts of their principals.

Pinkney, contra, for the claimants.

If the title of the claimants be good in equity it is sufficient; but it is good at law as well as in equity.

In examining the several claims, I shall follow the order which has been pursued by the counsel for the captors.

First, as to the claim of W. & J. Wilkins. The invoice and bill of parcels show the purchase by the claimants. The bill of parcels is always good evidence, in an action on a policy, to show interest. The invoice corresponds with the bill of parcels, and is not contradicted by the bill of lading. Leich's letter to Harris speaks of the goods as being "for Messrs. W. & J. Wilkins." These circumstances are strongly in our favor. It has been urged, however, on the other side, that the property of the goods could not have been in the claimants at the time of capture, because, 1st. There was a condition of payment, without complying with which the goods were not to be delivered; and, 2d. Because there was a power vested in Harris to keep back the property, in case of the insolvency of the Wilkins's. The first objection is founded on an error in fact. The objection, if applicable to the claimants of the other parts *of the cargo, is not so [***324** here. It appears, indeed, in some part of the evidence, that an inducement to prompt payment was held out to the Wilkins's, viz., an offer to allow seven per cent. discount for prompt payment; but there was no express condition of payment. The second objection, viz., that Harris was empowered to keep back the goods, in case of the insolvency of the claimants, is easily answered. Insolvency of the parties was the sole ground on which Harris could retain the goods; but this is only the same power which the shipper himself would have had by the general law in maritime cases, if he had consigned the goods directly to the Wilkins's. It is the general law, in case of the insolvency of the consignee, that the shipper may stop the goods *in transitu in itinere*, although purchased in England, if the purchase was on credit. The intervention of Harris, in this case, merely gives a facility to the right which the shippers before possessed. (4 Rob., 21, 25, *The Josephine.*)

It is also urged that the shippers themselves, in their letters, have denominated the goods in question British property, and expressed an apprehension that it would not be protected by the American government, and have therefore suggested to Harris that he could swear they were his. This objection possesses little weight. A mere attempt to conceal belligerent property only deprives the party of the benefit of further proof, but is not a ground of confiscation. (4 Rob., 161, 195, *The Madonna delle Gracie; Gregory's* case.)

2d. As to the claim of M'Keen & Woodland. Two objections to this claim, arising from the letter of Baily, Eaton & Brown to M'Kean, have been urged by the captors.

1st. The consignment to Holladay.

2d. The expectation of the shippers that M'Kean & Woodland would pay cash.

The consignment to Holladay needs no farther explanation than is to be found in the letter which states the fact. The shippers, having heard that the partnership of M'Kean & Woodland was dissolved, were uncertain to which of them the consignment ought to be **325***] made, and *therefore determined to consign the goods to Holladay. But the property vested in M'Kean & Woodland, notwithstanding this intermediate consignment. In a court of prize, such intermediate consignment is not considered as altering, in any degree, the nature of the case.

2d. Though the letter from the shippers requests an immediate cash payment, there is no express condition to that effect: there is merely an appeal to the justice and honor of the claimants.

An additional proof that the property was in the claimants is, that it was insured for them, and not for the shippers.

It appears that all the bills of lading, except that for W. & J. Wilkins, express the shipments to have been made on account and risk of American citizens generally. The reason for this general mode of expression was the uncertainty of the shippers respecting the dissolution of the partnership.

3d and 4th. We now come to the claims of Kimmel & Albert; and Browning & Co., which, depending on precisely the same principle, will be examined together.

In these two cases only is there an absolute condition of payment. But the goods had been regularly ordered by the claimants long before they were shipped. They were finally shipped for them, and in pursuance of their orders. They were delivered to the master of a general ship. The invoice, bill of lading and letters, all concur in showing property in the claimants. The legal property vested in them by the delivery of the goods to the master. The shipper, having delivered them to the master, was *functus officio*, and could not thereafter stop the goods on any ground but the insolvency of the consignee, which is the only case of stoppage *in transitu* authorized by the common law or the law maritime. (1 Rob., 181, 219, *The Aurora; Conversation between Sir W. Scott and Dr. Lawrence;* 6 Rob., 325, 6, 7, *The Constantia.*)

Again. Can a captor devest the eventual rights of citizens, or does he take the property subject to the conditions to which it would be subject in the hands of the consignor or his agent? We contend for the latter doctrine. **326***] *The rights of the citizen become absolute upon his complying with those conditions. In the present case, if the goods had arrived at their port of destination without capture, the title to them would have become absolute in Kimmel & Albert, upon payment to the consignor of the amount required. And, as the captor, according to our doctrine, does but stand in the place of the consignor, we contend that the property will become equally absolute in the claimants upon making the same payment to him.

We do not admit the doctrine that property cannot, upon the high seas, pass *in transitu*, so as to defeat the captors. Suppose it had been agreed that the property should change after it had passed a certain degree of longitude; would not the agreement be carried into effect, upon that degree of longitude being passed? But it is not now necessary to contend for this doctrine, because the property in the present case was vested in the claimants, upon the shipment, liable, however, to be devested upon a condition.

There is manifest inconsistency in the English prize law. A belligerent lien will be condemned, but a neutral lien will not be protected; neutral property may become belligerent *in transitu*, but belligerent property cannot become neutral. This court will adopt the reason of the rule, but not the rule itself.

Harper, in reply.

In this case there was no transfer of either an equitable or legal right. In the case of W. & J. Wilkins, the delivery of the goods was only to Harris; or to the master of the ship, who, by undertaking to deliver them to Harris, became his agent, and not the agent of the Wilkins's. So with regard to the invoice, bill of lading, and bill of parcels; they were all delivered, not to the Wilkins's, but to Harris or his agent, the master. No evidence of the title of W. & J. Wilkins was put in a course to reach them, but through the agency of Harris, who was not to deliver it at all, but in a certain event. The goods, although purchased by order of the claimants, were not delivered to them. The claimants could not have maintained an action for them, either at law or in equity.

*M'Kean & Woodland's case is still [***327** stronger against them. The business of that concern was not continued by any person. They have become insolvent. Holladay has the absolute control over the goods. He was to make arrangements with the claimants or with M'Kean alone, and was to require cash.

Saturday, March 12th. *Absent*—LIVINGSTON, *J.*

MARSHALL, *Ch. J.*, after stating the facts relating to the several claims in this case, delivered the following opinion of the court, as to the claims of M'Kean & Woodland, Kimmel & Albert, and John H. Browning & Co.:

1. As to the claim of M'Kean & Woodland.

The question of property, in this case, depends on certain letters written by Baily, Eaton & Brown, which were found on board the captured vessel. A letter of the 11th of July, 1812, addressed to Samuel M'Kean, shows in the clearest manner that the property in dispute was purchased and shipped for M'Kean & Woodland, in pursuance of their orders; and accounts for assigning it to Mr. Holladay.

There is nothing in the cause which can throw the slightest suspicion on the fairness of this transaction. It unquestionably is, what, on the face of these letters, it purports to be, a purchase for M'Kean & Woodland, made in pursuance of their orders, and shipped for them to Robert Holladay, because, in the moment of shipment, information was received that their partnership was dissolved, and the shipper had no instructions in what manner to direct to them. In this situation, he considered himself as acting most certainly for their advantage by addressing the goods to an agent

residing in the same town with M'Kean & Woodland, who should receive them to their use. In such a case, the court is of opinion that the property was vested in M'Kean & Woodland, and is, consequently, not liable to condemnation as enemy property.

The sentence is affirmed.

328*] *2. As to the claim of Kimmel & Albert.

From their letter it is appareut that, in the event of war, Baily, Eaton & Baily, reserved to themselves that power which ownership gives over goods, and instructed their agent, M'Kean, in what manner that power was to be exercised. There being no letter addressed to Kimmel & Albert, but under cover to M'Kean, it is apparent that they were to know nothing of the shipment, unless, in the opinion of M'Kean, it should be prudent to make the communication; and, even then, the property was to become theirs, not under the original contract, but under a new contract to be made with M'Kean. The dclivery on board the ship was a delivery to M'Kean, not absolutely for Kimmel & Albert, but for them provided they acceded to new and distinct propositions made by Baily, Eaton & Baily. In such a case, no change of property could take place till Kimmel & Albert should accede to these new propositions; and the capture having taken place before the contract was complete, the goods must be considered as enemy property.

The sentence is reversed, and the claim dismissed.

3. The claim of John H. Browning & Co.

This claim stands on precisely the same principles with that of Kimmel & Albert. The documentary evidence is in effect the same, and was inclosed in the same letter from Baily, Eaton & Baily to Samuel M'Kean. The claim therefore must be dismissed.

The sentence is reversed and the claim dismissed.

JOHNSON, *J.*, delivered the opinion of the majority of the court, as to the claim of W. & J. Wilkins, as follows:

The points of distinction between this case and that of M'Kean & Woodland, unfavorable to these claimants, are the following:

1. That Harris, the direct consignee, had a control given him over the goods, which au-

329*] thorized him, had *he thought proper, to refuse to deliver them over to the Wilkins's.

2. That Harris had also a power, uuder certain circumstances, to make them his own.

3. That, in the letters both to the Wilkins's and Harris, the consignor alleges as his reason for making the shipment through Harris, his fears that this government would not protect British property; thereby, as is contended, acknowledging this property to be British.

On the other hand, it is a circumstance favorable to this claim, that the original bills of parcels were made directly to the claimants, and were sent along with the shipmcnt as a substitute for an invoice.

It is assumed as a postulate, that a direct consignment on account of the consignee, made in pursuance of his orders, is not subject to condemnation as prize of war; and that it is immaterial whether it be purchased for cash or credit; or insured in the enemy's country or elsewhere.

It will, then, be enough to show that every beneficial interest which such a shipment would vest in the consignee was vested in the claimants in this case.

The first difficulty arises from the circumstance that the bill of lading was made out to Harris, and not to the Wilkins's, whereby the captain of the ship became bound to deliver them to Harris or his assigns.

Upon a fair view of the whole transaction, this distinction will be found rather to be formal than real; and that it produces no difference in the state of right between these parties.

The interest vested in the consignee by the delivery to the captain is not absolute to all purposes. So far as relates to the right of stoppage *in transitu*, it continues subject to the control of the consignor, and may be reduced by him into possession, before actual delivery; or the authority of the captain to deliver them *according to the original bills of lading, [**330** may be countermanded, and another destination given them.

Upon comparing all the circumstances of this case, it will be found that the trausaction was so arranged as to produce no other change in the rights of the parties than to put it in Harris's power to exercise this right of stoppage *in transitu*, in case of the insolvency of the Wilkins's.

The bill of lading is made out to Harris, which gave him the right to demand the goods of the captain.

But the invoice, which has the additional strength of a bill of parcels, is made out to the claimants, which gave them the right to demand the goods of Harris.

Both in the letter to Harris and to the Wilkins's, the shipment is declared to be ou account of the latter; and, in the letter to the former, the shipper goes into a detail of his reasons for giving the claimants so large a credit.

Thus these papers, taken together, place the interest of the claimants on the same footing as if the bill of lading had been made out to Harris for the use of the Wilkins's; and in that case, there could have been little doubt that the claim must be sustained.

If the invoice, although made out to the claimants, had been inclosed to the direct consignee, it would have furuished a strong argument in favor of the captor. But here, the evidence of right is placed in the claimant's own hands; thereby acknowledging their right iu the goods shipped, and furnishiug them with the means of asserting it. Thus the shipper could never have denied the rights of the claimants in this case; for he had furnished the most direct and conclusive evidence against himself.

But it is asserted that Harris had it in his power to make these goods his own, in defiance of the will of the claimants.

If this were the fact, it would only show that, in *either view of the alternative, [**331** it was a shipment on American account, and that the shipper had parted with all his interest.

But the fact is not so; aud in answering this argument, we answer the remaining one also.

The shipper knew what he was about. War

was already probably declared, and he was aware of the crash of mercantile credit which generally follows on such an event. He also knew that, in case of asserting his right of stoppage *in transitu*, the property reverted and became British; in which case, as he expresses himself, the property might be subjected to seizure, as enemy's property.

With these considerations on his mind, he makes out the bill of lading to Harris, and informs him that his object is to enable him to keep the goods back in case of an alteration in the circumstances of the claimants; and in this case only is the hint given him that he may claim them as his own. It is contended, that he acknowledges, in his letter to the claimants, that the property is British. But this is an error in fact. It was necessary to assign some reason or some excuse for not having the bills of lading made out to the claimants themselves. And for this reason, he urges an apprehension that our government would not protect British property. But this reason could only be applicable in the event of a stoppage *in transitu;* as a direct shipment to the claimants would have left no room for such an apprehension. In the letter, also, to Harris, it is said, is contained an acknowledgment that the property is British. This, also, is founded in mistake; for the letter to Harris only communicates the reason which had been assigned in the other letter, for having the bill of lading made out as it was. But suppose the passage in the letter to the claimants, on this subject, had been full and explicit to the declaration of an opinion that the property continued British, although shipped on American account; yet this would have been but an expression of an erroneous opinion, and certainly ought not, as far as the interests of the claimants are concerned, to have an influence on the decision of this court. But it is asserted that the goods continued, on the whole **332***] voyage, at the risk of *the shippers. This may be true, and yet it does not prove enough. Had the shipment been direct to the claimants, and insurance omitted contrary to order or custom, the shippers would have been equally liable, and yet the property would not have been subject to capture. It is enough for the purposes of the claimants that the property in the goods had been transferred to them, independently of the control of the shipper or his agent, except so far as the right to stop *in transitu* interfered. And such was the situation of the rights of the parties in this case. The goods ordered by the claimants were shipped to an agent for their use, subject only to a right which unquestionably, under any circumstances, existed in the shippers. In their letter to the claimants they inclose a bill of parcels, by way of invoice, containing a positive acknowledgment of the sale to them; and the letter itself, as well as that to Harris, speaks of the goods expressly as their goods. The immediate consignee could, therefore, only be considered as the bailee of the claimants. Nor does it appear that a tender of the money would have been necessary to entitle them to receive the goods of Harris, as, in the letter to Harris, it is acknowledged to be a sale on credit, and particular discounts offered as an inducement for an early payment.

Indeed, there are words in the letter to the direct consignee, which amount to a positive declaration that the shipments were not on his account nor on that of the shippers, but for the use and benefit of others. "I shall send you, and our friends through your hands, all the goods prepared for your market." By connecting these words with the bills of lading, the result is that, although the direct consignee was entitled to demand the goods of the captain, yet it was not to his own use, but to the use of the several persons on whose account they were shipped.

Decree affirmed.

STORY, *J.*, delivered the following separate opinion as to the claim of W. & J. Wilkins:

I cannot concur in the opinion of the court, just delivered, as to the claim of Messrs. Wilkins. It is true that the goods were purchased pursuant to the orders of Messrs. Wilkins; but I do not think that the *property, by [***333** the mere purchase, became vested in them; and the usage and course of trade is generally otherwise. The purchase was made with the money of the shipper; and, until a delivery, actual or constructive, to the Messrs. Wilkins, the propriety thereof remained completely in the shipper. The goods were also shipped as the property of the shipper, consigned to the agent of the shipper, and not to the agent of the Messrs. Wilkins, to be delivered only in case of the consignee's being satisfied of their perfect solvency. It is true that the bill of lading purports that the goods are shipped on account and risk of the consignee; but the confidential letters explain the transaction, and show that the shipment was so made as a cover against belligerent risks; and that the property was not intended to be changed from the British shipper, in its transit. The delivery, then, of the goods on board of a general ship, was no delivery to the Messrs. Wilkins. It was not even a delivery which vested the property of the goods in the consignee. The legal property and possession thereof still remained in the shippers; and if the goods had actually come to the hands of Mr. Harris, his possession would have been but a continuation of the possession of the shipper. In contemplation of law, the goods were as much under the control and possession of the shipper as if he had been on board the vessel during the voyage, or had shipped them in his own name. If they had been lost during the voyage, the loss would have been his. He had not a mere right of stoppage *in transitu* in case of insolvency, for that can be exercised only where the property by the shipment is vested in the consignee for his own use; but he had a perfect right of countermand in all cases whatever. He might sell the property, give it a new direction, control its delivery, and, indeed, exercise all the rights of full dominion and propriety. It seems to me, that if the Messrs. Wilkins had neither a *jus ad rem* nor a *jus in re*, and the latter only is recognized in prize courts, they could only, by subsequent acts, overreach the legal rights of the captors. At the time of the shipment and capture it was, in my view, enemy property liable to condemnation, having no neutral or American *onus* attached to it. It was subject to the legal claims of the creditors of the shipper; and nothing existed in the Messrs. Wilkins but a mere *spes*

occupandi, or, as the common law phrases it, a **334***] mere possibility, which attached *neither to the substance nor the form of the thing. Upon what ground, then, if I am right as to the ownership of the goods, can the claim be maintained? The right of capture acts upon the proprietary interest of the thing captured, at the time of capture. It is not affected by the secret liens or private engagements of the parties. It repudiates even the strong claim of a bottomry bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a court of prize? The absence of all authority to this effect, and the strong and emphatic language of all the cases as to secret liens, speak as powerfully as the most direct and pointed decisions against it.

There is a case cited by the court in *The Aurora* (4 Rob., 218) where property was shipped by a merchant in Holland to A, a person in America, by order of B, and per account of B, but with directions to A not to deliver it unless satisfaction should be given for the payment; and it was held as good prize on the ground that the property still remained in the enemy shipper. This case I think strongly in point; and the manner in which Lawrence attempted to distinguish it from the case then on trial, shows a full concurrence in its correctness. The reasoning of the court in *The Aurora* itself, and in *The Marianna* (6 Rob., 22), are also illustrative of the general doctrine.

On the whole, I consider that, by the doctrine of the common and the prize law, these goods were, at the time of capture, enemy property; and that the claim of the Messrs. Wilkins ought to be rejected; and in this opinion I have the concurrence of two[1] of my brethren.

Monday, March 14th. *Harper* suggested diminution of the record in the case of W. & J. Wilkins, and prayed the court to grant a writ of *certiorari* to the court below; but the court refused, the case having been argued and decided.

Cited—1 Wheat. 214; Blatchf. Pr. 385; 1 Woods. 65; 2 Gall. 297.

335*] *THE FRANCES, BOYER, MASTER.

(THOMPSON ET AL. CLAIMANTS.)

A naturalized citizen, who, in time of peace, returns to his native country for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two countries, for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war, is to be considered as having gained a domicile in his native country—and his goods, captured after the war, liable to condemnation. Goods appearing by the ship's papers to be a consignment from alien enemies to American merchants, condemned *in toto* as prize, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods, in consequence of advances made by them.

Further proof on these points refused.

THIS was an appeal from the sentence of the United States Circuit Court for the District of Rhode Island.

The facts were as follow:

War was declared by the United States against Great Britain on the 18th of June, 1812.

The ship Frances, having on board a cargo of goods of British manufacture, consigned to various persons in the United States, sailed from Greenoch, in Scotland, on the 19th of July, in the same year, for New York. On the 28th day of August following, she was captured by the Yankee privateer, and carried into the District of Rhode Island, where the cargo was libeled as enemy property.

Robert and James Thompson and William Steele, naturalized citizens of the United States, claimed a considerable part of this cargo as their own property; and also claimed 130 packages, another part of the same cargo, as being owned by them jointly with British subjects, or as having a lien upon the property in consequence of advances made upon the consignment.

These goods were all consigned by James Thompson, a naturalized citizen of the United States, residing in Scotland, to William Steele, a citizen of the United States, carrying on the business of the concern in New York.

All the goods claimed, except the 130 packages, were incontestibly the property of the claimants; and, on the trial, restoration of two-thirds was decreed to Robert Thompson and William Steele, residents in the United States; in which decree the captors acquiesced. The remaining third, which belonged to James Thompson, who resided in Scotland, was condemned; and from this sentence he has appealed to this court.

*The 130 packages were also con- [***336** demned as enemy property; and from this sentence the claimants have appealed to this court; but, having received more full information than they originally possessed respecting the owner-

1.—Judges WASHINGTON and TODD.

NOTE.—The national character of the owner at the time of the capture, determines its legality, and no future circumstances changing the hostile character of the claimant to that of a friend or subject, can entitle him to restitution. The Venus, Supra. 253, 284.

Where a Frenchman by birth had resided thirteen years in the Republic of Mexico. *Held*, that he had acquired a domicile in the enemy's country which subjected him, so far as it related to his property, to all the disabilities of an enemy. Rogers v. The Armado, 1 Newb., 400.

Where a merchant, domiciled in a neutral country, at the time of the capture, afterwards left his commercial establishment in the neutral country to be conducted by his clerks in his absence, and visited his native country merely on mercantile business, intending to return to his adopted country. *Held*, that the neutral domicile still continues. The Friendship, 3 Wheat., 14.

Domicile in an enemy's country gives a hostile character.

Society v. Wheeler, 2 Gall., 105; Rogers v. The Armado, 1 Newb., 400; The Dos Harmanos, 2 Wheat., 76.

A person cannot be a resident of two states at the same time. Brent v. Armfield, 4 Cranch, C. C., 579.

A neutral, who has resided in an enemy's country resumes his neutral rights as soon as he puts himself and his family on the way to return home to reside. United States v. Guillem, 11 How., 47; The Frances, 1 Gall., 614.

If citizens domiciled in the enemy's country wish to avoid the hostile character, they must actually remove before the breaking out of hostilities. Otherwise their property then afloat will be liable to confiscation. The Frances, 1 Gall., 614.

ship of these goods, they now abandon their claim as to this property, except as to 66 boxes, of which they still claim to hold a moiety; the other moiety being acknowledged to be the property of Messrs. Dalgleish & Frame, British subjects.

A claim to all the above-mentioned goods was also interposed by the United States, for a violation of the non-intercourse laws; which claim was rejected in the Circuit Court, and an appeal taken to the Supreme Court.

James Thompson, as appeared from the evidence, was a native of Scotland, and came to the United States in the year 1793, where he resided, carrying on trade and commerce, till the year 1801. In 1797 he was naturalized. In the year 1801 he went to France, on the commercial business of his house, and, some time afterwards, passed over to England, where he was employed in making purchases for and shipments to his house. In the year 1803 he settled in Glasgow, where he continued doing that part of the business of the partnership which was to be transacted in Great Britain, until the declaration of war. After the knowledge of that event, he transacted no commercial business whatever, and was exclusively employed in arranging his affairs in such manner as would enable him to return to the United States. This being accomplished, he, in August, 1813, engaged a passage on board the cartel ship the Robert Burns, about to sail from Liverpool to New York, but was stopped by the orders of government. He then passed over to Ireland, and privately embarked for the United States, where he arrived in November last. Several affidavits were taken to show that he always considered the United States as his permanent place of residence, and that he uniformly expressed his determination to return. His letters manifested the same intention. It also appeared that his business was complicated, and required his attention after he ceased to engage in new adventures; but it did not appear that he had performed any act which could **337** *]be considered as *commencing to return, until August 1813, when he engaged a passage on board the Robert Burns.

As to the 66 boxes of merchandise, the moiety of which was still claimed by Robert & James Thompson and William Steele, they prayed, on bringing up the cause to this court, to be allowed to make further proof of their property in the said goods; and offered, as further proof, the affidavit of James Thompson that they were the joint property of the house of Dalgleish & Frame and of Messrs. Thompsons & Steele, under a contract made by two letters which were exhibited, and which he said were original. In addition to this, James Thompson swore that he gave his bill for the moiety of these goods, which bill he had paid, and that he was prevented from notifying this contract to his partners in his letter to them, by the hurry produced by the shipment. The claimants offered, also, the affidavit of William Steele, stating that, some time after the papers of the ship Frances were opened, he received the invoice and letters annexed to his affidavit in an envelope with some other papers. That the letters were in the handwriting of John Frame and James Thompson. That, before he received them, he was convinced, from the marks, that the goods in the invoice were, in some respects, the joint property of his house and of Dalgleish & Frame; which fact he stated to the agents of the captors as well as the judge of the Circuit Court, at the trial in June, 1813; and that James Thompson was in the habit of taking goods on joint account from houses in Scotland, and sending them to the house in America, without specifying whether they were on joint account or on commission.

The letters referred to were, one from Dalgleish & Frame, dated Glasgow, 27th June, 1812, and addressed to Mr. James Thompson, Glasgow, in which they say the goods were printed in consequence of his orders; and express a hope that he will take the whole contained in the invoice; or, if not, that he will allow them to go to his house on joint account. The other was a letter addressed to Messrs. Dalgleish & Frame, signed James Thompson, and dated Glasgow, 1st July, 1812, in which he acknowledges the receipt of their letter of the 27th of June, 1812, and says, that as there are a *great many more goods in the invoice [***338** than he had ordered, and as he did not wish to take so large a quantity, he would send them on joint account.

The invoice, or rather bill of parcels, is dated Glasgow, 27th of June, 1812, and was headed "Messrs. R. & J. Thompson and W. Steele bought of Dalgleish & Frame."

The affidavit of John Frame, taken in Glasgow, was also exhibited, in which he swears that the goods are the joint property of Messrs. R. & J. Thompson and Wm. Steele and of Dalgleish & Frame.

Such was the further proof offered.

In the Frances were two letters from James Thompson to Wm. Steele. The first was dated Glasgow, July 13th, 1812, in which he says: "I annex a list of goods consigned by the Frances. These consignments are the safest and surest trade for us, and it was from this conviction that I allowed of so many consignments." In the annexed list of consignments, referred to in the foregoing letter, were the goods shipped by Messrs. Dalgleish & Frame. In this letter he writes on the business of the house, speaks of the consignments generally, recommends that the goods should be promptly sold at the market price, and accounts of sales returned; but makes no allusion to any interest in the goods of Dalgleish & Frame.

Irving, for appellants, after stating the facts of the case, and the claim of Robert & James Thompson and William Steele, contended,

That British property shipped on board an American vessel, before a knowledge of the war, was not liable to capture, either under the laws of the United States or the President's instructions to the commanders of privateers. That the commissions issued by the President to the private armed vessels of the United States, only authorized them to seize, 1st. British vessels and the property found on board; 2d. All property liable to capture by the laws of war; and that the property, in the present case, did not come under either of these *descriptions. [***339** (Acts of Congress of June 18th, and June 26th, 1812, Laws U. S., vol. 11, p. 227 and 238. See, also, the instructions of the President to the private armed vessels of the United States.)

Enemys' property in possession of the nation

declaring war, at the time of the declaration, is not liable to seizure as prize of war; it can only be sequestered by municipal regulation. The court having jurisdiction in cases of this kind, sits as a municipal, not as a prize court. (1 Rob., 238, *The Rebeckah;* 5 Rob., 207, *The Boedes Lust;* 2 Azuni, 224.)

The property, in the present case, is to be considered as committed to the public faith. The circumstances under which it was shipped, and afterwards sailed, were very peculiar. The non-intercourse act and the several acts supplementary thereto, the revocation of the French decrees, the President's proclamation of 2d November, 1810, the letter of the American Secretary of State (Mr. Monroe) to Mr. Foster, the British minister, under date of July 26th, 1811, the revocation of the British orders in council, and the assurances of Mr. Russel, the American *Charge d'Affaires* in Great Britain, presented a state of things on which the British merchants, and the American merchants in Great Britain, confidently relied for the security of their property shipped, under these circumstances, to the United States.

This doctrine, that the property of an enemy, found in the country at the breaking out of a war, is under the safeguard of a public faith, is a principle of the common law. In England, property in this situation would not be condemned. Enemy goods which came down the Baltic, and were landed in England before a knowledge of the war, have been there held to be safe. *Magna Charta* itself recognizes the principle. By the rule of reciprocity, therefore, protection ought to be extended by the American government to the property now in dispute.

It is said that we have not a standing in court, that James Thompson is an alien enemy, and that an alien enemy cannot support a claim **340***] of this kind. But we *say that, admitting James Thompson to be an alien enemy, his agent in this country may have a standing in court, if the property in question be divested of its hostile character, which we contend is the case here. (5 Rob., *Nostra Madonna delle Gracie;* 6 Rob., 1; Id., 21, *The Marianne;* 2 Rob., 135, *The Packet de Bilboa.*)

But if these goods be hostile property, and the claimants, on that account, have no right to them, still, we contend, the captors cannot support their claim. The property of the goods, if not in the claimants, is in the United States, and liable to seizure under the non-intercourse act of March 1, 1809; which act is neither repealed by nor merged in the act declaring war, nor any other act. (Laws U. S., vol. 9, p. 243, § 5, § 8, and § 18 of the act.) The 3d sect. of the prize act (Laws U. S., vol. 11, p. 239), requires that all the laws of the United States, then in force, be observed by the owners, officers and crews of privateers. The non-intercourse act was one of the laws of the United States then in force. The second set of instructions to the privateers of the United States (issued 26th August, 1812), interdicts the capture of American vessels having on board British goods. They are to be seized by the collectors of the respective ports. The United States have always asserted their prior right to such property. (See the circular letter from the Comptroller of the Treasury, of October 16th, 1812.) They have chosen to municipalize it—to reserve it to themselves. Congress has resisted every attempt to the repeal of the non-intercourse. The act of July 13th, 1813 (Laws U. S., vol. 12, p. 14), shows that the United States have not relinquished their claim to property situated like that now in dispute. Their relinquishment only goes to such property as should be condemned as prize of war.

As to the first instructions of the President, they only authorize the private armed vessels of the United States to capture enemy property on board neutral or hostile vessels, and not that found on board American vessels returning to the United States, flying before the storm of war, and seeking the protection of their country. See the circular letter of Mr. Secretary Gallatin, of 26th August, 1812. The second set of instructions, before referred to, prohibit the capture of American vessels returning to the United States with British property shipped *after the repeal of the orders in coun- [***341** cil, and before the declaration of war was known in England. These instructions were operative as soon as issued, and were the law for all the privateers of the United States. They made a cessation of hostilities as to the property above described; which, if thereafter captured by a privateer, would be restored to the owners. The captors would only be relieved from the payment of damages and costs. (2 Azuni, 229, 230, 355, 263; 2 Dallas, 40, *Bain* v. *Schr. Speedwell;* 1 Rob., 154, *The Mentor.*)

We would now, on behalf of the claimants, move the court to allow us further proof as to the ownership of the property. We wish to show that the goods are not, in truth, consigned property, but that one moiety belongs to the claimants. We wish to explain the papers which the captors have considered as proving the property in question to be hostile. That we have a right to make this explanation, we refer the court to the following cases: 6 Rob., 3; Id., 132, *W. and J. Bell's* case; 4 Rob., 161, *Madonna delle Gracie;* Id., 21, *The Josephine;* 3 Rob., 268, *The Sarah* That further proof may be allowed in an appellate court, see 1 Rob., Am. Ed., p. 7; Sir W. Scott and Sir J. Nicholl's statement of the general principles of proceeding in the admiralty.

Dexter, contra,

Said that the motion, on behalf of the claimants for further proof, was entirely unexpected —that there was nothing for them to found such a prayer upon; that the claim to the 130 packages was ambiguous, the ground upon which it was made being alternative, viz., either that the goods were shipped on joint account, or that the claimants have an equitable lien on them, on account of advances made on the consignment.

That these 130 packages were wholly British property is clear from the papers exhibited, they were consigned by British merchants to the claimants, with orders to sell, and remit the proceeds.

The decision as to the residue of the property in dispute, viz., the third claimed by James Thompson, depends upon his national character. That this is hostile is *evident [***342** from the decision in the case of the *Venus* (*ante* p. 253), to which decision, and the argument on behalf of the captors in that case, we beg leave to refer the court.

To return, then, to the 130 packages. It being clear that they were British property, the only question is, whether such property is liable to condemnation as prize of war.

The case, as stated and argued upon by the captors, is not justified by the facts; the real state of the case is materially different. The Frances was captured, not in port, but on the high seas. She did not enter the port upon the faith of the nations, but was brought in as prize.

The counsel for the claimants, admitting the goods now in dispute to be British property, has said that American property similarly situated would not be condemned in England; and that therefore, by the rule of reciprocity, protection ought to be extended by the American government to these goods. But even the rule of reciprocity, if it were one which this court could enforce, would not avail the claimants in the present case; for the British government do not themselves respect the rule. They have captured and condemned our vessels sailing towards England, though ignorant of the war.

The declaration of war is expressed in terms as general as possible. The instructions of the President to the privateers of the United States give them a general authority to capture all property liable to capture by the laws of war.

The public faith was not pledged so as to protect this vessel. If it was pledged to repeal the non-intercourse law, there was no pledge that war should not be declared; and we claim condemnation under the declaration of war.

As to the President's instructions of 26th August, it appears that they were issued only two days previous to the capture of the Frances. The captors, consequently, had no notice of their existence. They sailed with instructions authorizing this capture; and we contend **343***] *that the new instructions were no instructions to these captors, until they had received notice of their being in force.

It has been said, on the part of the appellants, that if their claim is rejected, the United States, and not the captors, will be entitled to the property. We reply that the United States have now abandoned their claim; so that the property, if condemned, must be condemned to the captors.

Harper, for appellants.

The reasons on which we ground our prayer for further proof are the following:

1st. Certain bales of carpeting appear, by the invoice and bill of lading, to be the property of Steele. In the letter of 13th July, 1812, from James Thompson to Steele, they are stated to be a consignment. The further proof which we would offer in regard to this apparent inconsistency, goes to show that upon these goods, although stated to be consigned to Steele, James Thompson & Co. had made advances to the owners to the amount of £1,000 sterling, which created a lien upon the goods. This lien, we contend, was the property of James Thompson & Co. Again, certain other good appear, in like manner, by the bill of lading and invoice, to be the property of Steele; but, by the letter, to be the property of Dalgleish & Frame and James Thompson. The further proof we offer here is, that we were joint owners with Dalgliesh & Frame.

It is a general rule of prize law, that further proof shall be allowed on an appeal, where the preparatory evidence was doubtful or ambiguous. The present case, we conceive, comes within this rule.

Dexter, contra.

On this point of further proof, cited the two following cases: 6 Rob., 24 (Amer. ed.), *The Marianna*—to show that an equitable lien is no ground of restitution in prize causes—and 5 Rob., 196, *The Tobago*, where it is decided that a bottomry bond given in time of peace, gives *no such title to the obligee as will en- [***344** able him to support a claim for restitution after a declaration of war. He contended that a captor takes *cum onere* only when the *onus* is visible and direct.

Pinkney, same side.

Further proof, under the circumstances of this case, ought not to be allowed. The goods were shipped when war was expected. The intention of the shipper was to give a neutral character to the property. James Thompson knew the facts relative to the transaction as well when he made the shipment as now. He had reason to expect and did expect war. Hence the color given to the transaction. If the court allows further proof in a case like this, they will hereafter be inundated with fraud and perjury. It is a general rule of the prize courts, that further proof which goes to contradict the ship's papers shall not be admitted. If there had been really an American interest in this case, it was James Thompson's duty as well as interest to let it appear upon the ship's papers. The original claim of the appellants was stated in the alternative: either they had a lien on the goods for money advanced by them through James Thompson, or the goods were consigned to them on joint account.

The heading of the invoices was false, by their own admission. A letter appears among the papers in this cause from Robert Sterling, Jun., who had property on board, shipped in the name of Wm. Steele; this letter was evidently written in contemplation of war. James Thompson's letter of 13th July contains a list of goods consigned, in contradistinction to the goods belonging to the firm. The goods in question are among the consignments. By James Thompson's letter of 14th July, it appears that he knew of the war. From a second letter of Robert Sterling, Jun., dated 15th July, it is evident that he also knew of the war. In contradiction to such documents, further proof ought not to be admitted.

Harper, in reply.

In the cases of the bottomry bond and the lien, cited by the counsel on the opposite side, the possession of the *property was in [***345** the captors. The lien was a lien without possession, it was only an incumbrance. But here, the thing was in possession of him who had the lien. The property was vested, so far as the lien extended for the advances. Steele was Thompson's agent, and might have retained the goods until the advances were repaid.

Although war was feared, peace was confidently expected. There was no motive for giving a neutral character to the property. No fraud was intended. There was no intention to defeat the non-intercourse law. Besides, an intent, even if it existed, to defeat a municipal law, is no ground for refusing further proof.

The letters referred to by the counsel for the

captors, went with the invoices; and the accidental ambiguity which seems to exist in the papers was owing to the hurry occasioned by the endeavor to get the goods first to market, and to obtain the bounty on exportation.

Dexter. In the cases cited, the property was not more in the belligerent captor than it was in the present case. These goods never were in possession of the consignee. They were captured in the hands of the shipper. They were not shipped as the property of James Thompson & Co., but as the property of the Scotch merchants.

Irving cited 1 Rob., 86, *The Bernon*, on the point of further proof.

Monday, March 7th. *Irving.* As to the national character of James Thompson. It appears, from the testimony in this case, that James Thompson is a native of Scotland, that he came to the United States in 1793, was naturalized in 1797, and, in 1801, returned to Scotland, where he continued to reside as a merchant till some time subsequent to the declaration of war.

Naturalization, under the laws of the United States, confers upon the subject of it all the rights and privileges of a native citizen, excepting that of becoming President of the United
346*] States. He has, therefore, the *same right to leave this country and go abroad which a native citizen possesses. The law of England is the same in this respect. When is the hostile character to be fixed upon him? Not until a war breaks out between the two countries, and he continues, notwithstanding, to reside and carry on a hostile trade with the enemy country. (2 Cranch, 120, *Murray* v. *The Charming Betsy.*) A citizen, whether native or naturalized, surprised in a foreign country by a war, has a right to a reasonable time to withdraw his effects. (4 Rob., 161, 195, *Madonna delle Gracie.*) In Mr. Johnson's case (1 Rob., 17, 12, *The Indian Chief*), his engagements to his creditors were considered by the court as a sufficient justification of his residence in Great Britain, and his property was restored. On the point of reasonable time to withdraw, see 5 Rob., 90, *The Ocean*; 1 Rob., 165, 196, *The Hoop*; 4 Rob., 191, 232, *The Dree Gebroeders.* Vattel, B. 3, ch. 4, § 63.

Expectation of peace justifies delay in an enemy country, or explains the *quo animo* of the resident. (5 Rob., 60, *The Diana.*)

In *Bell* v. *Gilson*, (1 Bos. & Pul., 355), it is decided that the goods of a British subject purchased in an enemy's country after the commencement of hostilities, may, under certain circumstances, be sent to England. This decision, though now overruled in that country, in the case of *Potts* v. *Bell* (8 T. R., 548), has not been overruled here.

The liberty to withdraw property in case of war is expressly recognized by various treaties, which fix the time for withdrawing. (See, among others, the treaty of 1794, between His Britannic Majesty and the United States, art. 26.) But these treaties do not create the principle.

If, then, we allow time to an enemy to withdraw his effects, shall we not allow at least the same indulgence to our own citizens?

A cruiser cannot capture for violation of a municipal law. The seizure for a violation of the non-intercourse *act is directed to [*347 be by the collectors; the action for the recovery of the penalties and forfeitures arising under the act is to be debt, and the proceedings generally are to be in conformity with the act of 2d March, 1799, to regulate the collection of duties on imports and tonnage. But where a statute gives a particular form of action, that form must be pursued. (Act of Congress of March 1st, 1809, § 8 and 18; Laws United States, vol. 9, p. 248, 254; Act of March 2d, 1799, § 67, 68, 69, 88, 91; Laws United States, vol. 4, p. 389, 390, 427, 431; Bac. Abr., vol. 4, p. 654, tit. Statute, K.)

Saturday, March 12. *Absent*—LIVINGSTON, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

The rights of James Thompson depend entirely on his national commercial character; which is decided by the opinion given in the case of the *Venus*, (ante p. 253).

The sentence of condemnation pronounced in the Circuit Court, as to James Thompson's claim, is affirmed.

The original evidence is very strong to prove that the shipment made by Dalgleish & Frame was entirely a consignment. The whole letter of the 13th of July confirms this idea. It is scarcely credible that the property of Dalgleish & Frame would have been placed on the list of consignments without a note upon it, had it been shipped on joint account. The hurry of business will not excuse or account for this omission. The proposition of Dalgleish & Frame is stated to have been made on the 27th of June, and to have been accepted on the 1st of July. The letters of Thompson to Steele are written on the 13th and 17th of July, when this shipment is treated as being altogether a consignment. The hurry could not have been such as to account for a misstatement of the fact. There is, too, something mysterious in the manner in which the papers, offered as additional proof, reached Mr. Steele. That they should not have been accompanied by a letter, nor bear any marks of coming from abroad, is singular.

**Further proof is not admitted, and the* [*348 *sentence is affirmed.*

Wednesday, March 16th. *Absent*—MARSHALL, *Ch. J.*

WASHINGTON, *J.*, as to the opinion of the court on the question of lien, referred to the opinion delivered in the case of the Frances (Irvin's claim, post. p.), which he said was precisely within the principle of the present case.

THE FRANCES, BOYER MASTER.
(Graham's claim.)

Where the affidavits produced on the order for further proof are positive, but their credibility impaired by the non-production of letters mentioned in the affidavits, a second order for further proof will be allowed in the Appellate Court.

THIS case, like the preceding, was an appeal from the District Court of Rhode Island; and the claim of John Graham, the appellant,

was to certain other goods by the same ship, the Frances, captured and carried into Rhode Island, as stated in the case referred to, by the Yankee privateer.

Harper, for claimant.

Pinkney and *Dexter*, for the captors.

The material facts of the case. and the substance of the argument on both sides, are stated in the following opinion of the court,[1] delivered

March 12th, by MARSHALL, *Ch. J.*:

John Graham, a merchant of New York, claimed sundry parcels of goods shipped on board the Frances, as his sole property.

The goods were shipped by William Graham & Brothers, merchants of Glasgow, on account and risk of John Graham, merchant, of New **349***] York. There are *two bills of lading, each filled up with the name of John Graham. There are also two invoices, each headed with the name of William Graham & Brothers as shippers, and stating the goods to be shipped on account and risk of John Graham. The first of these invoices is marked in the margin thus, W. G. ⋈ I. P. and the other thus, [G.] There were also two lists of goods. The first headed, "List of goods shipped by the Frances, for Messrs. John Graham & Co., New York." This list is marked W. G. ⋈ I. P. The other is headed, "List of goods shipped by the Frances, for Messrs. Peter Graham & Co., Philadelphia." These goods are accompanied by two letters dated the 15th and 16th of July, signed William Graham & Brothers, the first addressed to Messrs. John Graham & Co., and the last to Messrs. Peter Graham & Co. The letter to John Graham & Co. treats of their trade generally, and contains only the following allusion to this shipment: "You have herewith the ship Fan- "ny's accounts, to which refer—also invoice of "sundry goods per Frances. We hope they may "go to a good market. We expect you will "have about one hundred packages of English "goods. There will be somewhat more to "Philadelphia."

The letter to Peter Graham & Co. is also a general letter on the subject of their trade. It contains the following passage respecting the shipments by the Frances: "We have shipped "by Frances a few goods well selected. We "could not get almost any cluster seeds."

The Circuit Judge directed the cause to stand for further proof.

It appears from the affidavit of John Graham that in the month of January, in the year 1809, he entered into a limited partnership with his brothers, William Graham and Peter Graham, who, as well as himself, are naturalized citizens of the United States. The business was to be conducted at New York by himself, under the name of John Graham & Co.; at Philadelphia, by Peter Graham, under the name of Peter Graham & Co., and at Glasgow, by William Graham, under the name of William Graham & Brothers. That, from the commencement of the partnership, he has been in the constant **350***] habit of carrying on extensive *business with the knowledge of his partners, on his private account, and also in connection with others. That the investment and disposal of the funds of the deponent, together with the management of the mercantile concerns of the firms composed as aforesaid, and the commission business, were the principal if not the sole business of William Graham & Brothers at Glasgow. That, from the intimate knowledge they possessed of each other's affairs, and in consequence of their connection as brothers, the distinction between his firm and his private character was not always preserved. It was the less attended to because the affairs of the company and his individual concerns were frequently the subjects of the same letter, and it became the more usual to address him by the style of the firm, because there are several other persons of the same name in New York. He adds, that in making shipments on the sole account of the deponent, William Graham has been in the habit of assorting the whole into invoices of small quantities, calculated to suit the generality of purchasers in the New York market, and also that the goods in any one of the said invoices might be sold entire, or transhipped to Philadelphia or any other market, with the original invoice accompanying the same, as such original invoice would inspire more confidence in the buyers. This circumstance occasioned the lists of property shipped by the Frances, and one of them to be addressed to Peter Graham & Co. He swears in the most positive and precise terms, that the property is entirely his own, and was purchased with his private funds in the hands of William Graham.

William Black deposes, that he has been long and intimately acquainted with John Graham, who is a man of fortune and character, and has been in the habit of transacting much of his own business in the said Graham's counting-house. That, from his knowledge of the affairs of the said Graham, he verily believes that the said Graham, both before and since the war, has been in the habit of doing business on his private account, and has received many shipments in which neither of his brothers were interested. He has been concerned with the deponent as part owner of vessels in which the deponent believes that neither William nor Peter Graham held any share.

*Isaac Belt and David Dunham, mer- [***351** chants of New York, swear to facts similar to those stated by William Black.

Charles Graham, of a different family from the claimant, swears that in the year 1811, there were, according to the dispensary, six persons of the name of John Graham in New York, one of whom was the deponent's father; and that mistakes were frequently made respecting each other's letters which came through the post-office.

William Hill, principal clerk of William Graham & Brothers, deposes to the different concerns and to the nature of the business transacted by William Graham & Brothers, as stated in the affidavit of John Graham. That they had under their care ships and vessels in which John Graham alone was interested. That since an early period in the year 1811, the concern of William Graham & Brothers have not shipped any goods whatever, for or on account of the said copartnership, to either of their said establishments, or in any other manner whatsoever. That vessels continued to arrive, particularly the Trident, the Fanny, and the Cuba,

1.—Livingston, *J.*, was absent when this opinion was delivered.

to the charge of the said William Graham & Brothers, for the account and risk of John Graham, in which ships and cargoes the said copartnership or the said William Graham had no share or interest whatsoever. The deponent has seen sundry letters from the said John Graham to the said William Graham & Brothers, to invest the moneys arising from the freight and cargoes of those ships, in goods, in behalf of him, the said John Graham, so soon as the British orders in council should be revoked; and, until then, to place the amount to his private credit in the books of William Graham & Brothers, which was done by the deponent as clerk. That this money was invested in the goods shipped by the Frances and other vessels, which were shipped on the sole account of John Graham, and were so entered on the books, by the instructions of William Graham. He states the practice of dividing shipments into small invoices, as is stated in the affidavit of John Graham.

Peter Graham swears that he has not, and never had, any interest in the goods shipped by **352***] the Frances. That *John Graham has been in the habit of transacting business on his own account, with the knowledge of his partners, and has frequently consigned his separate goods to Peter Graham & Co.

William N. Steele, clerk of Peter Graham, deposes to the same fact; and founds his belief that Peter Graham had no interest in the goods shipped by the Frances, on his knowledge of the business of the house.

William Graham states in detail, with great explicitness, the circumstances narrated in the affidavits of John Graham and of William Hill, his principal clerk, and avers most solemnly that the goods shipped by the Frances were the sole property of John Graham.

The court below directed restitution of two-thirds of the cargo, as being the property of John and Peter Graham, and condemned one-third, as being the property of William Graham. From this sentence of condemnation John Graham has appealed; and from so much of the sentence as directs a restitution of one-third as the property of Peter Graham, the captors have appealed.

It is certainly a rule in prize courts dictated by good sense, and calculated to promote the purposes of justice, that letters accompanying the cargo, written in good faith, in the prosecution of a fair and honest business, should have great influence in ascertaining the real proprietors of it. The letters on board the Frances are of this description. They are such as would be written if the goods were really the property of the company; but such as could scarcely have been written if the goods were the sole property of John Graham. Had they been his sole property, it must have happened that some expression would have been found in the letters indicating the fact. Men who write carelessly and without design, may not be very explicit; but it rarely happens that they entirely conceal the truth. There will be some allusion to it.

If the goods were the sole property of John Graham, why address a letter to Peter Graham & Co.? The affidavits account rationally enough for making up separate invoices; but **353***] addressing a letter to Peter Graham *& Co., at Philadelphia, by a vessel destined for New York, has very much the appearance of a shipment destined for the company at that place, and not for John Graham, of New York. The expressions of that letter favor the same idea. "We have shipped you, by Frances, a few goods well selected." These cannot well be the goods of John Graham. The language is surely not such as would be used in that state of things. "We could not get almost any cluster of seeds." These expressions have a necessary reference to some letter of orders from Peter Graham, mentioning cluster seeds among the articles directed to be shipped.

The affidavits produced on the order for further proof, are too positive to be disregarded without considerable reluctance and hesitation. There are, however, certain rules of evidence, the authority of which is admitted in all courts. One of these is, that if a written paper be referred to, which paper is in the power of the party, it ought to be produced. The affidavits of William Graham and of William Hill state expressly that letters had been received from John Graham, directing the disposition of cargoes shipped from America on his own account, and ordering the proceeds to be invested in British manufactures, also on his own account, so soon as the British orders in council should be repealed. Why are not these letters produced? It is impossible not to perceive their necessity. Mr. John Graham must have copied these letters into his letter book. Why has he not furnished some evidence of this fact. His letters must have been answered by William Graham more explicitly than in that which was found on board the Frances. Why is no one of those letters produced? It is impossible to account for the fact that no one of these letters is an exhibit in the cause. The court feels itself bound, judging on this evidence according to the rules of law, to consider the goods as the property of the company. But it is urged, on the part of the claimant, that if permitted to give further proof, he will produce the correspondence and such other proof as will be entirely satisfactory to the court. Several circumstances exist in this cause to induce the court to allow still further time for the production of such further evidence as may place the transaction beyond any doubt.

The cause is ordered to stand for further proof.

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*THE FRANCES, BOYER, MASTER. [*354

(Dunham & Randolph's Claim.)

A case of further proof. Goods, shipped by a British to an American house (partly in conformity with orders, and partly without orders,) who had an option to accept or reject the whole invoice in a limited time, remain the property of the shippers until the election be made to accept them.

THIS is another case of goods by the Frances, captured by the Yankee, and condemned in the Circuit Court of Rhode Island, brought up to this court on appeal.

Messrs. Dunham & Randolph, merchants of New York, claimed three bales and nineteen boxes of goods shipped by Alexander Thompson, of Glasgow, a British subject, and consigned to Dunham & Randolph. The bill of

lading is in their names, and the invoice purports to be on their account and risk. A letter from Thompson to Dunham & Randolph, dated Glasgow, 11th July, 1812, after describing the goods, and the labor he had employed in the business, and stating that the goods were sent partly in the Fanny and partly in the Frances, says: "I have exceeded in some articles, and "have sent you others not ordered." "I leave "it with yourselves to take the whole of the "two shipments, or none at all, just as you "please. If you do not wish them, I will thank "you to hand the invoices and letters over to "Messrs. Falconer & Co. I think twenty-four "hours will allow you ample opportunity for "you to make up your minds on this point; "and if you do not hand them over within that "time, I will, of course, consider that you take "the whole."

On the 15th of July, Alexander Thompson again wrote to Dunham & Randolph a letter in which he mentions the information that a bill declaring war had passed the House of Representatives. He then adds, "considering the "circumstances of the times, I thought it best "to inform Messrs. Falconer, Jackson & Co. "fully of the conditions on which I have ship-"ped you the goods by the Fanny and Frances."

In a letter to Messrs. Falconer, Jackson & Co. of the same date, he explains, in full, the proposition he had made to Dunham & Randolph, and directs how those gentlemen are to act for him, should Dunham & Randolph reject the consignment.

355*] *This property was condemned in the courts below, and from the sentence of condemnation the claimant appealed to this court.

Pinkney, for the appellants.

This is a mere question of fact as to property. Were or were not the goods the property of the enemy? We contend that they were not. All the documentary evidence shows the property to belong to Dunham & Randolph. The condition mentioned in Thompson's letter of 11th July, was a condition subsequent. The property vested in the claimants, liable to be devested, if rejected by them within twenty-four hours after receiving the letter.

The greater part of the goods, if not the whole, was shipped by order of the claimants long before the sailing of the vessel. The delivery to the master of the ship was an execution of the order. The shipper had no longer any control over the property, except, in case of the insolvency of the consignees, in which event he might stop it *in transitu*.

Every circumstance connected with the transaction appears to be perfectly fair; and if the evidence now before the court is not sufficient to support the claim of the appellants, it is a case for further proof. The claimants had accepted the shipment by the Fanny before the capture of the Frances, and thereby rendered certain what was before optional. They thereby bound themselves to take the shipment by the Frances.

Hunter, contra.

The goods in question were not shipped according to order, as appears by Thompson's letter of 11th July. They belonged to the shipper until the consignees had elected to take them; and they could not make their election before the arrival of the Frances.

At whose risk were the goods while at sea? Thompson had no power to impose the risk on the claimants. If the goods had arrived at Boston they might have been attached as the property of the shipper. If attached *as [***356** the property of the claimants, they might have said the goods were not their property; or if they had been sued as garnishees of Thompson, they might have said they owed him nothing. They were not bound to accept the goods.

If the property, at law, belonged to Thompson, *a fortiori* in a case of prize. It is a rule of prize courts that, in time of war, no future election shall be allowed to change the right of property at sea—*in transitu*. The question is, in whom is the legal estate? At whose risk were the goods passing at the time of capture? (2 Rob., 111, 133, *The Packet de Bilboa;* 1 Rob., 90, 107, *The Danckebaar Africaan;* 5 Rob., 115, 128, *The Jan Frederick;* 1 Rob., 283, 336, *The Vrouw Margaretha;* 4 Rob., 21, 25, *The Josephine;* Id., 180, 218, *The Aurora;* Id., 170, 207, *The Carl Walter;* 6 Rob., 337, *The Carolina;* 1 Rob., 243. 289, *The Copenhagen.*) These cases all go to prove that, during war, property cannot change *in transitu*.

Dexter, same side.

In this case there was no contract to change the property. To constitute a contract the assent of both parties is necessary. The goods were not shipped according to the order of the claimants, and a condition was annexed. The property never vested in the claimants. It was only to vest in them on condition that they failed to deliver over the goods to Messrs. Falconer & Co.

Pinkney, in reply.

The further proof which the claimants would offer, will show that almost all the excess of goods beyond the order was on board the Fanny. Here was a direct assignment to the claimants. The goods were delivered to their agent, the master of the vessel. The documents were all sent to the consignees. No change of property *in transitu* was necessary. The property was already vested in the claimants; and, upon its arrival, they might have asserted their right to it. So far as the goods comported with the order, the contract was *certainly executed. There can be no [***357** doubt about those goods. The claimants might have maintained trover or replevin for them.

This was not the sort of shipment described by Sir W. Scott in the cases cited. Thompson, the shipper, was a naturalized citizen of the United States. This appears in other cases before this court; and that fact constitutes part of the further proof which we wish to introduce. There was no knowledge of the war in this case. The transaction was not shaped by the expectation of war. Thompson did not believe that war would take place, and he gives his reasons. The shipment was directed on the 11th of July. Between that and the 15th the intelligence of the war was received.

Saturday, March 12th. *Absent*—LIVINGSTON, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

It has been argued for the appellants, that, by

and the invoice and bill of lading, the true construction of the letter of Alexander Thompson, the property was vested in Dunham & Randolph, liable to be devested by their rejecting the consignment within twenty-four hours after receiving the letters. That the condition annexed to the transfer is subsequent, not precedent.

The court cannot concur in this reasoning. It has been very truly urged for the captors, that to vest this property in Dunham & Randolph, a contract is necessary; and that to form a contract, the consent of two parties is indispensable. In this case, no such contract appears. Had Thompson, in execution of the orders of Dunham & Randolph, consigned to them, unconditionally, such goods as they had directed, the contract would have been complete; and the goods would, on being shipped, have become the property of Dunham & Randolph. But Thompson has not done this. With the goods which were ordered he has consigned other goods, expressly stipulating that Dunham & Randolph shall not take the goods they had ordered, unless they consent to take the whole quantity put on board both vessels. This, then, is a new proposition, on **358***] which Dunham & Randolph *are at liberty to exercise their discretion. They may accept or reject it; and until they do accept it, the property must remain in Thompson. The sentence of condemnation, therefore, in this case, was warranted by the evidence before the Circuit Court.

But the claimants pray an order for further proof; and say, that, before the capture of the Franccs, the Fanny had arrived, and Dunham & Randolph had consented to take both cargoes.

This application is opposed on the principle that, were the fact even true, as alleged by the claimant, belligerent property cannot change its character *in transitu*.

Reserving any opinion on the law of the case, until the facts alleged shall be substantiated, if it shall be in the power of the claimants to substantiate them, the cause is ordered to stand for further proof.

THE FRANCES, BOYER, MASTER.

(Kennedy's Claim).

Question of fact as to property.

THIS was likewise a case of goods by the Frances, condemned in the Circuit Court of Rhode Island. They were claimed by Duncan Kennedy, an American citizen, who appealed to this court.

The case was submitted to the court without argument.

Saturday, March 12th. *Absent*—LIVINGSTON, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

Duncan Kennedy, surviving partner of the house of George Stayley & Co., merchants of New York, claims eight boxes of merchandise, part of the cargo of the ship Frances, as his property.

*The invoice is headed: [***359**

"Glasgow, 8th July, 1812.

"Messrs. George Stayley & Co.

"Receive from James Smith."

A letter from James Smith to George Stayley & Co., in speaking of the goods, terms them "our goods," and does not, in any manner, indicate that they are the goods of Stayley & Co. He concludes his letter with saying: "As it is to be hoped the trade will now open, I shall expect your instructions saying what goods are best suited for the market."

The bill of lading is filled up with the name of George Stayley & Co. "on account and risk as per invoice."

There are several letters from George Stayley, in Glasgow, to his father; but none of them indicate an opinion that the property of the goods was in George Stayley & Co.

The sentence, condemning these goods, must be affirmed.

THE FRANCES, BOYER, MASTER.

(French's Claim.)

An intention, clearly proved, of a consignor of goods to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account; until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize. No difference though the consignee were the agent of a third person who had directed him to order the goods, unless it appears that he actually did order them.

THIS, like the former cases of the Frances, was an appeal from the United States Circuit Court for the Rhode Island District.

William French, the appellant, a citizen of the United States, claimed fourteen boxes of merchandise shipped on board the Frances by James Auchincloss, of Paisley, in Scotland, to A. & J. Auchincloss of New York, on their account and risk, with orders to remit the proceeds to the shipper for payment. The claimant *alleged that the goods had been [***360** previously ordered by him through A. & J. Auchincloss, to be imported on his account and risk.

Further proof was ordered by the court below, to consist of the original order for the merchandise, and all the letters and correspondence relating to it, and of all the proofs of property in the claimant.

Under this order the claimant produced a letter dated Baltimore, 20th February, 1812, signed by himself, and addressed to A. & J. Auchincloss, requesting them to order from their friends in Scotland, goods not exceeding in value £1,000 sterling, to be shipped so soon as the orders in council should be revoked.

On the 20th of September, 1812, A. & J. Auchincloss wrote a letter to the claimant, advising him of the capture of the Frances with the goods, said to be shipped on his account, to their address, and desiring him to take the necessary steps to have his property cleared.

To these letters were added affidavits of the claimant, tending to prove the property in him, together with an affidavit of Darius Hodson,

that he forwarded the above last mentioned letter to the claimant at Providence, by his request; and that, when he took it from the file, it was a whole sheet directed to the claimant from New York, by J. Auchincloss, Jun.; but that, in order to save postage, he, the deponent, tore off the outside leaf, not thinking, at the time, of its being of any importance.

Upon this proof, the claim was rejected in the court below, and the property condemned to the captors.

In this court the cause was argued by *Jones* for the appellant, and *Dexter* for the captors; and on

Tuesday, the 15th of March. *Absent*—MARSHALL, *Ch. J.*

WASHINGTON, *J.*, delivered the following opinion of the court:

361*] *This is the claim of William French to a part of the cargo of the Frances, shipped by James Auchincloss, of Paisley, in Great Britain, to A. & J. Auchincloss, of New York, on their account and risk. By the correspondence between the consignor and consignees, which was exhibited to the court below, under an order for further proof, it is somewhat doubtful whether these goods were to be sold as the property of the consignor or of the consignees. In the letter from the former to A. Auchincloss, dated the 17th of July, 1812, he says: "You will lose no time to "transmit immediately, on the receipt of the "invoice by the Fanny as well as by the "Frances, to the full amount of the invoices; "as thereby, and no other way, is your credit "and John's to be restored here. Also remit, "as I have often told you, to clear off your "old debt; and, for God's sake, let us have no "more failing in the family. You will observe that the goods per Fanny and Frances "are principally bought upon a credit of 3, 4 and "5 months—this the consequence of failing."

In another letter of the same date, from the same to the same, he says: "By this ship, the "Frances, I have shipped you 14 boxes of different kinds of goods, which I beg you will "lose no time to dispose, as by early remittances you will undoubtedly strengthen your "credit." In another part of this letter he says, "I beg you will lose no time to remit "largely, say 3,000 or 4,000 pounds. Remember the old cash account with the Paisley "Banking Company." These letters, so far as they throw light upon this transaction, intimate very strongly that A. & J. Auchincloss were to dispose of these goods upon their own account, and as the purchasers of them. But to produce a change of property from the shipper to the consignee, it was essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell, and the other to buy. Had the language of these letters been more explicit than it is to prove that the intention of the consignor was to vest the right of property in the consignee, it would not have been sufficient to effect such a change, until the goods were received, or some evidence given of the agreement of the consignee to take them on his own account. No order from A.

362*] & J. Auchincloss to the *consignor of this cargo, authorizing the shipment of it, was produced or offered to be produced in the court below; and this court, therefore, is warranted in believing that none such was ever given. Indeed, no interest whatever in these goods is asserted to have existed in A. & J. Auchincloss, but the same is claimed by Wm. French, a citizen of the United States, who, under the order for further proof, produced, in support of his claim, a letter from himself to A. & J. Auchincloss, dated the 20th February, 1812, in which he requests them to order from his friends in Scotland, a quantity of goods enumerated in the letter not to exceed £1,000 sterling, to be shipped as soon as the orders in council should be revoked, and adding that he should consider the goods at his risk from the time they should be shipped; also an invoice of these goods sent by A. & J. Auchincloss to Wm. French, together with a letter from them, dated the 20th of September, 1812, advising him of the capture of the Frances with the goods shipped on his account, and recommending it to him to take the necessary steps to vindicate his right to the property. This letter made its appearance in the court below, with the outer leaf, on which the postmark would have been placed, had there been any, torn off. To do away the suspicion which this circumstance might well excite, the affidavit of Darius Hodson was produced, in which he states that he forwarded this letter to the claimant, at Providence, having first torn off the outer leaf with a view to lessen the rate of postage.

The affidavit of the claimant is added, which is fully to the purpose of supporting his interest in these goods, so far as his order to A. & J. Auchincloss can vest such an interest in him. But passing over those observations which might fairly be made upon the mutilated state of the letter from A. & J. Auchincloss to the claimant, and the suspicious manner in which that circumstance is attempted to be explained, it may be observed that the claim of Wm. French is in no respect stronger than if it had been made by A. & J. Auchincloss. Admit that he wrote to A. & J. Auchincloss the letter of the 20th of February, 1812, and received from them that of the 20th of September, the inquiry still remains to be answered, where is the order for this *shipment from A. [***363** & J. Auchincloss as the agent of the claimant?

The truth is, that in whatever light this question is viewed, these goods were at the risk of the shippers until they should be received by the consignee; and, consequently, were, by the capture, made good prize, as property belonging to the enemy.

THE FRANCES, BOYER, MASTER.

(Gillespie's claim.)

The commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods, hostile or neutral.

THIS, also, was an appeal from the sentence of the Rhode Island Circuit Court condemning certain goods captured on board the Frances, by the Yankee privateer.

These goods were shipped by Colin Gillespie, the claimant, who had been naturalized in the

United States, and consigned to Archibald Bryce and Alexander Muirhead, for sale and remittance to the shipper at Glasgow.

To ascertain the national character of the claimant, further proof was ordered by the court below, calling upon him to show how long, after his naturalization, he resided in the United States, before he went to Great Britain; how long he had since resided in the United States, at any time or times; how long in Great Britain; what was the nature of his business in the latter country; and in whom the property vested at the time it was shipped.

Upon the production of this further proof, it appeared that the property was vested in the claimant at the time of its being shipped; that he was a native of Great Britain; that he emigrated to the United States in 1793; was naturalized in 1798; having, in the interim, returned to his native country on mercantile business in 1794 and 1796, and revisited the United States in 1795 and 1797; that he again returned to his native country in 1799, was there **364*]** married and revisited the United *States with his wife in the same year; that he continued to reside in New York until June, 1802, when he once more returned to Great Britain, and resided there until November, 1805, when he came to the United States (Mrs. Gillespie having died in Scotland), formed a partnership with John Graham, of New York, and returned to Glasgow in the same year, where he carried on the business of the partnership under the firm of Colin Gillespie & Co.; that he remained there until the partnership was dissolved, and until the 2d of July, 1813; on which day he left the enemy's country, and arrived in the United States with his family in October, 1813; that he kept house at Glasgow, and built a warehouse there, which he still owns, and kept his counting-house therein. He formed a determination to return to the United States, as he deposes, on being informed of the declaration of war by the United States against Great Britain, which took place on the 18th of June, 1812, and was known in England about the 20th of July following, but was prevented, by his engagements and commercial concerns from carrying that intention into effect until the period above mentioned, still leaving some of his affairs unarranged

Upon this evidence the property was condemned in the Circuit Court, and an appeal was taken, by the claimant, to this court, where the cause was argued by *Jones*, *Harper* and *Dexter* for the claimant, and *Pinkney* for the captors.

Jones, for the claimant.

The goods in question were purchased early in July, 1812; they were shipped on the 14th of that month, at which time the declaration of war was not known in England. It does not appear that the claimant shipped any other goods than those in question. In less than a year after he had received information of the war, he returned to the United States with his family, thereby giving unequivocal evidence of the *quo animo* of his residence in Great Britain. In such a case, even the property of a neutral would be protected; *a fortiori*, ought the property of one of our own citizens to receive protection. Cases of this kind are analogous to cases of confiscation. If there be any particular period at which *we can consider this [***365** property as assuming a hostile character, it must be that at which it would have been confiscable by the enemy, supposing the party to continue an American citizen. Had that period arrived? Were the circumstances such as would have justified Great Britain in confiscating this property? If not, surely the United States ought not to condemn it. (Vattel, B. 3, sec. 63.)

This case may be considered in another point of view, viz., whether the case of a naturalized citizen returning to his native country, and carrying on trade, as in the present case, is distinguishable in its consequences, in the event of war, from that of a native citizen going to a foreign country and engaging in trade. We contend that it is not. One authority, and one only, seems to favor the distinction; and that is the case of *La Virginia* (5 Rob., 99). But in that case, it does not appear that the American character of Mr. Lapierre was acquired by naturalization. It might and very probably did depend on domicile alone. We contend that a person naturalized in this country is as much a citizen of the United States, to all the intents and purposes of the present case, as a native. The naturalization law of the United States requires of the applicant for the privileges of naturalization, unqualified abjuration of allegiance to his former sovereign. The law of England on the subject goes to an equal extent. Naturalized and native subjects are looked upon as the same, to all legal purposes. (4 Cranch, 321, *Dawson's Lessee* v. *Godfrey*.)

A denizen may be made such for life or in tail; "but one cannot be naturalized either with limitation, for life or in tail, or upon condition; for that is against the absoluteness, purity and indebility of natural allegiance." (Co. Lit., 129, [a]; 2 Domat, 376.)

If, according to the doctrine of perpetual allegiance, on the return of a naturalized citizen to his native country, his former duties return, and his duties to his adopted country still continue, under what contradictory obligations would he be placed. This was Lord Hale's doctrine, but it is now done away. (Foster's Crown Law 185, sec. 4.)

*It has been decided in England, in [***366** the case of *Marryat* v. *Wilson* (1 Bos. & Pul., 430), that a natural born subject of that country admitted a citizen of the United States of America, either before or after the declaration of American independence, may be considered as a subject of the United States, so as to entitle him to trade to the East Indies under the 13th article of the treaty of 19th November, 1794.

Harper, same side,

Asked whether the court, in the case of the *Rapid*, had decided the question as to the difference between the British acts concerning letters of marque, prizes and prize goods, which authorize the capture of the property of inhabitants in hostile countries (and on which the British admiralty decisions are founded), and the act of Congress declaring war, which only gives a right to capture the property of British subjects.

JOHNSON, *J.*, said the court had fully considered that point and decided it in the case of the *Rapid*.

Pinkney, for the captors.

We contend that the property even of a na-

tive American citizen domiciled in an enemy country at the time of the capture of such property, is liable to condemnation as prize of war; and, *a fortiori*, the property of a naturalized American citizen, a native of the enemy country, under like circumstances; which is the case before the court, and which will be first considered.

It has been contended on the other side, that a person naturalized in the United States is as much a citizen of this country as a native, and that he continues to be so, though he return to his native country and there engage in trade. It has been argued that, in order to become an American citizen, he must abjure his allegiance to his former government; that, consequently, though he should return to his native country, he can no longer be considered as under the protection of that government; that his new allegiance to the United States continues, and that our government is bound to protect him; that he is therefore to be considered in the **367***] *same light as a native citizen, and that his property is equally to be protected in case of war.

That a person so abjuring his native allegiance cannot claim protection from his former government while he continues in the country of his adoption, is admitted; but we contend that if he voluntarily returns within the sphere of his original allegiance, he is as much a subject of his former government as if he had never emigrated; that the reciprocal duties of allegiance and protection, on the respective parts of the subject and the sovereign, are revived; he is no longer a citizen of the United States. The two allegiances are incompatible, we admit; the naturalization law of the United States clearly goes upon this idea; but in case of the party's return to his native country, it is the old allegiance which must prevail, and not the new, as is contended by the claimant. By his return, he has, in fact, consented to resume his former allegiance; for he must be presumed to have known the laws of his country, and that those laws would impose upon him his old duties in case of his return. He is now, as Sir W. Scott would call him, a redintegrated subject of his native country, and is liable to all his former obligations. He is now bound actively to support the government to which he has returned. In case of war, he may be compelled to take up arms against the country he has adopted; to pay taxes for the support of the war, &c., and this, not by arbitrary power, but of right. These obligations, it will be recollected, we contend are the effect of a voluntary return. We do not mean to say that if a naturalized citizen should enter the army of the United States and be captured by the nation to which he formerly belonged, during a war between the two countries, he would, on being carried to his native country as a prisoner, incur those obligations. But in the case now before the court, the return of Gillespie, the claimant, to England, was entirely voluntary. Without regard, therefore, to the question of domicile, Gillespie was, according to the doctrine for which we have been contending, politically an enemy of the United States at the time of the capture of the Frances. If he was not an enemy, I should be glad to know who can be considered as such. If he is not *hostis* who has every hostile duty upon him, I am at a loss to know who is.

*If the war had been sudden, hu- [***368** manity might plead in behalf of the claimant. But in this case, there was no surprise. War had been threatening for a long time previous to its actual declaration. No indulgence, therefore, on this ground, can be claimed.

The counsel for the claimant has cited Lord Coke in support of his doctrine of naturalization, but does not seem to have considered that, according to that author, a British subject can never become a citizen of any other country.

The case of *Marryat* v. *Wilson* has also been cited. That case is perhaps entitled to some consideration; but even there, the court had, at first, decided against Collet, and it was only upon the request of the American minister (Mr. King) that they consented to reconsider the case, when they finally decided in his favor.

2. If Gillespie was politically an enemy at the time of the capture, the doctrine of commercial domicile is wholly immaterial in the present case. But as the court may not view the subject in the same light as we do, a few remarks on the latter point may not be unnecessary.

We lay it down, then, as an indisputed position, that the character of captured goods is decided by the commercial domicile of the owner at the time of capture. And we contend that Gillespie had a commercial domicile in Great Britain at the time of the capture of the goods in question. It does not appear that he had, in any manner, put himself in motion—*in itinere*, to return before the capture. All the evidence showing his intention to return arose after that event. A hostile character, therefore, attached to the property, if not to the owner.

This is not a case of withdrawing funds; it is a case of trade originating before the war, and continued after the war. Besides, the rule of withdrawal applies only to cases where the domicile of the party is not in the enemy country, though his trade is carried on and his property situated there. (See *Coopman's* case, cited in *The Vigilantia*, 1 Rob., 12, 14; *Escott's* case, cited in *The *Hoop*, 1 Rob., 170, [***369** 201; *The Madonna delle Gracie*, 4 Rob., 161, 195.)

It has been said that at the time of the shipment of the goods in question the war was not known in England, and that it would be a case of great hardship, under such circumstances, to subject this property to condemnation. But want of notice, in cases like this, is an excuse not known to the law of nations. (See *Whitehill's* case, referred to in the case of *The Hoop*, 1 Rob., 170, 201.) Whitehill was a British subject—had been at St. Eustatius only two days and had no knowledge of the war—yet his property was condemned.

As to the fact that public treatics frequently allow a particular time for the respective subjects of both parties to withdraw in case of war, it may be observed, that this is only providing against the exercise of a right which the contracting parties would otherwise have had. But these mutual concessions do not alter the nature or effect of the domicile.

At all events, Gillespie ought to have put himself in motion to return to the United States immediately upon knowledge of the war. This he does not appear to have done; and, accord-

ing to Sir W. Scott, nothing but the actual force of the government is a sufficient excuse for the neglect. But no such excuse has been offered.

On either of the grounds, therefore, which have been taken in this argument, we conceive that the property in controversy must be condemned.

Harper, in reply.

It is the nature of the trade, not the place of residence, which determines the hostile or neutral character of the trader.

We must still insist that a naturalized citizen of the United States is a citizen to every intent, the right to be President of the United States only excepted, which exception but proves the general rule.

It is said, on the part of the captors, that a **370***] naturalized *American citizen ceases to be such when he returns to his native country. Suppose, then, while absent in his native country, a descent should be cast upon him in this —would he be considered by our courts as an alien, so as to deprive him of the estate so cast upon him? Again, suppose, in case of war between the two countries, he should enlist himself under the banners of our enemy, and be found in arms against us, should we not consider him as a traitor, and treat him accordingly? If he chooses to take such double responsibilities upon himself, it is his business to reconcile them; we can only consider him as an American citizen.

We might admit, perhaps, that by a return to his native country in time of war, he must be considered as having abandoned his rights as a citizen of the United States, in relation to trade; still, however, he could not throw off his duties. But Gillespie returned in time of peace. He therefore did not assume new duties incompatible with those he owed to this country. He assumed only that temporary allegiance to the government of Great Britain which every other stranger in that country owed. Upon the breaking out of the war, perhaps new duties might arise inconsistent with his duties as an American citizen. Yet, in that case, a reasonable time ought to be allowed him to remove; and if he made every reasonable exertion to return to the United States, and especially if he did actually return in less than a year after being informed of the existence of the war, which is the fact, he must be considered as having retained his American character.

The domicile of the owner at the time of capture is not the criterion whereby to determine the character of the property captured, in all cases. If it be so generally, this case ought to be an exception. Gillespie was lawfully in England at the breaking out of the war; he cannot be presumed to have known that war would take place; it is impossible that he should have known it; such a presumption is unreasonable. *Whitehill's* case has been cited on the other side; but the counsel for the captors is mistaken as to the facts of that case. Whitehill knew of the war, and that St. Eustatius was hostile, at the time he went there; which essentially distinguishes it from the case now before the court.

371*] *Pinkney* referred to the history of the times, to show that Whitehill had no knowledge of the war when he went to St. Eustatius.

Harper. If Whitehill did not know that war had actually been declared, he knew that measures had been taken which may be considered as equivalent to a declaration. The capture took place in February. He knew that letters of marque had been issued in December preceding, and that a long irritation had existed between the two governments. He knew, also, that the trade in which he was engaged was a trade frowned upon by his own government. In the present case the circumstances were entirely different. (5 Rob., 220, 247.)

Saturday, March 12th. *Absent*—LIVINGSTON, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

Colin Gillespie, a naturalized American citizen residing in Glasgow, claimed sundry goods, shipped on his own account, as his property. This claim depends entirely on his national character, and is decided in the case of *The Venus*.

The sentence of the Circuit Court, condemning the property of the claimant, is affirmed.

VOWLES AND OTHERS *v.* CRAIG AND OTHERS.

Absent—MARSHALL, *Ch. J.*

If a person, who has obtained a survey upon a military land warrant under the commonwealth of Virginia for 2000 acres, sell and transfer, for a valuable consideration, his right to the survey, and assign the plat and certificate to the purchaser, whereupon he obtains a patent for the land in his own name; and if, upon a resurvey, it appear that the grant conveys 2700 acres, the vendor cannot in equity support a claim for the surplus, against the vendee.

THIS case, as stated by TODD, *J.*, in delivering the opinion of the court was as follows:

This suit was instituted on the chancery side

NOTE.—A sale in bulk is not defeated by a discrepancy in the quantity, as where deed describes the land as containing 96 acres, be the same more or less, and it afterward appeared that the farm contained ten acres less. Faure v. Martin, 7 N. Y., 210; Marvin v. Bennett, 26 Wend, 169; Stebbins v. Eddy, 4 Mas. 414.

Where land is sold for a gross sum, the grantee takes the quantity actually comprised within the bounds of the conveyance, without reference to the quantity mentioned; and if there is no fraud or misrepresentation, he is not liable for a surplus, nor entitled to a deduction from the price for a deficiency in the quantity. Morris Canal Co. v. Emmett, 9 Paige, 168; 2 John, 37; 5 Mass. 355; 1 Atk. 325.

Where farm is sold at a fixed price per acre, and the quantity is misrepresented, though without fraud of the vendor, a court of equity will relieve the party injured by the mistake; the purchaser may take the farm at the price of the real number of acres, and if he has paid for it, may have compensation for the deficiency. Stebbens v. Eddy, 4 Mas. 414.

The rule of equity that where land is sold for a certain quantity a court of equity relieves if the quantity be defective, applies only to contracts for land in a settled country, where titles are complete, boundaries determined, and real quantity known, or capable of being ascertained. Dunlap v. Dunlap, 12 Wheat, 574.

A survey is not void because it includes more land than was directed to be surveyed by the warrant. Taylor v. Brown, 5 Cranch, 234.

Where deed describes land by natural boundaries and such boundaries contain more land than the quantity mentioned in deed, purchaser is entitled to it. Clark v. Munyan, 22 Pick. 410.

of the Circuit Court of the United States for the Kentucky District, by the complainants, now **372***] appellants as the heirs *and legal representatives of Mary Vowles, formerly Mary Frazer.

The bill alleges that in the year 1774 a survey was made for Mary Frazer, as heir at law and only daughter of George Frazer, dec'd., by virtue of the Governor's warrant and agreeable to the royal proclamation of 1763, for 2,000 acres of land in Fincastle county, on Elkhorn Creek, the waters of Ohio River. That according to usual and customary allowance, made in this, as well as other military surveys at that time, a considerable quantity of land over and above 2,000 acres is contained within the actual boundaries. That in the year 1778, whilst the said Mary was a minor, Michael Robinson, as guardian of the said Mary, and who had intermarried with her mother, made a contract with the defendants Lewis, Joseph and Benjamin Craig, for the sale of the said 2,000 acres of land surveyed as aforesaid for the said Mary at the price of 30s. per acre, amounting to £3,000, which was paid in the depreciated paper currency of Virginia and was of little or no value. That the said Mary was induced to affix her signature to an assignment of the said plat and certificate of survey, which was post-dated so as to bear the appearance of its being executed when she was of full age; in consequence of which Lewis Craig obtained a patent for the said land in his own name and has since conveyed a part thereof to the said Joseph and Benjamin, under whom the other defendants derive their titles. The prayer of the bill is to vacate the contract and to decree a reconveyance of the land, and for general relief.

The answers of the defendants, Lewis and Joseph Craig, admit the making of the survey, and that it contains a considerable quantity of land within the boundaries more than 2,000 acres.

They admit the contract with Michael Robinson for the purchase of the said survey, but positively deny that it was made in the year 1778, and aver that it was made in 1779. They deny that the contract was for 2,000 acres of land at 30s. per acre, but was for the whole survey at the price of £3,000. They also positively deny that the assignment on the plat and certi- **373***] ficate of *survey was post-dated or that any fraud or misrepresentation was practiced or used relative to the transaction.

The answers of the other defendants are deemed immaterial to the investigation of the questions arising in this case.

The cause was heard in the Circuit Court upon the bill, answers, depositions and other proofs. The court decreed the bill to be dismissed with costs; from which decree an appeal was taken to this court.

Taylor, for the appellants.

On examination of the evidence exhibited, we are satisfied that the allegation that the assignment was made during the minority of Mary Frazer is not sufficiently supported to have authorized the Circuit Court to have decreed a reconveyance. But we suppose the complainants were entitled to relief in some shape for the surplus land contained within the survey; either by a decree for the reconveyance of the surplus, by a pecuniary compensation for it according to its present value, or by a pecuniary compensation according to the price at which the land was sold, on which interest should be allowed.

No evidence is introduced of the terms of the sale, whether by the acre or in gross, except the survey, assignment, power of attorney, and receipt before mentioned, from these it plainly appears that the parties contracted on a supposition that the quantity of land sold and purchased was 2,000 acres.

The surplus of 700 acres (nearly one-third of the whole quantity supposed to be sold) cannot be considered as a small one, such as might arise from inaccuracy of instruments, &c., and therefore within the contemplation of the parties.

The remote residence of the vendor, who had but lately attained full age when she sold, precludes the idea of her having any information of the quantity of land to which she was entitled, other than that which was derived from the survey. On her part, therefore, and probably on the part of the purchaser also, the contract was *made under an evident mis- [***374** take respecting the subject of sale. There is nothing discoverable in the contract or exhibits from which it can be collected that the sale was made without responsibility for the quantity, the words, more or less, almost universally used to designate such an intent, are nowhere to be found.

The case presented is that of a contract made under the influence of mistake, in both parties, as to a material and important part, without fraud or concealment on either side.

It is supposed that no difference exists between contracts for the sale of lands, and those of any other description. The same principles apply to all. This doctrine is recognized in the opinion expressed by the Court of Appeals in Kentucky, in the case of *Young* against *Craig*. In delivering that opinion the court expressed itself as follows: "The question in this case is whether Craig, who had sold to Young a tract of land containing in its boundaries a surplus, has a right to recover such surplus, or in case it cannot be had, a compensation therefor in money. There is no novelty or peculiarity in the principles upon which questions of this sort depend. In contracts of this kind the same good faith is required, and the same responsibility attaches to its violation, which law and reason prescribes in every description of contracts. If, through fraud or gross and palpable mistake, more or less land should be conveyed than was in the contemplation of the seller to part with, or the purchaser to receive, the injured party would be entitled to relief in like manner as he would be for an injury produced by a similar cause in a contract of any other species."

The same opinion also establishes the principle that in sales in gross as well as in sales by the acre, if the parties have contracted under manifest error as to quantity, the party injured is entitled to relief, unless, indeed, the surplus or deficit was small, not more than usual in such cases, and of course supposed to be within the contemplation of the parties. In that case it is true the court refused to decree compensation for the surplus land sold, because it appeared plainly to have been the intention of the parties to risk the gain or loss, and because the

375*] surplus *was not more than usual in such sales.[1] In the case of *Young* v. *Craig*, the court appears to have adopted the principle laid down by Pothier in his treatise on obligations (ch. 1, art. 3, s. 1, title Error), and also by the writers on natural law, "that an error about a thing, or about its quality, upon pros-376*] pect of which a man *is induced to come to any agreement, renders the agreement or bargain void, for in such case a man is not supposed to have agreed absolutely but upon supposal of the presence of such a thing or quality, on which, as on a necessary condition, his consent was founded, and, therefore, the thing or quality not appearing, the consent is understood to be null and ineffectual." (Puffendorf's Law of Nature and Nations, b. 1, ch. 3, § 12.)

On these principles, as applied to this case, the complainants would be entitled to compensation, or the contract would be considered as void, unless it was in proof that the surplus was not unusually great, and was not more than may reasonably be supposed to have been in contemplation of the parties. As the consideration of quantity does not appear to have been the operating motive which led to the contract, though it certainly influenced the price, according to the principles established by writers on natural law, it would appear that the error of the parties rather afforded a ground for a decree of compensation than for annulling the contract.

From an examination of the documents exhibited it will clearly appear that the parties contracted under an opinion that the survey contained only two thousand acres. The survey itself specifies that quantity. The power *of attorney to Joseph Craig describes [*377 the land as 2,000 acres, and the receipt of Michael Robinson for the last payment, states it expressly to be in full for 2,000 acres of land, the property of Mary Frazer. There is not an expression used which shows an intention on either side to make a risking bargain.

No evidence appears in the record to show that military surveys do usually contain surplus lands, and it is supposed without such proof the court cannot take judicial notice of such an allegation.

But if the court should recognize it, must it not also be admitted that the surplus in this case (one-third) is much more than is usual? The influence of error on the contracting parties being proved, it lies on the defendants to bring themselves within the exceptions stated in the

1.—The opinion of the Court of Appeals in Kentucky in the case of *Young* v. *Craig*, was as follows:

The question in this case is whether Craig, who had sold to Young a tract of land containing in its boundaries a surplus, has a right to recover such surplus, or in case it cannot be had, a compensation therefor in money.

There is no novelty or peculiarity in the principles upon which questions of this sort depend. In contracts of this kind the same good faith is required; and the same responsibility attaches to its violation which law and reason prescribe in every description of contract.

If through fraud, or gross and palpable mistake, more or less land should be conveyed than was in the contemplation of the seller to part with or the purchaser to receive, the injured party would be entitled to relief in like manner as he would be for an injury produced by a similar cause in a contract of any other species.

In this case, however, there is no evidence of fraud; and the only ground from which an inference can be deduced that there was such a mistake as would justify the interference of the court for the purpose of correction, is the surplus contained in the boundaries described by the deed. Whether this ground be sufficient to justify such an inference depends upon the nature and terms of the contract.

Contracts for the sale of land may be considered of two descriptions. 1st. Where the sale is of a specific quantity, which is usually denominated a sale by the acre; and, 2d. Where the sale is of a specific tract by name or description, each party risking the quantity; and this latter, for sake of brevity, is sometimes called a sale in gross.

It is evident that in a sale per acre much less variation from the quantity intended to be conveyed would afford evidence of a mistake which would justify the interposition of a court to correct it than would be sufficient for that purpose in a sale of the other description. But even in a sale per acre, as from the roughness and unevenness of the ground from the variation of instruments and from the different results that will necessarily be produced by different surveyors operating with the same instruments, it is impracticable to ascertain the quantity with perfect precision, a small deficit or surplus, however exactly the parties may have intended to be confined to a specific quantity, would not justify an application to a court of justice for relief. In many cases, however, of sales of this sort, the parties did not intend to be very scrupulously exact with respect to the quantity. There was particularly in the sales made at an early period of this country great liberality of admeasurement frequently allowed by the seller and expected by the purchaser. Where this was the case to authorize a conclusion from the surplus contained in the boundaries of a tract, that there was a mistake of quantity, the surplus ought to be greater than was usual in conveyances made about the same period and with the same intention of allowing liberal admeasurement. But as in some sales of an early period, and in perhaps a great majority of those of a more recent date, such a liberality of admeasurement was not intended by the parties it would be obviously improper and unjust to lay down any general rule as to the rate of surpluses that would justify an inference of a mistake which would deserve a correction. Each case must depend much upon its own particular circumstances. Whether such an inference would be authorized in the present case were the sale in question per acre, and not in gross, need not be determined since we are of opinion it is of the latter description.

The deed of conveyance must be taken as conclusive evidence of the terms of sale, unless it had been shown that language not comporting with the true intention of the parties had been inserted through fraud or mistake, of which there is not the slightest indication in this case.

The deed describes the land by its boundaries and situation, and as "containing by survey four hundred and twenty-five acres, be the same more or less." The plain and most obvious meaning of the expressions "be the same more or less," is that the parties were to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity. This, it is believed, is the sense in which such an expression is uniformly understood by both the learned and the unlearned. This idea is not repelled by the expression of the quantity of acres; on the contrary, it rather derives strength from the manner in which the quantity is mentioned, for it plainly indicates that the expression of quantity was used as matter of description only, and that it was the intention of the parties not to be confined to a precise and specific quantity.

We do not mean to be understood that in a sale of this kind the surplus or deficit might not be so great as to authorize an inference that it had been produced by fraud or mistake; but in this case, where the estimated quantity was 425 acres, and the largest quantity with which any subsequent survey has made it is 481, the surplus does not appear so great as not to be within the reasonable limits of a risking bargain of this kind. (See in support of this doctrine, Sugden, 225, 6; 1 Call., 301.) We are, therefore, of opinion that the decree of the Circuit Court, in favor of Craig, was erroneous, and must be reversed with costs.

case of *Young* v. *Craig*, by the exhibition of satisfactory evidence on those points. This has not been done.

If the complainants are entitled to relief, the next inquiry is, how it should be granted. The object of the parties being a sale and purchase of 2,000 acres of land, the contract being made for that quantity only, could Lewis Craig be compelled to receive and pay for more? Let it be supposed that he had made an improvident bargain, that the lands were not worth the price he gave, or that since the sale they had greatly depreciated in value, Mary Frazer, or her representatives, could, on no principle of equity, take advantage of her own error to require payment for a greater quantity of lands than had come within the contract, and Lewis Craig might relieve himself by a conveyance of the surplus land.

As Lewis Craig was not exposed to the risk of depreciation in value, on principles of reciprocity Mary Frazer and her representatives should be placed in the same situation, and should be entitled to a specific reconveyance, so far as it can be had without affecting the rights of others. It appears from the proceedings that Lewis Craig is still in possession and the owner of a part of this land, and that Joseph Craig, who was concerned in the purchase, holds another part; so far as these extend, a specific reconveyance may be decreed. As to the other **378***] *defendants who appear to have been purchasers, and who probably had not notice of the latent equitable claim of the complainants so as to effect them, it is not contended that they can be compelled to convey. As to the quantity deficient after the conveyance of the lands held by Lewis and Joseph Craig, a decree for pecuniary compensation according to the present value, if the principles before stated are correct, is the appropriate relief. If the court should be of opinion that the complainants are entitled to their decree in respect to the surplus land, but should not consider the principles before stated correct, as to the manner in which it should be granted, no alternative seems to remain but that of adopting the original price (said to have been $5 per acre, and from calculation appearing to have been so) as the measure of compensation. The purchasers having had the use and received the rents and profits of the land should, as an equivalent, be decreed to pay interest, and an account should be decreed to ascertain the value of the paper money on the 20th December, 1779, and the interest which has accrued.

The length of time which has been suffered to intervene may perhaps be considered as amounting to a waiver of the complainant's equitable right, and be made an objection to a decree for relief in any shape.

In reply to this the following facts, which appear on the record, are stated:

That the defendants soon after their purchase removed to Kentucky, where they continued to reside, and that Mary Frazer and her representatives always resided in, or near Fredericksburgh, in Virginia.

Bledsoe, for the appellees.

Craig purchased Mary Frazer's interest, be it much or be it little. Her interest was all he purchased, and all he could obtain. And as evidence of it she assigned the plat and certificate of survey, that the patent might issue to Craig for whatever the survey contained. There was no mistake here. If Craig has got more land from the commonwealth of Virginia than he ought to have had, is Mary Frazer or her representatives to step into the *place of the [***379** commonwealth to correct the error or the fraud? Or is she to step into Craig's place to defraud that commonwealth or to take advantage of the error of its officer because she once owned 2,000 acres of land which she has parted with? Had she carved and granted a definite interest out of her claim, retaining a part, the question might be differently settled. But in this case she would be worse than a volunteer who cannot be compensated in equity. She would be a volunteer *mala fide*.

A complainant in equity must recover on the strength and soundness of his own title. It is not sufficient that the defendant is in the wrong; the plaintiff must have right.

If the claim of the complainants to any part of the land itself were to be sustained, where would you begin on the survey to correct the error? On which end, side, or corner? The beginning and ending corners of a survey are arbitrarily designated by the surveyor when he makes out his plat and certificate: seldom or never corresponding with the actual stages of process on the ground itself.

But as it was clearly the intention of the parties that the whole should be sold, and as the evidence of the whole was transferred, the utmost that the complainants could, in any event conscientiously ask, would be, that the defendants should refund a part of the purchase money, in proportion to the surplus, with interest, which must be reduced by the scale of depreciation.

TODD, *J.*, after stating the case, delivered the opinion of the court as follows:

In the written arguments submitted by the parties, it is admitted by the counsel for the appellants that the evidence exhibited does not support the allegation in the bill; that the assignment was made during the minority of Mary Frazer. This admission renders it unnecessary for the court to go into a minute examination of the evidence; it will be sufficient to observe that the testimony is clear and satisfactory on this point; and, therefore, there is no pretense for setting aside the contract and decreeing a reconveyance of the land. But it is contended that the complainants are entitled *to relief in some shape for the surplus [***380** land contained within the survey; either by a decree for the reconveyance of the surplus land, by a pecuniary compensation for it according to its present value, or by a pecuniary compensation according to the price at which the land was sold, on which interest should be allowed.

This argument assumes for its basis that there existed a mistake as to the thing sold. If there was a mistake, how did it originate, and who is injured thereby? Was there a mistake? It may be inquired to what quantity of land was Mary Frazer entitled by virtue of the Governor's warrant issued in pursuance of the royal proclamation? To two thousand acres. How much did she sell and receive payment for? Two thousand acres. It would appear from this that she had sold and received pay-

ment for as much land as she was entitled to. How comes it that this surplus was included in the survey? From the fraud, design, ignorance or negligence of the surveyor. Who is defrauded or injured thereby? The commonwealth of Virginia, and not Mary Frazer. For what is it asked that compensation shall be made? For land which, by the fraud, design, ignorance or negligence of the surveyor, Mary Frazer might by possibilty have been entitled to. Was the sale of this survey of a specific quantity, at a certain price per acre? or was it the sale of a specific tract? The bill alleges it was of the first description; the answers deny it, and say it was of the latter. There is no proof to support the allegation in the bill, unless from the survey, a power of attorney, and the receipt for the purchase money, it should be inferred, that as they relate to 2,000 acres of land, only that quantity was intended to be included in the sale. But this proof is conceived to furnish a very opposite conclusion—the description and designation of the tract of land sold, not as part of a tract, but an entire tract. The answers, being supported by the assignment, that it was a sale of the whole survey, and being also responsive to an allegation as well as to an interrogatory in the bill, must be taken as true and conclusive. When an assignment is made of a plat and certificate of survey, the purchaser takes it subject to the risk of its containing a less quantity than is expressed on its face, and should it contain more, he is entitled to it. In **381***] the case of *Young* *v. *Craig*, decided by the Court of Appeals of Kentucky, (a copy of which has been furnished and relied on by each party) the court say, "there was, particularly in the sales made at an early period "of this country, great liberality of admeasurement frequently allowed by the seller and "expected by the purchaser. Where this was "the case, to authorize a conclusion, from the "surplus contained in the boundaries of a "tract, that there was a mistake of quantity, "the surplus ought to be greater than usual in "conveyances made about the same period." Now, it appears from a statement in the bill, as well as from the general history of the country, that it was usual and customary to make considerable allowance in military surveys; and it is not shown that the surplus in this is greater than in other surveys made about the same time. Again, in the same case, the court proceed, "it would be obviously improper and unjust to lay down any general rule as to the rate "of surplus that would justify an inference of "mistake which would deserve correction; each "case must depend upon its own particular circumstances; whether such an inference would "be authorized in the present case, were the "sale in question per acre and not in gross, "need not be determined since we are of opinion it is of the latter description." If this reasoning be correct as to conveyances, it will apply with redoubled force to assignments of plats and certificates of survey, where the purchaser takes it subject to the risk of its containing less than it specifies.

Mary Frazer or the complainants can be considered in no other view than mere volunteers *mala fide*, and of course not entitled to the aid of a court of equity.

It seems, as a necessary consequence, if the complainants are not entitled to the surplus land, they are not to compensation in either of the other modes contended for. Where there is no right there can be no claim to compensation sustained.

Decree affirmed with costs.

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*THE SALLY, PORTER, MASTER. [*382

Property engaged in an illicit intercourse with the enemy to be condemned to the captors, not to the United States. A municipal forfeiture under the laws of the United States is absorbed in the more general operation of the law of war. The prize act of 26th June, 1812, operates as a grant from the United States to the captors, of all property rightfully captured by commissioned privateers, as prize of war.

THIS was an appeal from the decree of the Circuit Court for the District of Massachusetts.

The facts of the case were as follow:

The brig Sally, John Porter, master, was captured by the privateer Jefferson, John Kehew, commander, July 7, 1812, as prize, and sent into the port of Salem in the District of Massachusetts, for adjudication. The Sally, at the time of her capture, had on board a coaster's manifest, and a permission from the collector of the port of Passamaquoddy, dated July 7, 1812, to proceed to Boston. From the manifest, her cargo purported to be one box of hones, and one box of furs. She had on board, also, about four thousand bushels of salt.

The Sally was licensed and enrolled for the coasting trade, at New London, June 6, 1812, upon the oath of John Patterson, of the city of New York, who swore that he was the agent of James Mavor, of New York, the owner.

Patterson was on board at the time of capture. Upon the return of the monition in the District Court, Patterson claimed the brig for Mavor, and Edward Monroe claimed the salt for himself and Lemuel P. Grosvenor, of Boston.

The affidavit of claim of Monroe did not state where the salt was taken on board, nor for what reason it was not mentioned in the manifest.

Patterson, Porter, the master, and the crew, upon the preparatory examinations, swore that the salt was put on board the brig at Robinstown and Eastport, in the District of Maine.

Among the papers found on board the Sally was a permission to land her cargo of 60 tons of cordage and 50 bolts of duck, from the deputy-collector of the port of Passamaquoddy, dated June 20, 1812.

*There was also found on board a [*383 letter to Messrs. Monroe & Grosvenor, Boston, dated Eastport, July 7, 1812, signed "L. P. G.," covering a bill of lading of the salt. In this letter it is said, "I am sorry to say that no clearance of the salt can be obtained on board the brig; I have, however, dispatched her, with a clearance of two small packages of John Brewer, consigned to us, and leave you to manage; it will, at least, be as well as the other goods sent—and I am hourly expecting a seizure to pay for sundry prizes taken from St. Andrews." Again: "A protection can be had, for any vessel bound here with provisions, from the English admiral," &c. St. Andrews is a small town in New Brunswick, a province belonging to Great Britain.

In the manifest of the Sally the two small packages above mentioned are consigned to Monroe & Grosvenor, Boston.

The captors produced witnesses in the District Court, who proved that the Sally discharged at St. Andrews her cargo of cordage, after the 1st July, 1812, and took in there the salt.

The vessel and cargo were condemned, in the District Court, to the captors, and an appeal entered by the claimants. In the Circuit Court the decree was affirmed, and Monroe and Grosvenor appealed to this court.

A claim was interposed by the United States as for a forfeiture under the non-intercourse act.

On the above statement (and upon the argument in the case of *The Rapid*, ante p. 155) the case was submitted.

Tuesday, March 15th. *Absent*—MARSHALL, *Ch. J.*

STORY, *J.*, delivered the opinion of the court:

This case cannot be distinguished from that of *The Rapid*. It was there decided that property engaged in an illicit intercourse with **384***] the enemy is liable to confiscation *as prize of war, and the only remaining question now before us is, to whom it shall be condemned—to the captors, or to the United States.

By the general law of prize, property engaged in an illegal intercourse with the enemy is deemed enemy property. It is of no consequence whether it belong to an ally or to a citizen; the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences of enemy ownership. In conformity with this rule, it has been solemnly adjudged, by the same course of decisions which has established the illegality of the intercourse, that the property engaged therein must be condemned as prize to the captors, and not to the crown. This principle has been fully recognized by Sir William Scott, in *The Nelly* (1 Rob., 219); and, indeed, seems never to have admitted a serious doubt.

But a claim is interposed by the United States, claiming a priority of right to the property in question, upon the ground of an antecedent forfeiture to the United States, by a violation of the non-intercourse act of March 1, 1809 (vol. 9, p. 246, § 5), the goods having been put on board at a British port, with an intent to import the same into the United States.

We are all of opinion that this claim ought not to prevail. The municipal forfeiture under the non-intercourse act was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations, but is confiscable under the *jus gentium*.

But even if the doctrine were otherwise, which we do not admit, we are all satisfied that the prize act of 26th June, 1812 (ch. 107), operates as a grant from the United States of all property rightfully captured by commissioned privateers, as prize of war. The language of the 4th, 6th and 14th sections is decisive.

The decree of the Circuit Court, condemning the vessel and cargo to the captors, is affirmed.

Cited.—8 Cranch, 168; 2 Black, 674; 5 Wall. 376; Blatchf. Pr. 84, 162; 2 Gall. 98.

*THE EUPHRATES. [*385

Further proof, inconsistent with that already in the case, refused on the part of the claimant.

THIS was an appeal from the sentence of the United States Circuit Court for the District of Rhode Island.

The merchandise, in this case, was libeled in the District Court of Rhode Island as belonging to subjects of Great Britain. The capture was stated in the libel to have been made on or about the 23d day of August, 1812. No libel was filed against the vessel.

In June term, 1813, a claim was interposed on behalf of the United States, on the ground that these goods were imported in violation of the non-intercourse laws.

In May, 1813, Matthias Bruen interposed a claim to certain merchandise on board of the Euphrates, alleging that he is the sole legal owner thereof.

The papers connected with this shipment were as follow:

1. An invoice, dated Mansfield, 30th June, 1812, purporting the goods therein described to be shipped at Liverpool, under insurance, consigned to Mr. Henry Watkinson, New York, or, in case of his absence, to Mr. John French Ellis, of that place, for sale, on account of the manufacturers, Siddons & Johnston, who were British subjects.

2. A bill of lading by which it appeared that the goods were shipped at Liverpool, on the 7th of July, 1812, on board of the Euphrates, to be delivered to Henry Watkinson, he paying freight, &c.

1. A letter from Siddons & Johnston, dated Mansfield, 30th June, 1802, in which they say: "We have, this day, consigned to you for sale "on our account, sixteen trunks," &c., (which are the goods claimed). "We hope we shall "shortly hear of sales being made by you, to "advantage; we hope they will at least net us "what they are invoiced at, covering all ex- "penses. *We shall leave this ship- [*386 "ment to your discretion to make the best and "most advantageous returns you can."

There being no proof whatever on the part of the claimant, and he not appearing to have any interest whatever, by any of the papers on board, the goods were condemned both in the district and circuit courts, and the claimants adjudged to pay costs to the libelants.

From this decree there was an appeal, on the part of Mr. Bruen, to this court.

Harper, for the captors,

Stated that this was merely a question of further proof offered on the part of the claimants. The captors, he said, relied upon the documentary evidence produced in the cause. This evidence he stated to the court, and contended that it was too plain and consistent to justify the court in allowing the claimant further proof.

Stockton, contra,

Stated that the object of the further proof now offered was to show that Watkinson was agent for a manufacturing house in England; that the claimant ordered certain goods through this agent; that, on the passage of the non-intercourse act, he directed the goods not to be shipped, &c.

Daggett, same side,

Observed that it had been generally supposed that the rules of the English courts respecting further proof would not apply to the courts of the United States, but that parties would have the benefit of new evidence in this court, in prize cases as well as in other cases in admiralty; and that the parties in the present case had acted on that opinion.

The case was then submitted.

387* *Tuesday, March 15th. *Absent*—MARSHALL, *Ch. J.*

LIVINGSTON, *J.*, delivered the opinion of the court:

The court does not understand the counsel for the appellant as contending that there was any error in the sentence of the Circuit Court, or that any other than sentence of condemnation could have been pronounced there. It was, indeed, a very clear case, on the proceedings before that court. But it is supposed that Mr. Bruen is entitled to an order for further proof, and that the facts which he will be able to make out, if an opportunity be afforded him, will entitle him to a restitution of the property.

Without rejecting the application on account of its being made at so late a period, the court has looked into the proof which it is proposed to bring forward, and, on comparing it with the proof already in the cause, we are of opinion that it is totally incompetent to make out a title in the appellant. There is not the least reason to believe that these goods were shipped in consequence of any previous orders given to Mr. Watkinson by merchants in this country, and transmitted by him to Messrs. Siddons & Johnston. On the contrary, whatever orders may have been sent to those gentlemen by Mr. Watkinson, it is most manifest that they did not, in this case, act upon them; for the invoice and letter accompanying the shipment announce, in terms not to be misunderstood, that these goods were sent to the United States for the exclusive account and at the sole risk of the British manufacturers.

It has not escaped the notice of the court that not one of the gentlemen who are alleged to have given orders for these goods on Messrs. Siddons & Johnston, through Mr. Watkinson, and who all reside in the United States, appears as a claimant for any part of them. Instead of this, we find them, or several of them, assigning their interest in this adventure, whatever it may be, to the claimant; but for what value does not appear; and every instrument takes care to express that the property is to be recovered at the risk and expense of Mr. Bruen. Thus is a total stranger to the shipment, and a mere volunteer who may not have **388*** paid *a single cent for his title, made a party claimant; a mode of proceeding novel at least, and well calculated to awaken suspicions not at all favorable to his pretensions. Whether a title to goods obtained in this way would, under any circumstances, be sustained by a court of prize, we will not say; but it is, in our opinion, sufficient reason, of itself, to refuse the party any opportunity to make further proof. Mr. Bruen not only does not pretend that he owned any part of these goods at or previous to the time of capture, but merely that he was the legal owner at the time of filing his claim; and upon the affidavits now laid before the court, as the ground of an order for further proof, it appears that this legal title was acquired in the way already mentioned—that is, by a number of persons assigning to him a chose in action, which they must have considered of no value, or, at any rate, not worth pursuing. Such conduct can entitle the party to no favor or indulgence whatever. Upon the whole, the court is as well satisfied with the decree of the Circuit Court as it is with the total insufficiency of the evidence in reserve to produce any alteration in it.

The application, therefore, for further proof is rejected, and the sentence of the Circuit Court affirmed with costs.

Aff'g—1 Gall. 451. See Blatchf. Pr. 205.

THE MARY, STAFFORD, MASTER.

A case of withdrawing funds and further proof.

THIS was an appeal from the sentence of the United States Circuit Court for the District of Rhode Island.

The following is a statement of the facts connected with the case:

General Garret Visscher, alias Fisher, a native of the state of New York, entered into the British army before the revolution, and having obtained the rank of Lieutenant-General, died in England, rich, intestate, and without issue, leaving a large number of relatives, citizens of the state of New York, residing at or near Albany. Mr. *Nanning J. Viss- [***389** cher, one of the number, went to England, and met with no obstruction in obtaining letters of administration, and possessing himself of the estate to the amount of £150,000 sterling. In August, 1812, he set himself in motion to return to the United States, and did return, leaving Mr. Harman Visger, his agent, in England, to transmit the property to the United States, for the use of those concerned. Harman Visger, finding that he could not remit to this country in the course of exchange, without great loss, invested a large sum in goods of the growth and manufacture of Great Britain, and to transmit a part of them to the United States, hired, on freight, the brig Mary, an American registered vessel belonging to J. B. Kennedy, of South Carolina. The brig being at the port of London, was sent to Bristol, in July, 1812, to take on board this cargo. She arrived off that place, according to her log-book, on the 23d of the same month. On the 30th, an embargo was laid in England, on account of the war; and, on the 1st of August, the custom-house mark of stop was put on the Mary. Having been detained some time by the embargo, she sailed from Bristol, with the cargo on board, on or about the 15th day of August, 1812, bound to New York. Soon after she put to sea, she sprung a leak, and, on the 21st day of August, 1812, put into Waterford, in Ireland, to repair. Requiring a complete repair, her cargo was relanded and stored in the King's storehouses, and she was repaired by the freighter, at an expense of £1,700 sterling, to secure which

he took from the captain a bottomry bond. On the 7th of April, 1813, the Mary sailed from Waterford; having cleared out for Newport, in Rhode Island, in order to avoid the blockade which was supposed to exist as to New York. Before sailing, a British license of the description usually denominated a Sidmouth license, was obtained for her from the King's privy council, by Mullet, Evans & Co., subjects of the King of Great Britain. The license ran in their name, and purported to be a renewal of a similar license granted on the 8th of July, 1812. She had no license from the American government. On the 23d of April, 1813, she was captured on the high seas, by the American privateer Paul Jones, and sent into Newport with a single prize-master on board, the captain being left in command of the vessel and in possession of the ship's papers. On her arrival at New-
390*] port, she was libeled *by the captors as being and bearing enemy property, and also by the United States for a breach of the non-intercourse acts. The claimants made application to the Secretary of the Treasury, and he, under the act of January 2, 1813, "directing the Secretary of the Treasury to remit fines, forfeitures and penalties, in certain cases," remitted the forfeitures and penalties accruing to the United States.

The brig's papers were regular, proving her to be an American registered vessel.

The invoices and bill of lading stated her cargo to be shipped by Harman Visger, on account of the heirs of General Fisher, citizens of the United States, and consigned to Peter Remsen & Co., New York, to account with Nanning J. Visscher, administrator, or with Barent Bleecker, Esq., of Albany, agent for the heirs. The invoices were all dated 13th August, 1812. The bill of lading had no date; but by its reference to the invoices, the shippers have given it the semblance of the same date.

War was declared by the United States against Great Britain on the 18th of June, 1812, and the fact was known in London on the 26th of July following; the news was stated on that day in the public gazette in London, to have been received in Liverpool on the 18th of the same month.

The claimant was in England when the Mary sailed, and for some time after, and made no attempt to countermand the voyage. Insurance was obtained in England, freight paid, as well as license and brokerage money, and the exportation duties, before the Mary sailed.

The brig and cargo were acquitted in the District Court, but condemned in the Circuit Court; and from the decree of the latter the claimants appealed.

Stockton, for the claimants.

It is contended on the part of the appellants,
391*] *1. That the cargo in question having been purchased by citizens of the United States, either before the war was actually declared, or before that event was known in England, and with the sole intent of transferring American funds in England to the United States, the shipment was no act of illegal trading with the enemy, and no cause of forfeiture.

2. That the act of Congress of 2d January, 1813, authorizes this importation, and, by legal construction, amounts to a license for this vessel and cargo.

3. That the circumstance of the vessel's sailing with a Sidmouth license is no cause of forfeiture.

4. That the capture by the privateer was altogether unwarranted by its commission, and expressly against the instructions of the President of the United States; and, therefore, that the property ought to be restored with damages and costs.

As to the first point—the withdrawing of funds—we contend that a person found in a foreign country at the time of the breaking out of a war between that country and his own, has a right to do everything necessary to enable him to return to his own country with his effects. This doctrine is supported by weighty authorities, and is founded on principles of reason and justice. It is, besides, an act of sound policy in a nation to permit its own citizens to withdraw their funds from the hostile country; it is taking from the enemy's means of carrying on the war and adding to its own. According to the old rule on this subject, the withdrawing of funds from the enemy's country was a matter of right; but the modern rule of the Court of Admiralty has determined it to be a matter of favor merely. If it be a matter of favor, we conceive it is such a favor as both reason and policy would direct, in a case like this, to be granted. (See 4 Rob., 161, 195, *The Madonna delle Gracie;* Chitty's Law of Nations, 19, 20; 4 Rob., 191, 232, *The Dree Gebroeders;* 1 Bos. & Pul., 345. *Bell et al.* v. *Gilson;* 1 Rob., 184, 220, *The Betty Cathcart.*)

2. As to the act of the 2d January, 1813 (laws U. S., vol. 11, p. 341). This act amounts to a license from the *American govern-
[***392** ment. The remission of the forfeitures incurred by a violation of the non-intercourse laws, is to be considered as legalizing voyages made under circumstances like those of the present case. The act ought to be liberally construed. It cannot be supposed that the United States meant to remit the penalties accruing to them for the violation of the non-intercourse laws, in order to benefit the privateersmen. The remission was intended exclusively for the benefit of the owners; against whose claim the legislature supposed the non-intercourse law to be the only bar.

Again, the act of 2d January must have been known in Ireland long before the Mary sailed from Waterford for the United States. She may therefore be considered as having sailed from that port under the faith of this act, as she had commenced her voyage from Bristol between the periods specified therein.

The act of 13th July, 1813, relinquishing the claims of the United States, &c., does not favor the claim of the captors, inasmuch as it relinquishes only the property of British subjects not captured in violation of the instructions of the 28th August, 1812; whereas, the property in the present case belonged to Americans.

The Mary sailed from Bristol, or, at all events, from London, which is to be considered as the *terminus a quo* of the voyage, in consequence of the repeal of the British orders in council; and is therefore to be considered as embraced in the President's instruction to privateers of 28th August, 1812.

3. The Sidmouth license is no cause of condemnation, inasmuch as the original license was

obtained before the war was known in England, and the second was merely a renewal of the first; the British government conceiving themselves bound, in honor and good faith, to renew it.

There is no analogy between the present case and that of *The Julia*, decided yesterday. In that case the license was granted, *flagrante bello*, in order to neutralize belligerent property. But here, the granting of the license was only an act of justice, which the British government conceived themselves bound to perform.

393*] *The act of Congress of July 6th, 1812 (Laws U. S., vol. 11, p. 302, § 6), allows passports to be given for the safe transportation of any ship or other property belonging to British subjects, and then in the United States. This is just what the British government have done in the case of *The Mary*. The granting of the license was merely a reciprocity of good offices on their part.

But admitting this to be a case of sailing under the flag and pass of the enemy, still the vessel only, and not the cargo, would be liable to condemnation. As to this distinction between the ship and goods sailing under the enemy's flag, see Chitty's Law of Nations, p. 58; 5 Rob., 2, *The Vrow Elizabeth*.

4. This capture was illegal, being altogether unwarranted by the commission of the privateer, and directly in the face of the President's instruction of 28th August, 1812. This instruction prohibits the capture of "vessels "belonging to citizens of the United States "coming from British ports to the United "States laden with British merchandise, in "consequence of the alleged repeal of the "British orders in council." These were the precise circumstances of the vessel in question. The capture was therefore illegal.

That the President had a right to issue the instruction under consideration, cannot admit of doubt. By virtue of his office, he is commander-in-chief of the army and navy of the United States; and, as such, has, in time of war, the whole public armed force of the nation under his control. The privateers of the United States constitute a part of that public armed force. The President was therefore authorized to issue this instruction. (2 Azuni, 355.)

From the preceding considerations, we trust the court will feel itself justified in reversing the sentence of the Circuit Court.

J. Woodward, contra.

If the character of the Mary was, *prima facie*, belligerent, she must be condemned. No **394***] latent equities *can save her. That such was her character appears clearly from the examination *in preparatorio;* and a vessel must be acquitted or condemned generally, according as her character appears upon that examination. The license was for a British or American cargo. The presumption is that it was British. It was certainly British fabric. No American orders had been given for the goods. The whole appeared as British property, and at the risk of British subjects. If a vessel sails under such circumstances, she sails at her peril. (6 Rob., 24, *The Marianna;* 5 Rob., 194, *The Tobago;* 6 Rob., 134.)

But admitting, for argument's sake, that the property is, as the claimants contend, American property, still the transaction now under consideration was a withdrawing of funds from the enemy's territory after a full knowledge of the war, without the license of the American government; and therefore subjected the property so withdrawn to capture and condemnation as prize of war.

The property in question was certainly British long after the knowledge of the war in England, and the purchase of it by an American citizen in the territory of the enemy was an illicit trade, which is, of itself, cause of condemnation. That the property was British for a considerable time after the war was known in England appears from the dates of the invoices. They are all dated 13th August, 1812; from which circumstance (there being no bills of parcels) it is to be inferred that the purchase of the goods was made on that day; whereas the war was known in England, at all events, on the 26th of July preceding, and is stated to have been known in Liverpool on the 18th.

We contend, however, that this property was British, not only until the 13th of August, the time of the purchase, but that it is, at this day, strictly British property under color of an American name.

It does not appear from the record that the Mary sailed from London to Bristol with a view to the prosecution of the voyage to the United States. But if she did, there was an opportunity for countermanding the *voy-[**395** age after it was known that war had been declared; and such countermand ought to have been given. If it might have been, and was not, the doctrine of putting in motion does not apply to the present case. The claimants were clearly *in delicto*, and no presumption can be made in their favor.

This voyage was in violation of the non-intercourse laws of the United States; and on that ground, also, the property is liable to condemnation.

With regard to trading with the enemy, we contend that not only the purchase of hostile goods in the enemy country, but also the payment, in that country, of freight, license and brokerage money, and of the exportation duties, amount to a trading with the enemy; and that every trading with the enemy is illegal. (1 Rob., 165, 196, *The Hoop; The Juffrow Margaretha*, cited in the same case, p. 181, note [Amr. Ed.,] 4 Rob., 191, 232, *The Dree Gebroeders*.) Several cases have been thought to favor an opposite doctrine; but the case now under consideration does not, we conceive, come within the principle of any one of them.

The first is the case of *The Packet de Bilboa* (2 Rob., 111, 133). But here, the vessel sailed before the war. The Mary, on the contrary, sailed with full knowledge of the war.

The next case is that of *The Abby* (5 Rob., 251). The same distinction exists here as in the last-mentioned case.

The case of *Bell* v. *Gilson* (1 Bos. & Pul., 345) has been overruled in the case of *Potts* v. *Bell et. al.* (8 T. R., 548.)

As to the license, it does not appear that any was granted on the 8th of July. The recital of such an one in the subsequent license is no evidence. The license in question, therefore, although it purports to be a renewal of a former one, is a license *de novo*, obtained with a full knowledge of the war; and is therefore cause of condemnation.

396*] *Pinkney*, in reply.

This is neither a case of trade with the enemy nor of domicile. Visscher had not acquired a British character by either of these means.

It is not a case of trading within the opinion of this court in the case of *The Rapid*. Visscher, the present claimant, was not domiciled in England. He returned to the United States almost immediately upon hearing of the war. He arrived long before the cargo. The transaction commenced and the goods in question were purchased before the war was or could have been known in England. No criminality can possibly be attached to the transaction, and therefore it cannot be a ground of forfeiture. This is the language of the English decisions on this subject.

It is admitted that if this enterprise had not been undertaken before knowledge of the war, and if some material part of it had not been actually carried into effect—if it had been entirely a new undertaking, and not with the view of withdrawing funds—it would have been a case within the rule of the law of nations, which prohibits trade with an enemy. But where the goods have been purchased before the war, as here, the case neither comes within that rule nor within the decisions of the English Court of Admiralty. Sir W. Scott admits that such goods may be withdrawn. (5 Rob., 141, *The Juffrow Catharina*.)

But if the court should be of opinion that this case comes within the general rule prohibiting trade with the enemy, still it will be recollected that that rule admits of relaxation under peculiar circumstances; and we conceive that the circumstances of the present case, if of any, will justify such relaxation. The putting into Waterford cannot, with any reason, be urged against us. That was an act of necessity, and was no discontinuance of the voyage. No new trading with the enemy took place there.

As to the Sydmouth license. It has already been shown that the original license was obtained on the 8th of July, a considerable time 397*] before information of the *war reached England. However criminal, therefore, the obtaining such a license might have been in time of known war, in a time of supposed peace it was perfectly justifiable and innocent; it was also absolutely necessary in the present case; the adventure could not have proceeded without a license. The British government was, in fact, bound to give it, by the universal custom of nations. Every nation is under a similar obligation. Our own government has authorized the President to grant such licenses.

But it has been said, that though the obtaining of the first license may be justified in this manner, yet the second, having been procured after knowledge of the war, will not admit of the same justification. Little need be added to what has already been said on this point. The second license was merely a renewal of the first; they are both, indeed, to be considered but one license. The first having been granted, the second was required, under the circumstances of this case, by the law of nations; or, if not, it was, at any rate, required by good faith. So the British government thought, and so they acted. This case is widely different from those of *The Aurora* and *The Julia*.

With regard to the President's instruction of 28th August, we contend that the Mary comes within both the letter and spirit of that instruction. Her national character is clearly shown by her register and other documents; she is proved to be owned by J. B. Kennedy, of South Carolina; and it is clear that she sailed on the faith of the repeal of the orders in council.

The power of the President to issue instructions to the privateers of the United States has already been considered. Congress has given him a twofold power over this part of the armed force of the nation. He is authorized to grant and to revoke their commissions. But *omne majus continet in se minus;* he may therefore grant with limitation, and he may revoke in part. In issuing the instructions in question, he has done nothing more than he had full power and authority to do.

Tuesday, March 15th. *Absent*—MARSHALL, *Ch. J.*

The court made the following order:

*It is ordered that the claimant have [*398 leave to make further proof, by affidavits, as to the following points:

1. As to his own citizenship.

2. As to the names of the heirs of General Fisher who are interested in the property, the places of their residence, and their national character.

3. As to the time when Mr. Nanning J. Visscher went to England; the objects which he had in view in going thither; how long he resided there; when the cargo claimed by him was purchased; and when he returned to the United States. And,

4. As to the instructions which the Paul Jones had on board at the time of the capture of the Mary; and particularly, whether the instructions of the President of the 28th August, 1812, had been delivered to the captain, or had come to the knowledge of the captain at the time of the capture; or, whether the Paul Jones had been in port after the 28th of August, 1812, and before the capture.

It is further ordered, that the captors be also at liberty to make further proof as to these several matters.

THE UNITED STATES
v.
1960 BAGS OF COFFEE.

Absent—WASHINGTON, *J.*

The forfeiture of goods, for violation of the non-intercourse act of March 1, 1809, takes place upon the commission of the offense, and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid.

THIS was an appeal from the sentence of the Circuit Court for the District of Maryland, which restored a quantity of coffee which had been seized and libeled for violating the non-intercourse act of March 1st, 1809 (vol. 9, p. 243, § 4, & 5).

The claimants in the court below alleged, by way of plea, that the coffee was regularly en-

399*] tered and the duties *secured according to law, after which they became the purchasers for a valuable consideration. They also denied that it was imported contrary to law.

The United States demurred to that part of the plea which states the purchase, &c., and took issue upon that part of the plea which denies the illegal importation. By the sentence of the District Court the demurrer was overruled, and the coffee restored; which sentence was affirmed in the Circuit Court, and the United States appealed to this court.

The cause was elaborately argued by the Attorney-General, *Pinkney*, for the United States, and by *Boyd* and *Harper*, for the claimants, at last term, and again at this.

The words of the statute which create the forfeiture, are: "That whenever any articles, "the importation of which is prohibited by "this act, shall, after the 20th of May next, be "imported into the United States," "all such "articles" "shall be forfeited."

Pinkney, late Attorney-General for the United States.

Two objections have been made to the claim of the United States for this forfeiture.

1. That the right of the United States does not vest until seizure and condemnation, and

2. That the United States are bound by the act of their officer in receiving the duties and permitting the goods to be entered.

1. The forfeiture occurs at the moment of committing the offense. The statute says whenever the act is done, the thing shall be forfeited. No other time is mentioned. The seizure is the consequence of the forfeiture, not its cause. The thing is first forfeited, and then seized. The forfeiture immediately follows the offense. The seizure is merely to ascertain the fact. This is the plain construction, or rather the letter of the statute.

There is a distinction between forfeitures at **400***] common *law and those accruing under a statute. (3 Cranch, 351, *United States* v. *Grundy et al.*)

In that case the Chief Justice said: "Where "a forfeiture is given by a statute, the rules of "the common law may be dispensed with, and "the thing forfeited may either vest immedi-"ately, or on the performance of some particu-"lar act, as shall be the will of the legislature. "This must depend upon the construction of the "statute." The reason why the court decided in that case that the right to the ship did not vest in the United States immediately upon taking the false oath, was, that the United States had an alternative, either to take the vessel or its value, and until the United States had made their election, the right did not vest.

But there are two cases at common law where the forfeiture relates back to the time of the offense and avoids intermediate alienations—deodand and suicide. So also in the case of felony and flight. So also in all cases where the punishment for the offense is the forfeiture of the thing by which the offense was committed, or where the punishment cannot be inflicted on the person. In treason and felony, the forfeiture of personal chattels is not the punishment but a corollary, or consequence of the disability imposed on the person. But in regard to lands, the forfeiture relates to the time of the offense committed. With regard to purchasers the rule is *caveat emptor*. This is said to be a hard case, but there are other cases equally hard depending on the same rule. If goods are deposited with a merchant to keep, and he sell them, unless in market overt (and we have no market overt in this country), the sale is void and the owner may recover them from the purchaser who bought them without notice. This, too, is a hard case, but it is every day's practice.

To show that the forfeiture attaches at the moment of the offense committed, he cited 5 T. R., 112, *Wilkins* v. *Despard;* Salk., 223 and 12 Mod., 92, *Roberts*, v. *Withered;* 1 T. R., 252, *Lockyer* v. *Offley*.

2. As to the second point, he said it was impossible to contend that the United States were bound by their officer's ignorance of the fact of the forfeiture when he received the duties and granted the permit.

Boyd, contra. [***401**

The demurrer admits that the coffee was properly entered, that the duties were paid, and that there was a *bona fide* sale and transfer of the coffee, for a valuable consideration, before seizure. A forfeiture cannot overreach a *bona fide* sale to third person. That this is the rule at the common law is clearly proved by the very learned and elaborate argument of Judge Winchester in giving his opinion in the case of *The Anthony Mangin* (3 Cranch, 356), and the principle has been recognized by this court in the same case. (3 Cranch, 350, *United States* v. *Grundy et al.*) A forfeiture by statute is not more operative than a forfeiture at common law. There is no expression in the statute to justify the distinction. The common law says whenever a man shall commit treason or felony he shall forfeit his goods and chattels to the king.

Bona fide purchasers are favored at common law. (10 Ves., Jr., 104, *Ex parte Edwards;* 1 East., 94, 95; 2 Esp. N. P. Ca., 731; 12 Mod., 92; 2 Cranch, 390; 3 Cranch, 356; 6 Cranch, 133; 5 Bac. ab., 229.) The forfeiture must be followed by seizure and condemnation before the property can vest in the United States. This principle has been decided by this court in the *St. Domingo* cases, where the law being temporary and having expired after condemnation in the court below and before hearing in this court, the property was restored, which could not have been the case if the property was vested in the United States by the commission of the offense. If the title of the United States was complete at the time of the offense, and if the seizure was merely to ascertain the fact, the expiration of the law could not divest that title out of the United States, and this court must have affirmed the sentence of condemnation. (*Yeaton et al.* v. *the United States*, 5 Cranch, 281.) If the United States had not discovered the offense for three years, the act of limitations would have barred their claim. (2 Cranch, 336, *Adams* v. *Wood.*) If the coffee had been destroyed, the United States could not have recovered the duties, because the goods were not legally imported.

2. The United States are estopped from claiming the property by the acts of their officer, in granting the permit *and receiv- [***402**
ing the duties. The acts of officers are to be

favored. (16 Vin., 114, tit. Officers; 17 Vin., 153.)

The permit to land the coffee, and the receipt for the duties, are conclusive evidence to all the world, except the illegal importer, that the coffee was lawfully imported. If a claimant encourage the vendee to buy, his claim shall be postponed to that of the purchaser. (Sugden on Vendors, 480.) Acceptance of rent is an admission of title. (18 Vin., 149.) So here acceptance of the duties is an admission of a lawful importation. A purchaser is only bound to use reasonable diligence. He has only to ask whether there be a regular permit to land the goods, and whether the duties have been paid. If the officers were mistaken, and have given evidence of a good title, their mistake ought not to injure an innocent purchaser. (2 Br. C. C., 389; 5 T. R., 118; 1 T. R., 260; 3 Cranch, 389, 390.)

The inconveniences of such a rule would be intolerable — the utmost prudence could not prevent a man from loss.

In personal chattels, possession is the criterion of title. (13 Ves., Jr., 121.)

Harper, on the same side.

This is a case of *bona fide* purchase, for a valuable consideration, without notice. It is presumed to be without notice because the contrary does not appear. The only case supposed to be against us is that of *Roberts* v. *Withered* (5 Mod., 191; 12 Mod., 92; Salk., 223). That was a case of detinue against the wrongdoer. There was no intervention of a purchaser without notice. The relation of the forfeiture to the time of the offense is never suffered to overreach an innocent purchaser without notice. Relation is a fiction of law which is never allowed to do injustice. Where a party not only conceals his claim, but gives out that the title is clear, he shall be postponed. The permit was evidence on which the claimant had a right to rely. No one can take advantage of his own act to injure another.

As to the common law doctrine of forfeit-
403*] ure, the *cases of treason and felony furnish the general rule; the cases of deodand, suicide and flight are exceptions. In treason and felony the forfeiture is admitted not to relate to the fact committed. In the case of deodand, the exception to the rule is founded on the notoriety of the fact. In the case of suicide the reason for the exception is that there is no other mode of punishing the offense, and flight is an admission of the fact, and a withdrawing himself from punishment. Notoriety, confession, and the inability to inflict other punishment are the grounds of these exceptions to the general rule. In treason and felony, if the goods are sold *bona fide* without notice, the forfeiture relates back only to the conviction. Unimpeached possession is evidence of unimpeached title. This principle applies to forfeitures under a statute as well as to those at common law. The rule *caveat emptor*, is never applied to secret liens.

Pinkney, in reply.

The letter of the act of Congress is plain and express. The forfeiture is the necessary and immediate consequence of the offense. No other time is mentioned. He did not mean to say that the title of the United States is consummated until condemnation. But the forfeiture attaches by the commission of the offense, and overreaches all intermediate acts. This doctrine is necessary for the public good, otherwise the rights of the United States would be defeated by fictitious sales, the fraud of which it would be difficult, perhaps impossible, to detect. The forfeiture of the thing by which the offense is committed, is the punishment itself, not a mere consequence of a disability. It passes to the purchaser *cum onere*. Where legal rights have attached the rule *caveat emptor* always applies, but never to equitable liens without notice.

As to real estate, the relation in treason and felony was to the offense committed. Why did not the argument *ab inconvenienti* control the rule in that case? (Plowden, 260, 290.)

In the case of deodand, a horse kicks a man; before the man dies the horse is sold, the man dies, the horse is forfeited as deodand.

*Where is the notoriety? The true [*404 reason is, that it is the forfeiture of the offending thing. In felony, nothing but sale in *market overt* can prevent the relation of the forfeiture to the time of the offense. If *felo de se* give himself a mortal wound, and before his death convey his estate, and die, the conveyance is void. So in the case of flight after felony. The law looks principally to the thing for punishment.

The general rule of the law of England is that a purchaser of personal goods is not safe unless he purchased in *market overt*.

If the United States could be estopped by the acts of their officers, the plea is as good in behalf of the illegal importer as of the innocent purchaser. The purchaser was as much bound to know of the offense as the collector. But the collector had no authority to waive the penalty, and therefore cannot be presumed to have waived it. If he had even given a release of the forfeiture it would have been void.

The argument *ab inconvenienti* is rather an argument *ad misericordiam*. If there be hardship in the case, application should be made to the Secretary of the Treasury, who has power to relieve.

In the *St. Domingo* cases, the law had expired, without any provision being made to enforce the penalty in existing cases. After the expiration of the law the court had no authority to condemn; and the appeal annulled the sentence of the court below.

March 15th. MARSHALL, *Ch. J.*, *being absent*.

JOHNSON, *J.*, delivered the opinion of the court as follows:

This case has been argued very elaborately and has been a long time under consideration. But from the decision which the court has at length come to, its merits are brought within a very limited compass.

We are of opinion that the question rests altogether on the wording of the act of Congress, by which it is *expressly declared [*405 that the forfeiture shall take place upon the commission of the offense. If the phraseology were such as, in the opinion of the majority of the court, to admit of doubt, it would then be proper to resort to analogy and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. But from the view in

which the subject appears to a majority of the court all assistance derivable from that quarter becomes unnecessary.

It is true that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand, if by a sale it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it.

When hardships shall arise, provision is made by law for affording relief under authority much more competent to decide on such cases than this court ever can be.

In the eternal struggle that exists between the avarice, enterprise and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation. In this instance we are of opinion that the commission of the offense marks the point of time on which the statutory transfer of right takes place.

The decree of the Circuit Court of Maryland on the demurrer, is therefore reversed, and the cause remanded that the issue in fact may be tried.

STORY, *J.* The decree which has just been pronounced by a majority of the court is decisive of the case of *The Mars,* which is now pending in this court, and my decision therein must be reversed. The opinion which I there held and the reasons which support it, are disclosed on the record, and though the discussion in this court has not increased my confidence in that opinion, nevertheless, as I am not yet satisfied **406***] of its incorrectness, and two *of my brethren concur in it, I shall make no apology for introducing it in this place.

It is as follows:

The present information proceeds for a forfeiture of the brig Mars upon the allegation that the brig departed from the United States bound to a permitted port without giving bond pursuant to the act of the 1st of March, 1809, (ch. 91, § 16). There are other counts in the information which I need not now consider, because it is admitted there was a forfeiture under the first count, and the answer of the present claimant sets up, as a justification of his title, that he is a *bona fide* purchaser for a valuable consideration and without notice of the offense; and it is admitted that this justification is true in point of fact, and that there have been no *laches* either as to the United States or as to the purchaser.

The question presented to the court is, whether property which has become forfeited to the United States, and afterwards, and before seizure, while remaining in the possession of the vendor, is sold to a *bona fide* purchaser for a valuable consideration without notice, is protected against the claim of the United States.

This question is peculiarly delicate and interesting in whatever way it is considered. On the one hand it strikes at the root of almost all the forfeitures *in rem* which the legislature has provided to guard the revenue laws from abuse; and if the decision be against the United States, it may open a wide field for fraud and colorable transfers, to the encouragement of offenders. On the other hand, if the secret taint of forfeiture be indissolubly attached to the property, so that at any time and under any circumstances within the limitations of law, the United States may enforce their right against innocent purchasers, it is easy to foresee that great embarrassments will arise to the commercial interests of the country; and no man, whatever may be his caution or diligence, can guard himself from injury and perhaps ruin. Considerations of this nature have pressed heavily upon my mind, and I have therefore been solicitous to avoid a discussion involving so much public as well as private importance. I could have wished to have reserved *this [***407** question for the consideration of all the judges in the highest tribunal, that in forming my opinion I might have had the light reflected from their minds, and the benefit of their acknowledged learning. The parties have, however, seen fit to pursue another course, and I shall meet the question as my duty requires without asking for shelter under any authority; though not without extreme diffidence.

Before I proceed to the principle question, it will be necessary to clear the way by adverting to some considerations which have grown out of the argument on each side. It should be remembered that this is not a case where the vendor was out of possession, and of course where the law might infer a want of due diligence in the purchaser. To such a case the maxim *caveat emptor* would certainly apply. Nor is the present a case where the sale was made at the first moment when the property came within the jurisdiction or grasp of the United States—for I should have little doubt that such a hurried sale could hardly be the foundation of a solid title. It is not a case of voluntary gift or collusive transfer which would probably share the fate of all bounties in fraud or exclusion of public rights. (*Jones* v. *Ashurst,* Skin., 357.)

It is admitted that the sale is *bona fide,* for a valuable consideration, and without any express or implied notice. Further, the statute, on which the information is founded, has declared that the property shall be wholly forfeited, if the offense be committed; but it has not declared at what time it shall take effect, to what time it shall relate, nor whether it shall be incapable of being purged by subsequent events. The forfeitures under the statute are to be distributed in the same manner as forfeitures under the collection act of 2d March, 1799, § 91, by which informers and officers of the customs, as well as the government, may acquire vested interests; and it follows, therefore, that these interests, as to informers and officers of the customs, cannot vest until their rights are ascertained by seizure or condemnation.

It has been argued on the part of the United States, that the forfeiture is, by the statute, made absolute on the commission of the offense, and as it was competent for the legislature to enact such a law, the title cannot be divested *by any subsequent event. That the [***408** cases of forfeiture at the common law are not applicable because they depend upon the qualification annexed to them by the common law, which makes them conditional only, and not

absolute forfeitures, whereas the present statute has annexed no qualification. And in support of this distinction the opinion of the Chief Justice in the case of *The United States* v. *Grundy et al.* (3 Cranch, 337), has been quoted where he says (p. 350): "It has been proved that in "all forfeitures accruing at common law, noth- "ing vests in the government until some legal "step shall be taken for the assertion of its "right; after which, for many purposes, the "doctrine of relation carries back the title to "the commission of the offense, but the dis- "tinction taken by the counsel for the United "States, between forfeitures at common law "and those accruing under a statute, is cer- "tainly a sound one. Where a forfeiture is "given by a statute the rules of the common "law may be dispensed with, and the thing "forfeited may either vest immediately or on "the performance of some particular act, as "shall be the will of the legislature. This must "depend upon the construction of the statute."

I entirely subscribe to the doctrine here stated by the Chief Justice. There can be no doubt that the legislature may provide that its forfeitures shall take effect differently from the course prescribed by the common law; but the question will always be: Have the legislature so done? If they have not, shall the rules of the common law govern in the absence of any positive declaration? It should be remembered, also, that the Chief Justice is here speaking in a case where the main question before him rested in a considerable degrec upon the point whether the legislature had not given an election of remedy, and suspended the vesting of any interest until the determination of that election. But I apprehend that the words of the Chief Justice by no means imply that when a forfeiture *in rem* is attached to a statute offense, the rules of the common law are of course excluded. They do not, in my judgment, import more than the opinion which I have already expressed. Now, in the case at bar, I cannot perceive in the language of the legislature any systematic exclusion of the common law as to forfeitures. They have declared **409***] no more than that the *commission of an act shall induce a forfeiture; and so has the common law; but the question as to the nature and extent of the operation of this forfeiture is nowhere, that I can perceive, touched. This view of the subject leads me to deny another position assumed by the counsel for the United States, viz., that the doctrine of relation has nothing to do with the present controversy. In the progress of this examination, I think, if not already shown, it will sufficiently appear that the doctrine of relation has a very powerful influence in every essential view of the subject.

I will now consider the main question, which perhaps may be divided into two branches.

1. What is the interest or right which attaches to the government in forfeitures of property before any act done to vindicate its claims?

2. What is the operation of such act done to vindicate its claims, as to the offenders, and as to strangers?

1. As to the first point. In all cases at common law where lands are forfeited for the personal offense of the party, I take the rule to be universally true that until the offense is ascertained, by conviction and attainder, no title vests in the sovereign.

Before that time the party is entitled to the possession and profits of his lands, and the government have no vested right in them, either to enter or dispose of the estate. (2 Inst., 48; Staund., P. C., 192.) Nay, even after attainder until office found the sovereign is considered as having but a possession in law, and an office is necessary to complete a title. (Staund., P. C., 198.) The offender, therefore, has, until conviction, full power and authority to alien his lands and to convey to the purchaser a complete and legal, though defeasible seizin; and unless such conviction follow the offense the alienation is good against all the world. For, as Bracton says (Lib. 2, ch. 13, p. 30), "*ea vero, quæ post fel- "oniam facta sunt, semper valent et tenent nisi "fuerit condemnatio subsecuta, et si fuerit sub- "secuta, non valent.*"

If this be true, and there seems to be no reason to doubt it, *it follows that the es- [***410** tate of the offender is rightful, that he has both *jus ad rem* and *jus in re;* and consequently that the crown hath but a mere possibility which in no wise restrains the exercise of ownership over the property. (See 4 Bl. Com., 382.)

The same doctrine is also, in general, true as to like forfeitures of goods and chattels. (Bract. Lib. 2, ch. 13; Co. Lit., 391, a; Staund. P. C., 193; Id., 52; 2 Inst., 48; 2 Hawk., P. C., ch. 49.) Nor do the cases of deodand and suicide form any exceptions, for the authorities all concur that the forfeiture does not vest a property until the fact is found of record. (*Foxley's* case 5 Co., 109; *Hales* v. *Petit*, Plowd., 206, 262.) It has been supposed that goods waived vested *ipso facto* in the crown upon waiver; but on a careful examination of the authorities it will be found that the owner retains his full property until an absolute seizure by the crown. (Staund., prerog., lib. 3, ch. 25, p. 186; Fitz. ab. Estray, 2; 21 Edw. 4, 16.) For all purposes of alienation and sale therefore the property in goods and chattels remains in the owner notwithstanding the commission of an offense subjecting it to forfeiture; and consequently he may convey a good title against every person but the crown, and against the crown also unless in cases where the anterior relation applies. (*Jones* v. *Ashurst*, Skinn., 357.) I think therefore it may be assumed as a settled principle, that in forfeitures for personal offenses, before seizure or prosecution, the sovereign has no vested title.

Can the case be distinguished where the forfeiture is made to attach to the instrument itself by means whereof the offense is committed?

It seems to me that the most favorable cases for the United States, viz., deodands and waifs, conclusively show that no such distinction anciently prevailed, for whatever may be the effect of relation, it is certain that no property vested in the crown until seizure or inquisition. I infer, therefore, that no absolute property vested in the United States in the case at bar until actual seizure was made; and the decision in the King's Bench, in *Lockyer* v. *Offley* (1 T. R., 252), seems to me fully to support the inference. It has, indeed, been supposed by the counsel for the United States, that *Roberts* v. *Witherell* (1 *Salk., 223; 12 Mod., 92) and *Wilkins* [***411** v. *Despard* (5 T. R., 112), support a contrary

doctrine. But on examination they appear to me to confirm it. In the first, the action was detinue for property forfeited under the navigation act of Charles 2d, and the court held that the action will lay, because the bringing action amounted to a seizure. In the latter case there had been an actual seizure made for the forfeiture, and the sole question was if condemnation were not necessary to divest the property of the owner.

If I am right in the view which I have already taken of the subject, there can be little doubt that the title of the United States, so far as affects third persons, rests mainly on the doctrine of relation, and that the counsel for the United States must call in the aid of the common law to enforce the present claim. For if no title vests until seizure, there must, at the time of seizure, be a title in the offending party capable of being divested and of vesting in the United States. But at the time of the present seizure that title had been transferred to the present claimant and nothing was left in the vendor capable of transfer.

2. This leads me to the examination of the second point, viz.: What is the operation of the acts done by the sovereign to vidicate his title by forfeiture?

At common law, in case of attainder for treason or felony, the forfeiture of lands relates back to the time of the offense committed so as to avoid all intermediate changes and conveyances. (4 Bl. Com., 481, 487; Co. Lit., 390, b; Staund., P. C., 192), but in general, in like cases the forfeiture of goods and chattels relates back only to the time of conviction, so that all previous changes and alienations, and even *bona fide* gifts, are protected. (4 Bl. Com., 387; Co. Lit., 391; Staund., P. C., 192; Perk., § 29; Skinn., 357.) There are some cases in which the relation is carried back to the time of the inquisition made; but, unless that of suicide form an exception, there is no case where the relation is pressed beyond the time of prosecution. According to the decision in Plowden, 260, a *felo de se* forfeits all his goods and chattles, from the time of committing the act which occasions the death; and the doctrine seems to be supported by *Rex* v. *Ward* (1 Lev., 8.) The general **412***] ground assigned for it is, that *otherwise the offender would go unpunished, and it is compared to the case of flight after felony. Now, admitting that this is a solid reason, and a sufficient foundation for a legal adjudication, it may well be doubted if the doctrine, or the decision in Plowden, required the forfeiture to relate back further than the death of the party.

The case was that Sir James Hales, the offender, was joint tenant with his wife of a term of years; and the question made was whether after inquisition the forfeiture should not relate back so as to overreach the right of survivorship which accrued to the wife.

Now, one of the judges (Weston) held that the forfeiture should only have relation to the death, at which time the title of the wife accrued; yet, in this concourse of titles, the king's title by prerogative should be preferred. (Plowd., 264.) And I find that Lord Hale (1 Hale., P. C., 414,) expresses great doubt whether, for all purposes, the relation could be carried back to the stroke which occasioned the death. Be this case as it may, it is the only exception to the general doctrine; and *inter apices juris* a case so unjust as that which robbed an unfortunate woman not only of the moiety which vested in her by survivorship from her husband, but of the other moiety absolutely vested in her by grant, I am glad to find is a judicial anomaly.

I have said that the case of a *felo de se* forms the only exception to the general rule. There are authorities to show that in case of flight for felony, the forfeiture, after it is found by inquisition, verdict, or indictment, relates back to the time of the flight so as to avoid all mesne acts. (*Rex* v. *Wendman*, Cro. Jac., 82.) But I think the better opinion, notwithstanding, is that it relates only to the time of finding the flight. (Co. Lit., 390; Staund., P. C., 192; 5 Co., 109, b; Bro. Forfeiture *des terres*, 119; Id. Relation, 31.) But it has been argued that admitting the rule that the forfeiture of goods and chattels in general relates back to the time of conviction, yet it is inapplicable to a case where a specific thing is declared forfeited by law, for in such case the *corpus delicti* attaches to the thing in whose hands soever it may come; and the case of deodand, put by counsel, in Plowden, 262, is cited in illustration. "If my horse strike a "man, *and afterwards I sell my horse, [***413** "and after that the man dies, the horse shall "be forfeited." I do not find any authority to support this position, although it is cited as law in 1 Hawk., P. C., ch. 26, § 7, and in terms *de la ley, deodand*. It seems a peculiar case growing out of the avarice of the church and the superstition of the laity in ancient times. The distinction seems also countenanced by the court in *Lockyer* v. *Offley* (1 T. R., 252.) The counsel for the plaintiff there argued that the ship was forfeited the moment the smuggling was committed, even though she had afterwards come into the hands of a *bona fide* purchaser; and Mr. Justice Willes, in delivering the opinion of the court, in alluding to the argument that the forfeiture attached the moment the act was done, said: "It may be so as "to some purposes, as to prevent intermediate "alienations and incumbrances." To be sure this expression carries with it a pretty strong implication; but in the same case, returning to the argument, the same learned judge says: "I "do not know that it has been ever so decided— "it may depend upon circumstances, such as "length of possession, laches in seizing, or other matters." And the decision of the court went ultimately upon other grounds. I must, therefore, consider the authority as not fairly extending to this point, and indeed as rather leaning the other way. On the other hand, the case of lord and villain has been cited from Co. Lit., 118, § 117, to show that even where a right to seize property exists in the lord, it is not perfected by seizure so as to overreach prior alienations; for until seizure it is said that he has neither *jus in re*, nor *jus ad rem*, but a mere possibility. And the conclusion drawn from this example is not materially affected by the consideration that a contrary doctrine prevails in the case of the sovereign (Id., § 118), because the reason assigned is perfectly consistent with it—viz., that the property is in the sovereign before any seizure or office. I do not think much reliance can be placed upon analogies borrowed from the feudal tenures, because

they were governed by peculiar and technical niceties, the reasons of which have long since ceased, and perhaps cannot now be well understood. But if the principle of the case put be that where the absolute property is not vested before the alienation, a subsequent seizure will not avoid such alienation if made *bona fide*, it is directly applicable to the case at bar.

414*] *I have already endeavored to show that the absolute property did not vest in the United States until seizure; and I think it would be a bold assertion that the United States could, before such seizure, have conveyed the property to a purchaser, or have clothed it with a national character. I consider a passage in Lord Hale's treatise on the customs as corroborating the view which I have already taken of this case. He says: "Though a title "of forfeiture be given by the lading or un- "lading, the custom not being paid, yet the "king's title is not complete till he hath judg- "ment of record to ascertain his title, for "otherwise there would be endless suits and "vexations; for it may be ten or twenty years "hence that there might be a pretense of for- "feiture now incurred." (Harg. Law tracts, 226.) According to Lord Hale even seizure would not be sufficient to fix the title in the king; but it must be consummated by a judgment of record.

But the point of difficulty is to decide whether the United States had not such an inchoate title as, connected with a subsequent seizure, would, by a retroactive effect, defeat the intermediate purchase. Now, it is precisely in this view that the case of villain may admit an unfavorable distinction; for until seizure the lord has not even an inchoate title, but a mere possibility. And though the property is in the like case of the sovereign said to be in him without seizure or offiee, yet I apprehend the title is not consummate until seizure or office; for uutil that time it could hardly be held that a purchaser under the villain, or even the villain himself, had a tortious possession and use of the property. The case of villenage, then, even supposing it to apply, does not go *quatuor pedibus* with the present. The case of *Attorney-General* v. *Freeman* (Hard., 101), has also been relied on by the claimant. In that case the party, after outlawry and before inquisition, made a *bona fide* lease of his lands; and it was held that the forfeiture did not overreach the title of the purchaser.

But I do not think that much reliance can be placed on this case, because it turned on a settled distinction that until inquisition the king has no title in the real chattels or freeholds of the outlaw; but in personal chattels the title is in the king without inquisition. (1 **415***] *Ld. Ray., 305; Salk., 395; 12 Mod., 176.) And the relation does not extend beyond the time of the commencement of the title. The case of *The Anthony Mangin* (3 Cranch, 356, n.) before Mr. Justice Winchester, is the only other authority that I recollect which has been thought materially to bear upon the question. I entertain the most entire respect for the opinions of that truly able and learned judge; and although the decision of that case did not rest upon the present question, it is but justice to acknowledge that it has thrown great light on the subject, and enabled us all to meet the stress of this cause with more certainty than could otherwise have been done. It was very clearly the opinion of the learned judge that a seizure did not relate back to the time of forfeiture so as to overreach an intermediate *bona fide* conveyance; and he has certainly offered cogent reasons in support of that opinion. But after a diligent examination of the authorities cited by him, I am well satisfied that the point has never been solemnly adjudged, and must now be decided upon principle.

It seems to be a rule founded in common sense, as well as strict justice, that fictions of law shall not be permitted to work any wrong, but shall be used *ut res magis valeat quam pereat* (3 Rep., 28, *b.*), and this rule, so equitable in itself, seems recognized in the common law. (13 Rep., 21; 2 Vent., 200.) And in respect to the doctrine of relation, this rule has been admitted in its fullest extent in civil cases. (Bro. Relation, 18; 1 H., 7, 17; Bro. Debt, 139; 6 Rep., 76, *b;* 3 Rep., 28 *b.*) For it has been repeatedly adjudged that relations shall never work an injury, "and shall never "be strained to the prejudice of a third per- "son who is not a privy or a party to the "act;" and further, that "in destruction of "a lawful estate vested, the law will never "make any fiction." (3 Rep., 29; 2 Vent., 200.)

It is true, as we have already seen, that a different rule prevails as to forfeitures of lands in treason and felony, founded probably on feudal principles, or the barbaric character of the times; yet even as to cases of treasou and felony a striking distinction is admitted in favor of goods and chattels; and mesne acts before conviction or inquisition are suffered to retain their actual validity.

*Looking to the vast extent of com- [***416** mercial transfers the favor with which navigation and trade are fostered in modern times, and the extreme difficulty of ascertaining latent defects of title, it seems difficult to resist the impression that the present is a case which requires the application of the milder rule of the law.

If the principle contended for by the government be admitted in its full extent, it will be found very difficult to bound it. A bale of goods which is once contaminated with a forfeiture will retain its noxious quality through every successive transfer, even until it has assumed under the hands of the artizan its ultimate application to domestic use. Yet such a position would strike us all as monstrous. If we say that the forfeiture shall cease with the change of the identity of the whole package, as such, still an intrinsic difficulty remains. The object of the government would be completely evaded by the offeuder, and the innocent purchaser would sink under the pressure of frauds which he could never know, nor by diligence avert.

On the whole I have come to the result, not however without much diffidence of my own opinion, that a forfeiture attached to a thing conveys no property to the government in the thing, until seizure made or suit brought. That previous to that time the owner has the exclusive right of possession and property, though the government may be considered as having an inchoate title, or possibility. That against the offender or his representatives, upon seizure or suit, the

title by operation of law relates back to the time of the offense so as to avoid all mesne acts; but as to a *bona fide* purchaser, for valuable consideration and without notice of the offense, the doctrine of relation does not apply so as to divest his legitimate title.

Considering, as I do, that this question is of very great importance, I trust that it will receive the decision of the highest tribunal; and I shall not feel humbled if, upon better examination, a different doctrine shall prevail by the judgment of that court.

I do therefore adjudge and decree that the decree of the District Court in the premises be affirmed.

Cited—8 Cranch, 417; 3 Wheat. 311; 8 How. 379, 382; 7 Wall. 460; 11 Wall. 368; 14 Wall. 56, 58; 6 Otto, 299, 404; 1 Abb. U. S. 100, 102; 2 Abb. U. S. 314, 320; 1 Dill. 57, 63; 2 Dill. 306; Blatchf. & H. 60, 61; 2 Cliff. 68; 3 Cliff. 315; Crabbe, 355; Deady, 100; 1 Story, 134.

417*] *THE UNITED STATES v. THE BRIGANTINE MARS.

A forfeiture under the 3d section of the act of 28th June, 1809 (ch. 9), will overreach a *bona fide* sale to a purchaser for valuable consideration without notice of the offense.

THIS was an appeal from the sentence of the Circuit Court of Massachusetts District, which affirmed the sentence of the District Court, restoring the brig to the claimants.

An information was filed against the brig Mars, for a breach of the act of 28th June, 1809 (entitled "An act to amend and continue "in force certain parts of the act, entitled an "act to interdict the commercial intercourse," &c.), in departing from port without having given bond according to the 3d section of the act, which provides that "if any ship or vessel "shall, contrary to the provisions of this sec- "tion depart from any port of the United "States without clearance, or without having "given bond in the manner above mentioned, "such ship or vessel, together with her cargo, "shall be wholly forfeited."

The vessel, after her return to the United States, and before seizure, was *bona fide* purchased by the claimants, for a full and valuable consideration, without notice of the offense. Upon this ground she was by the decree of the District Court ordered to be restored; which decree was affirmed by the Circuit Court. Judge Story's opinion in pronouncing that decree, will be found in the preceding case of the *United States* v. *1960 Bags of Coffee*.

This case having been submitted upon the arguments which were had in that case,

JOHNSON, *J.*, delivered the opinion of the court as follows:

"This case depends upon the principle established in the case against the coffee, the Bohlens, Claimants.[1]

418*] *The decision, as in that case, was founded upon the ground of a sale to a *bona fide* purchaser without notice.

1—The case of the *United States* v. 1960 *Bags of Coffee*, ante p. 398.

The decree of the Circuit Court of Massachusetts District, in this case, is therefore reversed, and the brigantine Mars adjudged forfeited to the United States."

Rev'g.—S. C. 1 Gall. 192.
Cited—3 Wheat. 311; 8 How. 379, 382; 7 Wall. 460; 14 Wall. 56; 6 Otto, 299; 2 Cliff. 68; 3 Cliff. 315; 1 Abb. U. S. 100, 103; Deady, 100; case below; 5 Mason, 471.

THE FRANCES, BOYER, MASTER.

(*Irvin's claim.*)

No lien upon enemy's property, by way of pledge for the payment of purchase money, or otherwise, is sufficient to defeat the rights of the captors, in a prize court, unless in very peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien from attaching.

THIS was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods captured on board the Frances. These goods were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of lien.

Irving, for appellant.
Pinkney, for captors.

Tuesday, March 15th. *Absent*—MARSHALL, *Ch. J.*

WASHINGTON, *J.*, delivered the opinion of court as follows:

Thomas Irvin is a merchant of New York, and claims certain packages of merchandise consigned to him by Robertson & Hastie, and also three boxes of merchandise consigned to him by Pott & M'Millan. The consignors were British subjects, residing in Great Britain at the time that these goods were shipped, which, according to the terms of the bills of lading, were on account and risk of the shippers.

It is not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the claimant founds his pretensions on a lien created on the goods consigned by Robertson & Hastie, in consequence of an advance made to the shippers, in consideration of the consignment, by his *agent in Glasgow; and on the [*419 goods shipped by Pott & M'Millan, in virtue of a general balance of account due to him as their factor. To establish these claims in point of fact, an order for further proof is asked for, and the question is, whether, if proved, the claim can, in point of law, be sustained?

The doctrine of liens seem to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. The consignor or owner cannot maintain an action against his factor to recover

the property so placed in his possession, without first paying or tendering what is thus due to the factor. But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. (Abbott on Shipping, 184.) It is, to use the words of Sir W. Scott, "an in- "terest directly and visibly residing in the sub- "stance of the thing itself." The possession of the property is actually in the owner of the ship, of which, by the general mercantile law of all nations, he cannot be deprived until the freight due for the carriage of it is paid. He has, in fact, a kind of property in the goods by force of this general law which a prize court ought to respect, and does respect. On the one hand, the captor, by stepping into the shoes of the enemy owner of the goods, is personally benefited by the labor of a friend, and ought, in justice, to make him the proper compensation; and on the other, the ship-owner, by not having carried the goods to the place of their destination, and this, in consequence of an act of the captor, would be totally without remedy to recover his freight against the owner of the goods.

But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and **420***] *even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. In the case of the *Tobago* (5 Rob., 196), where an attempt was made by a British subject to set up a bottomry interest on an enemy's ship, Sir W. Scott observed, that no precedents to sanction such a claim could be produced; and he very properly concluded, that this was strong evidence that it had not been the practice of the court to consider such bonds as property entitled to its protection. And it seemed to be conceded that, upon the same principle, the captor could not entitle himself to the advantage of such liens, existing in an enemy, upon neutral property. From this it appears that the doctrine of the prize courts upon this subject works against as well as in favor of captors. The case of *The Marianna*, in 6 Rob., avoids all the objections made to the application of the case of *The Tobago* to the present. It is precisely in point.

The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs.

LIVINGSTON, *J.* I differ in opinion from the majority of the court. Irvin had a lien on the goods, apparent on the face of the papers. I have no difficulty in condemning the property subject to that lien; but I cannot assent to an unqualified condemnation.

For other claims in case of same vessel, see 8 Cranch, 335-363.
Cited—6 Wall. 498; 7 Wall. 162; Blatchf. Pr. 35, 37, 52, 134, 136; 1 Ware, 106; 2 Sprague, 155, 156.

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*THE THOMAS GIBBONS, [*421

ROCKWELL, MASTER.

Under the 8th section of the prize act of June 26th, 1812, the President had full authority to issue the instruction of 28th August, 1812.

The commission of the privateers of the United States may be qualified and restrained by the instructions of the President.

A shipment made, even after a knowledge of the war, is to be considered as having been made in consequence of the repeal of the orders in council, if made within so early a period thereafter as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the United States.

By the mere act of illicit intercourse the property of a citizen is not divested *ipso facto*, it is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage.

The President's instruction of 28th August, 1812, was meant to protect all British merchandise on board an American ship, without any exception on account of British proprietary interest.

THIS was an appeal from the decree of the Circuit Court for the District of Georgia.

The ship Thomas Gibbons sailed from Liverpool for Savannah on the 16th of August, 1812, was captured on the 12th of October following, on the high seas, off Tybee light house, and, the same day, brought into the port of Savannah as prize to the privateer Atas.

The ship and cargo were under the protection of a special license, dated 21st July, 1812, and conceived in the usual terms of the document usually denominated the Sidmouth license, except that, in this instance, the protection was extended to the return voyage back to Liverpool, there to discharge the cargo, and receive freight, if it should be found not to be allowable for the vessel and cargo to enter the ports of the United States.

The clearance from Liverpool, 13th August, 1812, mentioned the ship as being released, in consequence of her license, from an embargo laid on American vessels.

The cargo, shipped at Liverpool by sundry British merchants, was consigned to sundry commercial houses at Savannah, and was claimed by the respective consignees; by some, in their own behalf, and by others, in behalf of their correspondents in the interior.

From the evidence introduced into the cause, it appeared that part of the goods, although ex-

pressed to be on account and risk of the consignees, was shipped without previous orders or authority; that some of them were shipped under general orders (transmitted in time of peace) to ship goods; others, under particular orders given during the operation of the orders in council and the non-intercourse act; such as, to ship "when the trade opened," "at a proper season," "as soon as it was legal to ship to the United States," &c.; and lastly, that some of them were shipped with an understanding that they were to become the property of the citizen consignee upon arriving at the port of destination.

422*] *The commission of the Atas was granted on the 24th of September, 1812, and was accompanied by a copy of the President's instruction to privateers, of the 28th of August, 1812, by which the public and private armed vessels of the United States are directed not to interrupt "any vessels belonging to citizens of "the United States coming from British ports "to the United States laden with British mer- "chandise, in consequence of the alleged repeal "of the British orders in council."

Jones, for the the captors,

Contended that the ship and cargo were enemy property.

I. Constructively so, by the maritime law of nations, according to which law the hostile character is impressed.

1. By being placed, by the enemy's pass or license, *infra præsidium hostis;* and by the employment and course of traffic. (1 Rob. 10, 11, *The Vigilantia.*)

2. By direct trading with the enemy, *flagrante bello.*

II. Actually so, with regard to a great proportion of the cargo, according to the principles of municipal law, as recognized and acted upon by prize courts, in administering the maritime law of nations; according to which,

1. Goods shipped without previous orders or authority, although expressed to be on account and risk of the consignee, continue the property and at the risk of the enemy shipper, until accepted by the citizen consignee.

2. General orders (transmitted in time of peace) to ship goods, are, *ipso facto*, superseded, if war intervene and render the act unlawful as well as dangerous.

3. Particular orders (given during the operation of the orders in council and the non-intercourse act) to ship "when the trade opened," or "at proper seasons," or "as soon as it was **423*]** legal to ship to the United *States," could not authorize a shipment, merely upon the conditional revocation of the orders in council, whilst the American non-intercourse act continued in force; *a fortiori* if war should supervene.

4. The proprietary interest in goods shipped with an understanding that they are to become the property of the citizen consignee, upon arriving at the port of destination, continues in the enemy shipper until arrival and delivery, without regard to the terms in which the consignment is ostensibly made. (2 Rob. 111, *The Packet de Bilboa.*)

That, therefore, goods captured *in itinere*, under either of the foregoing predicaments, were to be treated as the property and at the risk of the shipper, and as partaking of his national character.

The principal question, he said, which would now be agitated was, whether the instruction of the President of the United States to American privateers, of 28th August, 1812, extended to the case now under consideration. He contended that it did not; or if it did, that it could not legally avoid the capture, nor in any manner affect the rights of the captors, *quoad* the prize in question, but could only be enforced (as originally intended) by the exercise of executive discretion and authority over the commission of the privateer. That, according to the decision in the case of *The Sally*, that the prize act operates as a grant from the United States to the captors, the President could not deprive them of their rights under that act. That the power of the President to instruct must be limited by the rights so granted to the captors. That the authority with which he was invested by Congress was only given him to regulate the conduct of our privateersmen, and to prevent abuses; not to limit their rights already vested. That he had no general authority to limit the rights of war, as was clear from the passage of particular acts of Congress investing him with the respective powers of removing British subjects, of giving licenses to depart, &c., which would have been wholly unnecessary had he possessed a general power over these matters. That the position contended for was further supported by the terms employed in the third section of the prize act, in which the owners, &c., of privateers are required to give bond *to the United [***424** States that they will observe "the instructions which shall be given them according to law, for the regulation of their conduct;" also by the letter of the Secretary of State (Mr. Monroe) to Mr. Russell, of August 31st, 1812, written under the eye of the President, in which the secretary says, that it was not in the power of the President to control the privateers, except by an indiscriminate revocation of their commissions. But,

2. That, admitting the power of the President to issue the instruction under consideration, the present case was not embraced thereby. That the property in question, having been shipped after a full knowledge of the war, could not be considered as shipped in consequence of the alleged repeal of the orders in council. That the only time in which the shipments contemplated by the instruction could be made, was that which intervened between the repeal of the orders in council and the knowledge of the declaration of war; after which it was unreasonable to calculate on the safety of property shipped for the United States. That the ship, also, was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy passport issued after the knowledge of the war in England, and was therefore *quasi* enemy property. That, at all events, the property intended to be protected, by the instruction from capture, was American property, and not British, and therefore that, as to the latter, the capture was certainly rightful.

Harper, contra.

It has been said, on the part of the captors, that the President had no authority to issue the instruction of 28th August, either on general

principles or under the prize act. We contend that his authority to issue it may be established on either of these grounds.

1. On general principles. The President, as commander-in-chief of the army and navy of the United States, has, in time of war, the whole public armed force of the nation under his control. The privateers of the United States constitute **425***] a part of the public armed *force. This appears from their commissions, without which they would be pirates. On general principles, therefore, the President was authorized to issue the instruction in question.

2. By the 8th section of the prize act, the President is authorized to establish and order suitable instructions for the better governing and directing the conduct of the privateers of the United States. Now, this "governing and directing" their conduct, we conceive, may be applied as well to the designation of the objects of hostility as to the mode of attack, &c. It is applicable, in our opinion, to their whole conduct.

But it is contended, that the present case is not embraced in the instruction. It is said that the ship did not sail in consequence of the repeal of the orders in council. What, then, we would ask, was the motive for sailing at the particular time this vessel sailed? What could have induced the master to sail after knowledge of the war, but a confidence that the repeal of the orders in council would have put a period to hostilities? It is well known that such a confidence did exist among the merchants in England generally, and that it continued until it was ascertained in that country that the repeal of the orders had not produced the expected effect. The act of Congress of 2d January, 1813, remitting certain fines, forfeitures, &c., has fixed upon the 15th of September as the period when it was known in England that this effect had not been produced. This vessel sailed on the 16th of August preceding. We insist, therefore, that notwithstanding the existence of hostilities was known in England at the time the Thomas Gibbons sailed, yet she sailed in consequence of the repeal of the orders in council.

The expression in Mr. Munroe's letter of 31st August was probably accidental—certainly incidental, and not a particular object of the letter.

The expression "British merchandise," in the instruction of 28th August, was not intended to designate the right of property, but the kind of goods. It was the policy of government to **426***] protect British as well as *American property shipped under the particular circumstances mentioned in the instruction.

Pinkney, on the same side.

The President cannot coerce the privateers of the United States to do what he pleases, but he may restrain them as he thinks proper.

It has been said that the license under which this vessel sailed was issued after knowledge of the war in England. This must be a mistake. It is dated on the 21st of July, 1812, when the war was not known in England; and it is to be presumed that it was issued at the time it bears date. Being issued, therefore, before knowledge of the war, it does not give a hostile character to the vessel.

Harper. The property is vested in the captors only when legally taken, it is vested *sub modo*.

STORY, *J.* That is the rule as laid down in the opinion of the court delivered this morning in the case of *The Sally*. The prize act vests only property lawfully captured.

Jones, in reply.

The captors may be punished, if guilty; but the captured property must vest in them notwithstanding. The instruction applies only to American vessels; but the license, we still contend, gave the vessel in question a hostile character.

Where the instruction speaks of British merchandise, the meaning is, British merchandise belonging to American citizens. This construction is consistent with all the acts of Congress on the subject, especially the act of 2d January, remitting forfeitures, &c. It is consistent also with Mr. Russell's declarations to the British merchants. (See 2d vol. of reports of committees, p. 30.)

Wednesday, March 16th. *Absent*—MARSHALL, *Ch. J.*, and JOHNSON, *J.*

STORY, *J.*, delivered the opinion of the court:

*The ship Thomas Gibbons, laden [***427** with a cargo of British manufactures, on account of British and American merchants, sailed from Liverpool, in Great Britain, on the 16th August, 1812, bound for Savannah, in Georgia, and was captured on the 12th of the ensuing October, on the high seas, off Tybee light-house, by the private armed vessel Atas, Thomas M. Newhall, commander, and, on the same day brought into Savannah as prize of war. The ship sailed from Liverpool, under the protection of a special license, dated the 21st of July 1812, granted by Lord Sidmouth, by order of the privy council, whereby the ship and cargo were protected from British capture, not only on the voyage to the United States, but also on the return voyage to Liverpool, in case the master should not be permitted to land the cargo in the United States; and the master was further allowed, in case of return, to receive his freight, and proceed in ballast to any port not blockaded.

The commission of the Atas was granted on the 24th of September, 1812, accompanied by a copy of the President's instruction of the 28th of August, 1812.

A libel was filed in the District Court of Georgia, upon which regular proceedings were had against the ship, as prize of war. The respondents interposed their claims and the District Attorney also interposed a claim in behalf of the United States. At the hearing, the District Court dismissed the libel of the captors, and upon appeal, the decree was affirmed in the Circuit Court.

The principal question which has been moved at bar is, whether the capture of the ship was lawful; and that depends upon the authority of the President to issue that instruction, and upon the true construction of it, if rightfully issued.

As to the authority of the President, we do not think it necessary to consider how far he would be entitled, in his character of Commander-in-Chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direc-

tion of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable. In the case at
428*] *bar, no decision on the point is necessary, because we are all of opinion that, under the eighth section of the prize act of 1812 (ch. 107), the President had full authority to issue the instruction of the 28th of August. That section provides, that the President shall be authorized "to establish and order suitable instructions for the better governing and directing the conduct" of private armed vessels commissioned under the act, their officers and crews. The language of this provision is very general, and in our opinion it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy.

It has been argued, that privateers acquire by their commissions a general right of capture under the prize acts, which it is not in the President's power to remove or restrain, while the commission is in force; that therefore his right to issue instructions must be construed as subordinate to the general authority derived from the commission; and that, in this view his instructions should extend only to the internal orginization, discipline and conduct of privateers.

We cannot, on mature deliberation, yield assent to this argument. It is very clear that the President has, under the prize act, power to grant, annul and revoke, at his pleasure, the commissions of privateers; and by the act declaring war, he is authorized to issue the commission in such form as he shall deem fit. The right of capture is entirely derived from the law. It is not an absolute, vested right, which cannot be taken away or modified by law. It is a limited right, which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed. The commission, therefore, is to be taken in its general terms, with reference to the laws under which it emanates, and as containing within itself all the qualifications and restrictions which the acts giving it existence have prescribed. In this view, the commission is qualified and restrained by the power of the President to issue instructions. The privateer takes it subject to such power, and contracts to act in obedience to all the instructions which the President may lawfully promulgate.

Public policy, also, would confirm this con-
429*] struction. *It has been the great object of every maritime nation to restrain and regulate the conduct of its privateers. They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies. If a power did not exist to restrain their operations in war, the public faith might be violated, cartels and flags of truce might be disregarded, and endless embarrassments arise in the negotiations with foreign powers. Considerations of this weight and importance are not lightly to be disregarded; and when the language of the act is so broad and comprehensive, we should not feel at liberty to narrow or weaken its force by a construction not pressed by the letter, or the spirit, or the policy of the clause. On the whole, we are all of opinion that the instruction of the President of the the 28th of August, is within the authority delegated to him by the prize act.

But it is argued that, admitting its legal validity, this instruction cannot protect the ship and cargo from capture as prize of war, because the cargo was shipped after a full knowledge of the war, and not "in consequence of the alleged repeal of the British orders in council."

We are of a different opinion. We think that a shipment made, even after a knowledge of the war, may well be deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the United States. Congress have evidently acted upon this principle; and have themselves fixed the time (the 15th of September, 1812), before which, shipments might be reasonably made upon the faith of that presumption. (Act of 2d January, 1813, ch. 149.) We are not inclined to hold a less liberal construction in favor of the acts of individuals proceeding from a confidence in the avowed intentions of the government.

It is further argued, that the ship was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy passport, and therefore was *quasi* enemy property. We cannot *assent to this argument. The ves- [*
430 sels exempted from capture are "vessels belonging to citizens of the United States, coming from British ports to the United States." The ship, in this case, was duly documented as an American, was coming to the United States, and from a British port. How can it be possible to bring a case more perfectly within the terms of the description? The argument proceeds upon the supposition that by the mere act of illicit intercourse, the property of an American citizen becomes divested *ipso facto;* but, in point of law, this is not the operation of the rule. The property is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage. But it has never been supposed that the documentary character of the ship itself, or the character of the owner, was completely changed for every other purpose. It is sufficient, however, in our opinion, that no such distinction as that assumed in the argument is to be found in the instruction itself; and we therefore hold the case within the natural and ordinary import of the language.

It is further argued that, at all events, the property intended to be protected by the instruction from capture was American property, and not British property; and therefore that, as to the latter, the capture was rightful. This is a question of some difficulty; but, on full consideration, a majority of the court are of opinion that the instruction meant to protect all British merchandise on board an American ship, without any exception on account of British proprietary interest. It was supposed that British as well as American merchants might, upon the repeal of the orders in council, be induced to make shipments, upon the faith that such repeal would suspend the further operations of hostili-

ties. The government meant to reserve to themselves the ultimate disposal of sueh property, in order that they might restore or eondemn it, as publie poliey or the natioual interests might require. This eonstruetion is supported aud eonfirmed by the act of Congress, of 13th July, 1813 (ch. 10), which, after relinquishing to eaptors all the right and title of thc United States, to the property of British subjects, captured on the high seas and shipped from British ports sinee the deelaration of war, expressly excepts such property as had been captured in violation **431***] *of the Presideut's instruction of the 28th of August, 1812. In giving this eonstructiou, therefore, we are satisfied that we eonform to the import of the language of the instruction, and do not contravene any poliey avowed by the govcrnment itself.

On the whole, we are of opinion that the decree of the Cireuit Court, dismissing the libel of the captors, ought to be affirmcd, and that the eause should bc remanded to the Cireuit Court for further proeeedings as between the United States and the claimants.

Cited—9 Cranch, 140.

PRINCE *v.* BARTLETT.

In case of insolvency, the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency manifested by some notorious act of the debtor pursuant to law.

ERROR to the Supreme Judieial Court of Massaehusetts, in an aetion of trover in which was involved the coustructiou of the acts of Congress, giving to the United States a right of priority in payment of the debts due by insolvent debtors.

The case was submitted to the eourt without argument, and is fully stated in the opinion which was delivered as follows. by

DUVALL, *J.*:

The material faets upon the record are these:

Ou the 4th of June, 1810, sundry goods, wares and merchandise, the property of Wellman & Ropes, were attached by the deputy of Bailey Bartlett, sheriff of the eounty of Essex, state of Massaehusetts, by virtue of eertain writs of attaehment sued out by several creditors of Wellman & Ropes.

On the 18th day of September, 1810, two several exeeutions issued on judgments recovered by the United States against Wellman & Ropes, at the September term, 1810, of the District Court held at Salem, on their joint and several bond for duties at the custom-house. Thc aetions in whieh these judgments in favor of the United States were rendered, were first eommenced on *the day of August, 1810; [***432** but no attaehment of property was made thereon. On the 19th day of September following, two suits of attachment, in favor of the United States—one against Wellman and one against Ropes—issued in due form of law, direeted to the marshal of the district or his deputy, returnable to the District Court to be held in December theu next ensuing.

Ou the 11th of October, in the same year, the goods, wares and merehandise before mentioned being in eustody of Bartlett, a sheriff, of the county, and in a store hired by him for the purpose, Sprague, one of the appellants, and deputy of Prinee, the marshal, after the refusal of the sheriff to open the store, forcibly broke into it, and seized, attached and conveyed away the property whieh had been attaehed by the sheriff in the manner before stated, by virtue of the executions and writs of attachment in behalf of the United States, and disposed of it iu satisfaetion of the judgments.

Wellman & Ropes continued in business until the aforesaid 4th day of June, and then failed; and then were, and ever sinee havc continued to be, debtors unable to pay their debts. Wellman has continucd at his usual place of abode in Salem ever since his failure, and has not for any whole day confined himself within his house, but has sometimes kept his person within doors, aud had his doors fastenecd, and oeeasionally used other vigilance and caution to avoid any arrest of his person for two or three weeks next following the said 4th day of June, but has never beeu arrested by any officer, or pursued for that purpose. Ropes has always eontinued at large in Salem, and has never confined or eoncealed himself from his ereditors at any time.

An aetion of trover was commenced by Bartlett, the sheriff, for the property by him attached as aforesaid, against Prince and Sprague,

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NOTE.—Mere inability in a debtor of the United States to pay all his debts,or a mere state of insolvency, does not give priority to the United States under the act of March, 1797, § 5, 1 Stat. at L. 512, unless there has been a voluntary assignment of all the debtor's property for the henefit of his creditors, leaving him in a state of legal, or technical, insolvency. U. S. v. Fisher, 2 Cranch, 358; U. S. v. Hooe, 3 Cranch, 73.

The word insolvency in the act, means a legal insolvency. Thclusson v. Smith, 2 Wheat., 396.

If, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyaucc of his cstate to a third person, or has mortgaged it to secure a debt, or if his property has heen seized uuder execution,the property is devested out of the debtor, and cannot he made liable to the United States. Thelusson v. Smith, 2 Wheat., 396; Conrad v. Atl. Ins. Co., 1 Pet., 386, 439; U. S. v. King, Wall. C. C., 313; Mott v. Maris, 2 Wash. C. C., 196; U. S. v. Clark, Paine, 629.

A deed made hy a debtor of the U. S. of *all* his property to trustees for payment of his debts, not including the debt to the U. S., is an act of insolvency, within the act giving priority to debts due the United States. U. S. v. Marshall, of N.C., 2 Brock. Marsh., 488.

Where a firm, heing indebted to the United States, made an assignment of all their effects, for the payment of their debts; *held*, that this was an act of insolvency, under the act giving the U. S. a preference. U. S. v. Shelton, 1 Brock. Marsh., 517.

To give the United States priority the assignment must be of all the debtor's property. A mortgage of part of his property, as indemnity, is valid against the U. S. U. S. v. Hooe, 3 Cranch, 73.

And it is incumhent on the United States, if they claim a priority to establish that the assignment does in fact contain all the debtor's property, where the assignment does not on its face purport to he of all. Conard v. Atl. Ins. Co., 1 Pet., 386; U. S. v. Hunter, 5 Mason, 229.

If, however, a small portiou of his estate should be left out, in order to evade the act, it would he considercd a fraud on the law and void. U. S. v. Langton, 5 Mason, 280; U. S. v. Marshal of N. C., 2 Brock. Marsh., 488; 1 Pet., 386; U. S. v. Del. Ins.Co., 4 Wash. C. C., 418.

who had thus forcibly dispossessed him of it, in the Court of Common Pleas in Essex county, where, upon trial, judgment was rendered in favor of the defendants. An appeal was prayed and granted to the Supreme Judicial Court of the commonwealth of Massachusetts, and at November term, 1811, the cause came on to be tried upon the facts before stated. Upon the **433***] plea of not guilty and issue, *the counsel for Prince and Sprague insisted that the several matters so alleged and proved in evidence on their part was sufficient to maintain the issue on their part, and to bar the plaintiff of his action. This was denied by the counsel for the plaintiff, and the judge who sat on the trial delivered his opinion to the jury, that the several matters produced and proved on the part of the defendants, were not upon the whole case sufficient to maintain the issue on the part of the defendants, and to bar the plaintiff of his action. With this direction the jury found a verdict for the plaintiff, and $10,240.69 damages.

To this opinion of the court an exception was taken, and the proceedings removed by writ of error to this court.

The sole question for the consideration of this court is, whether the priority to which the United States are entitled by law attaches in this case.

This priority is given by the 5th section of the act of the 3d of March, 1797 (ch. 74). It is also given by the 65th section of the collection law in the words following: "And in all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied." In the same section the legislature explain their meaning of insolvency by declaring that it shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.

At present there is no existing bankrupt law in the United States; but in many of the states provision is made by law for the relief of insolvent debtors. In the act of Congress of the 4th of August, 1790, the word "insolvency" only is used. In the acts lately passed on the same subject the words *insolvency* and *bankruptcy* **434***] *are both adopted and appear to be used as synonymous terms.

It is admitted that the property seized by the attachments and executions before stated was insufficient to satisfy the several claims exhibited, and that Wellman & Ropes were unable to pay their debts, but it does not appear that their property was attached as the effects of absconding, concealed or absent debtors; nor does it appear, or is it even alleged, that they or either of them have made a voluntary assignment of their property for the benefit of their creditors; nor is it alleged that either of them has committed an act of legal bankruptcy. It appears to be the true construction of the act to confine it to the cases of insolvency specified by the legislature. Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law—not a vague allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors, it would be difficult to ascertain.

The property in question being in the possession of the sheriff by virtue of legal process, before the issuing the writ on behalf of the United States, was bound to satisfy the debts for which it was taken; and the rights of the individual creditors thus acquired could not be defeated by the process on the part of the United States subsequently issued.

The court is of opinion that priority does not attach in this case, and that there is no error in the judgment of the Supreme Judicial Court of the commonwealth of Massachusetts.

Judgment affirmed.

Cited—4 Wheat. 120 (n); 1 Pet. 439; 12 Pet. 134, 136; 3 Story, 81; 1 Pet. C. C. 198; 3 Sumn. 352.

THE ST. LAWRENCE, WEBB, MASTER.

A vessel sailing to an enemy's country after knowledge of the war, and taken bringing from that country a cargo consisting chiefly of enemy goods, is liable to confiscation as prize of war. Suppression of papers, where it appears to have been intentional and fraudulent, and attended with other suspicious circumstances, is good cause for refusing further proof. But where the suppression appears to be owing to accident or mistake, and no other suspicious circumstances appear in the case, further proof may be allowed.

THIS was an appeal from the sentence of the United States Circuit Court for the District of New Hampshire.

*The material facts of the case were [***435** as follow:

The ship St. Lawrence, Silas Webb, master, was captured on the 20th of June, 1813, by the private armed vessel America, and, with her cargo, libeled as prize, in the District Court of New Hampshire. On the proceedings which were had there, it appeared that the St. Lawrence, owned by Robert Dickey, of New York, and Hugh Thompson, of Baltimore, arrived at Liverpool from Sweden in April, 1813, with a cargo of iron and deals. In the month of May, 1813, the agent of Dickey & Thompson entered into a contract for the sale of the St. Lawrence, with the house of Ogden, Richards & Selden, of Liverpool, the contract to be ratified or disaffirmed by Dickey & Thompson, and the bill of sale to be executed by them, in case of affirmance, to Andrew Ogden and James Heard, of New York, or either of them. On the 5th of May, 1813, a license was granted by the privy council of Great Britain to Thomas White, of London, and others, permitting them to export, direct to the United States, an enumerated cargo in the St. Lawrence, provided she cleared out before the last day of that month. On the 30th of May, 1813, she sailed from Liverpool for the United States, with the cargo specified in the license. Mr. Alexander M'Gregor and his family were passengers on board.

Upon the return of the monition in the District Court, Andrew Ogden interposed a claim, in behalf of himself and M'Gregor, to the ship and

part of the cargo. He also claimed another part of the cargo as his sole property. He likewise interposed a claim in favor of Selah Strong & Son; of John Whitten; of the firm of Howard, Phelps & Co.; of Abraham & George Smedes; of Peter and Ebenezer Irving & Co.; of Henry Van Wart; of Irving & Smith; of Jabez Harrison; of Hugh R. Toler; and of Thomas C. Butler. This claim was an affidavit of Mr. Ogden, in which he swore that he had not a full knowledge of the concerns of all the persons for whom he claimed, but verily and fully believed that many of the said goods on board the St. Lawrence were sent in payment of debts due, previous to the war, to several of the persons for whom he claimed. This claim was filed on the 17th of August, 1813.

436*] *William Penniman, of Baltimore, also interposed a claim for five chests of merchandise, which he swore were purchased for him by John Barnet, of London, prior to the war, with funds which he had in England eighteen months before the declaration of war, and in pursuance of orders given by him nine months previous to that event. He also swore that he had, at Baltimore, the original invoice of the purchase of said goods, and other documentary evidence to prove the aforesaid fact.

There was also a claim of the master for two cases and five trusses of merchandise, and six bolts of Russia duck.

In none of these claims was there a designation of the marks or numbers of the casks, bales, or cases which belonged to the different parties for whom the property was claimed.

The master, in answer to the 12th standing interrogatory, said, that for the names of the respective laders he referred to the bills of lading. That the goods were mostly, if not all, consigned "to order." That the goods were to be delivered to order, at such place as the owners or consignees should appoint; but that he did not know what interest any of the consignees or the shipper might have in the goods.

In answer to the 16th interrogatory, the captain stated that his letter bags, two in number, had been taken possession of, and sent to the custom-house; and that, as to any letter he had directed to the consignees or owners, he had done what he had a right to do; and that all his other papers had been forcibly taken away.

By Mr. M'Gregor's answer to the 9th interrogatory, it appeared that he was interested one-half part in the ship; that his sole object in becoming interested in the ship was that of returning to the United States; that he also owned one-half of the copperas and of the earthenware on board, shipped by Ogden, Richards & Selden, and, as he believed, one-half of the coal, but that, as to the last article, he was not positive, no invoices of said goods having been delivered to the deponent.

437*] *In relation to the vessel, Mr. M'Gregor deposed, that the only document relative to the sale of the ship, he believed to be a letter to the former owners from their agent, requesting them to make a bill of sale transferring said ship to Andrew Ogden and James Heard, or either of them, which he gave to Andrew Ogden.

It appeared further, from the examination of Mr. M'Gregor, that he was born in Scotland, was naturalized in the United States in 1795, had lived, the last seven years, in Liverpool, and was returning in the St. Lawrence, with his family, to the United States.

The goods claimed by Ogden as his sole property were shipped by the house of Ogden, Richards & Selden. The two gentlemen last named resided at Liverpool.

The District Court condemned the St. Lawrence and all the cargo, except the parts claimed by M'Gregor and the master. Both parties appealed from this decree to the Circuit Court, where the ship and whole cargo were condemned. From this decree the claimants appealed to the Supreme Court, where the cause was argued by *Irving* and *Webster* for the claimants, and *Pitman* for the captors.

Irving, for all the claimants except M'Gregor and Penniman.

It is contended, on the part of the claimants generally,

1. That the ship St. Lawrence, being an American vessel, owned and navigated wholly by citizens of the United States, and being on her return to the United States, with a cargo owned wholly by American citizens, could not legally be subject to capture by American cruisers.

2. That the character of an American citizen, whether native or naturalized, is not rendered hostile by his residence in a hostile country, if, within a reasonable time after the declaration of war, he withdraws with his funds from the hostile country and returns to his own; and that he has a right so to withdraw.

*3. That a citizen of the United [**438 States, not resident in the enemy country, has also a right, after the declaration of war, to withdraw his funds, within a reasonable time, from that country.

4. That if the courts below were not satisfied that the property claimed was, *bona fide*, property of American citizens, fairly purchased and shipped, the said courts ought to have let the claimants into further proof fully to establish that fact; and, as they refused so to do, that the claimants are entitled, in this court, to the same privilege.

The argument will be confined to this last point.

It will probably be urged, on the part of the captors, that the secreting of papers by the master is good ground for refusing us further proof. We contend, that as the master was only the agent of the claimants to navigate the ship, his act is not sufficient to justify the court in such refusal. On this point the court is referred to the following authorities: 1 Rob., 100, 119, *The Concordia;* Id., 109, 129, *The Hoop*, De Vries, master; Id., 86, 102, *The Bernon;* 2 Rob., 296, 362, *The Polly;* Chitty's Law of Nations, App., 303; 2 Rob., 87, 104, *The Rising Sun*. The last case goes also to show that a claim may be made by an agent; and that, too, without clearly distinguishing the rights of each particular claimant. (See also, Doug., 614, *Le Caux* v. *Eden*).

Webster, for M'Gregor and Penniman—several claimants.

1. M'Gregor claims half the ship and part of the cargo.

We contend that a distinction is to be taken between an American citizen, domiciled in England at the breaking out of the war, withdraw-

ing his funds, and an American citizen who goes to England, after the declaration of war, for the same purpose. That the former, whether a native or naturalized citizen, has a right (and perhaps it is his duty) to return to the United States with his effects. If he has no such right, why should the law of nations have provided a reasonable time for removing in case of war? This rule of the law of nations has **439*]** *been founded upon the necessity of the case, and upon the hardship which would attend the want of such a rule. A citizen of one country may lawfully go to any other country, in time of peace, and take up his residence there; and it would be very hard if he must suffer by the sudden and unexpected breaking out of a war—an event over which he had no control. A neutral would be permitted to withdraw his funds in such a case; and if we should allow the privilege to neutrals, why should we deny it to our own citizens? (1 Rob., 1, *The Vigilantia;* 1 Bos. & Pul., 355, *Bell* v. *Gilson.*)

The case of Escott, cited in *The Hoop* (1 Rob., 165, 196), may perhaps be thought to make against our claim. But the cases are not alike. In that case, Escott sent for his property; here, M'Gregor came with his.

A character gained by residence is lost by non-residence. When M'Gregor ceased to reside in England, his character, if hostile before, no longer continued hostile. That it was not his intention to continue his residence in England, is clearly evidenced by his actual return to the United States with his family.

With regard to his half of the ship, we contend that if he had a right to return, he had a right to use the means necessary for that purpose—he had a right to purchase a ship for the conveyance of himself and his family. So, if it was lawful for him to withdraw his funds, he might lawfully invest those funds in merchandise, if he could not otherwise withdraw them. (4 Rob., 161, 195, *The Madonna delle Gracie;* 3 Rob., 17, 12, *The Indian Chief;* 5 Rob., 248, *The President;* 5 Rob., 84, 90, *The Ocean;* 5 Rob., 60, *The Diana.*)

2. As to Penniman's claim, we shall, at present, merely ask the court to allow us further proof.

Pitman, contra, contended,

1. That there was no legal evidence that the cargo belonged to the claimants, as claimed.

2. That from the origin and character of the voyage, and suppression of papers, concealed enemy interests were to be presumed; that, **440*]** therefore, all right to further *proof was forfeited, and that condemnation of the whole, as enemy's property, must ensue.

3. That the ship, at the time of capture, belonged to Dickey and Thompson, and was liable to condemnation on the ground of having gone to Liverpool in April, 1813, with a cargo of iron and deals, as well as from the circumstances of the voyage upon which she was captured.

4. That the ship and cargo, whether belonging to citizens or enemies, being taken in trade with the enemy, were clothed with a hostile character, and therefore liable to condemnation.

Some other points were also touched upon in the course of the argument, viz.:

The want of proper claimants, of definite claims, and the requisite affidavits to support them.

The connection of Ogden with a house of trade in the enemy country; the presumption that the partnership was, in fact, interested in what he claimed as his sole property; and that he must be considered as a British merchant, in regard to those transactions originating with his house in Liverpool.

The national character of M'Gregor, which presents itself in the case of the *Venus.*

The presumption that Van Wart resides in England, the claim being by Ogden for Irving & Smith, of New York, his consignees; and,

The effect of the license.

Tuesday, March 15th. The case was submitted without further argument.

Wednesday, March 16th. *Absent*—MARSHALL, *Ch. J.*

LIVINGSTON, *J.*, after stating the facts of the case, delivered the opinion of the court as follows:

*From the manner in which the ap- [***441** pellants have argued this cause, it does not appear that they are very sanguine in their expectations of our reversing the decree of the Circuit Court, on the evidence on which that court and the District Court proceeded; but that their chief hope is derived from the further proof which they have it in their own power to produce, provided an opportunity be afforded them for that purpose. Except as to the property claimed by Mr. Penniman and Mr. M'Gregor, this court does not perceive how the Circuit Court could have done otherwise, upon the proof before it, than confiscate the cargo of the St. Lawrence as prize of war. Without meaning to decide, at present, on the right of an American citizen having funds in England, to withdraw them after a declaration of war, or of the latitude which he may be allowed in the exercise of such a right, if it exists, we think the evidence would have justified the court in considering this property as belonging to enemies of the United States.

The St. Lawrence had gone to England after the war was known, and had sailed from a British port, nearly one year after war had been declared; she was loaded in the country of the enemy, and by persons carrying on trade there; she was furnished with a British license, which extended both to British and American property; and the bills of lading, not being in a very common form, were well calculated to excite suspicion. But these circumstances, strong as they are, might, if everything had been fair, have been so explained as to have convinced the court that the property was truly American. Was this done, or even attempted? If we look at the conduct of the master and the claimants, we find them both acting in a way which left the court no other safe conclusion but that the cargo of the St. Lawrence was enemy property. The captain, instead of delivering to the captors, or bringing into court the letters to the consignees, which, no doubt, covered invoices and bills of lading, lets us know, in a way not to be misunderstood, that he had delivered or sent them to the parties to whom they were addressed. Taking his examination with the usual course of business, which

is to accompany every shipment with a letter, no doubt can remain that such letters were not only on board, but that they have been regu-
442*] larly received by the respective *consignees; for it is not pretended by the master that they were taken from him by the captors. Here, then, is not only a subduction of very important papers by the master, but an acquiescence in such conduct, on the part of the consignees, and a continued suppression of the same papers, to this day. The only proof, then, which the court had of the interest of the claimants, except of Mr. Penniman's, the master's, and Mr. McGregor's, is in the claim of Mr. Ogden, who states that he is not acquainted with their concerns, but believes they had an interest in the cargo; without, however, attempting to designate the packages belonging to either of them. The court below, therefore, might fairly consider the claimants as having not only failed in making out a legal title to the property, but as concealing papers which would have shown a title elsewhere.

But if there was defect of proof below, it is thought the claimants are entitled to time for further proof; and that, if this be allowed, they will be able to show that the property in question was purchased with American funds which were in England previous to the war, and that the claimants were the true and *bona fide* owners thereof. It is certainly not a matter of course, in this court, to make an order for further proof. When the parties are fully apprized of the nature of the proof which their case requires, and have it in their power to produce it, an appellate court should not readily listen to such an application; but when it appears that the parties who ask this indulgence have most pertinaciously withheld from the court letters and other documentary testimony, which must be supposed, in this particular case, to have been in their possession, they come with a very ill grace to ask for any further time to make out their title. But if we examine the affidavits which have been made to obtain further time, we shall find them all silent as to the papers which they must have received by the St. Lawrence; for in not one of them is a letter of that kind or an invoice mentioned; nor do they deny that such letters or invoices were received by them. Under such circumstances, this court thinks that it cannot, consistently with the circumspection with which such applications ought always to be received, allow the appellants time for further proof. The master's adventure, it is said, has been given up.

443*] *Of Mr. Penniman's claim the court thinks more favorably. In the claim which he filed personally, he not only swears that the property belongs to him, but states very particularly how and when it was purchased. He states, further, that the original invoice and other documentary evidence were at Baltimore; and in the affidavit made by Mr. Campbell, during the present term, there is such a full and distinct history given of this whole transaction, founded upon original letters and bills of exchange, that it is impossible to harbor one moment's doubt that the five chests of merchandise claimed by Mr. Penniman did, at the time of shipment, and long before, belong to him. To this affidavit is also annexed the original letter and invoice which he received by the St. Lawrence, which must dissipate every doubt on the question, if any had previously existed.

Where so strong a case is made out, the court is willing to impute to accident or mistake the non-production of these papers below. Perhaps Mr. Penniman thought he did sufficient in stating they were in his possession. Certain it is, he could have no motive for suppressing papers which would have established so conclusively his title to the merchandise which he claimed. The court, therefore, allows him until next term to make proof, by affidavit and the production of documents, of his right to the property claimed, at the time of its shipment at Liverpool; and the same indulgence is allowed to the captors.

In regard to the claim of M'Gregor to a part of the cargo, there is also some difference between his case and that of many others of the claimants. He swears positively to his interest, but that no invoice was delivered to him by the shippers, Ogden, Richards & Seldon. Ogden, also, swears to the interest of Mr. M'Gregor. Perhaps this testimony is sufficient to satisfy a court, as it did satisfy the District Court, that the property really belonged to Mr. McGregor. But if that be the case, other questions will arise of too much importance to be decided on the last day of the term, and when the court is not full. Whether an American citizen has a right to withdraw his funds form the country of a belligerent, after a war; or if he have, whether he have a right to charter a vessel for that purpose; and if he may go thus far, whether he may bring British *goods, on freight, to [*444 this country, without affecting thereby the safety of his own goods; are questions which the court does not now decide, and will therefore suspend, at present, giving any final opinion on the claim of Mr. M'Gregor to a part of the cargo; who, in the meantime, is also at liberty to make further proof on the same points with Mr. Penniman; the captors having the same right.

It may be well doubted whether Mr. Ogden and Mr. M'Gregor have any title to the St. Lawrence; but whether she belong to them or to Messrs. Dickey & Thompson, her fate seems necessarily involved in the decision of the *Rapid*, which was made this term. She went to England since the war; and is taken bringing a cargo from that country. If the whole of the cargo had belonged to Mr. M'Gregor, or any other American returning with his property to the United States, the court means not to say whether it would or would not have been cause of forfeiture; but when we find but a small portion of the cargo in that predicament, there can be no escape for her. The St. Lawrence was certainly guilty of trading with the enemy; and, being taken on her way from one of his ports to the United States, she is liable, on that ground, to be confiscated as prize of war, to whomever she might belong at the time.

Upon the whole, the sentence of the Circuit Court is affirmed in all its parts, with costs; except so far as it condemned those portions of the cargo which were claimed by Mr. Penniman and Mr. M'Gregor, respecting which this court will advise until the next term.

Aff'g—S. C. 1 Gall., 467; S. C. 9 Cranch, 120.

THE HIRAM, BARKER, MASTER.

Sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to the condemnation as prize of war.

Sailing with a cargo of provisions to the port of a neutral, who is the ally of our enemy in his war with another power, is such a furtherance of the views of our enemy.

THIS was a case of capture, as prize, by the private armed brig Thorn, duly commissioned by the President of the United States, and commanded by Asa Hooper, Esq.

445*] *The Hiram, owned by Samuel G. Griffith, an American citizen, sailed from Baltimore on or about the 24th of September, 1812, with a cargo of flour and bread, on a voyage to Lisbon. She was captured on the 15th of October following, and sent into Marblehead, in the District of Massachusetts, for adjudication. She was libeled in the District Court for the said district, by the captors. The vessel was claimed by Barker, the master, in behalf of Samuel G. Griffith; and the cargo by the supercargo, in behalf of said Griffith and various other shippers, American merchants at Baltimore.

Among the papers found on board the Hiram, at the time of her capture, were certain papers commonly called a British license or protection, being a certified copy of a letter from Admiral Sawyer to Andrew Allen, Esq., late British Consul at Boston, and an additional letter of safe conduct from Mr. Allen. It appeared from the evidence that this license was purchased from a citizen of the United States, and that a part of it was not filled up at the time of the purchase; and that such licenses were a common article of sale in Baltimore and other places.

There was also found on board, the owner's letter of instructions, in which the supercargo was directed to remit the proceeds of the cargo in bills of exchange or government bills to the shipper's correspondents in Liverpool; and moreover to sell the vessel at Lisbon, if an advantageous sale could be made, and remit the proceeds to England.

It appeared from the evidence in the cause that such remittances in bills of exchange were common among merchants.

The captors claimed condemnation of the vessel and cargo,

1. Because of the British protection or license.

2. Because the remittances were directed to be made in England in bills of exchange.

The District and Circuit Courts both decided **446***] that *neither the vessel nor cargo were liable to condemnation; but allowed the captors their expenses. From the decree of the Circuit Court both parties appealed.

Swann, for claimants.

The opinions delivered in the cases of *The Aurora* and *The Julia* may, perhaps, upon first view, be considered as deciding the present case; but upon a closer examination, it will be found that the facts in this case differ materially from those which appeared in the two former.

In the first place, in the case of *The Aurora*, there was an intent to supply the enemy—there was an intent to trade with the enemy; there was a direct violation of the act of Congress of 6th July, 1812; but here, there was no such violation. The license, in this case, was merely to trade with the neutral ports of Spain and Portugal. The present case differs from that of *The Julia*, inasmuch as the claim here is for the cargo only, and the license is for the vessel; whereas there, the license extended as well to the cargo as the vessel.

But these papers do not, in fact, import a license; they only intimate an intended forbearance, on the part of Great Britain, to molest a lawful trade to Spain and Portugal. Here was no sailing under the protection of Great Britain.

Again, this license, as it is called, was purchased as an article of commerce from a private individual; not from Admiral Sawyer nor from Mr. Allen; it is only a copy of Admiral Sawyer's letter certified by Allen. The obtaining such a copy of the letter was not unlawful.

Besides, there is no evidence that Admiral Sawyer ever gave the directions mentioned in his letter to the commanders of the squadron under his command, not to molest American vessels laden and bound as therein described. Indeed, his power to give such instructions does not appear; and if further proof be allowed, we can prove that licenses of this description were, in fact, disregarded in other cases.

Dexter*, contra. [*447**

In answer to the argument that the license in this case related to the vessel only, while the claim is for the cargo alone, it may be observed that the owners of the cargo were the owners of the license, which ought therefore to be considered as extending to the cargo as well as to the vessel. The license was undoubtedly intended as a protection. The voyage was clearly undertaken in furtherance of the views of the British government, as expressed in Admiral Sawyer's letter annexed to the pass; and I understand the ground of the decision in the case of *The Aurora* to be, that she sailed under the protection and in furtherance of the views of the enemy.

But if the court should not consider the sailing under the license sufficient cause of condemnation, we contend that this was also a case of indirect trade with the enemy; inasmuch as the proceeds of the cargo were directed by the owner to be remitted from Lisbon to Liverpool in bills of exchange.

Swann, in reply.

Buying a bill of exchange on England is not trading with the enemy. A man may, in an enemy country, purchase a ship from a neutral. (4 Rob., 232, 283, *The Countess of Lauderdale.*) Sailing under an enemy's pass, without trading with the enemy, is no cause of condemation.

There was not, in this case, such a subserviency to the views of the enemy, as ought to subject the property in question to the sentence prayed for by the captors. It is certainly lawful for the enemy to relax the rights of war; he may lawfully declare that he will suffer certain vessels to pass; and we conceive that if those vessels sail under the faith of such a declaration, it is no cause of condemnation. The enemy might have declared that he would not capture any vessel navigated wholly by Boston

seamen; but surely our government would not condemn a vessel for sailing under the faith of such a declaration.

448*] *Wednesday, March 16th. *Absent*—MARSHALL, *Ch. J.*

WASHINGTON, *J.*, delivered the opinion of the court:

This vessel was the property of Samuel G. Griffith, an American citizeu. On or about the 24 of September, 1812, she sailed, with a cargo of flour and bread, from Baltimore to Lisbon; aud on her voyage thither, was captured, on the 15th of October following, by the privateer brig Thorn, and brought into the District of Massachusetts, where she and her cargo were libeled as being enemics' property.

The brig was claimed by the master, in behalf of Griffith, and the cargo by the supercargo, as belonging to the said Griffith, and other shippers, being American merchants of Baltimore. Among the papers found on board of this vessel at the time of the capture, was a letter from Admiral Sawyer, dated the 5th of August 1812, addressed to Andrew Allen, Jun., as British Consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, which states that, being aware of the importance of insuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, he should give directions to the commanders of His Majesty's squadron under his command, not to molest American vessels unarmed and so laden, *bona fide* bound to Portuguese or Spanish ports, whose papers should be accompanied with a certified copy of that letter under the consular seal of the said Allen; also a letter from the said Allen, dated 15th September, 1812, addressed to all the officers of His Majesty's ships of war, or privateers belonging to subjects of His Majesty, recitiug that it is of vital importance to continue a full and regular supply of flour and other dry provisions to the ports of Spain and Portugal, or their colonies, and that, in consequence thereof, it has been thought expedieut by His Majesty's goverument that every degree of protection and encouragement should be given to American vessels so laden, and bound to the ports of Spain and Portugal or their colonies, and that, in furtherance of these views of His Majesty's government, Admiral Sawyer had directed to him a letter dated the 5th of August, 1812 (a copy of which is annexed), with instructions to furnish American vessels so laden and destined,

449*] *with a copy of his letter certified under his, the said Allen's, consular seal, which documents are intended to serve as a perfect safeguard and protection to such vessel iu the prosecution of her voyage; and that, in compliance with such instructions, he has granted to the American brig Hiram, whereof John B. Barker is master, now lyiug in the port of Baltimore, and laden with flour and bread, bound *bona fide* to Lisbon, a copy of the said Admiral Sawyer's letter certified under his consular seal, requesting all officers of His Majesty's ships of war, or of private armed vessels belonging to subjects of His Majesty, not to offer any molestation to the said vessel, but, on the contrary, to grant her all proper assistance and protection on her passage to Lisbon, and on her return from thence to her port of departure, laden with salt or in ballast only.

Under an order calling upon the different claimants to give further proof relative to the British license found on board the brig, when aud where it was obtained, of whom, and by whom, and on what terms, and, generally, relative to all facts aud circumstances concerning the procurement of the same, William Hartshorn made an affidavit stating that he purchased for Mr Griffith, the owner of the vessel, in September, 1812, from John R. Waddy, of Virginia, but then in Baltimore, a citizen of the United States, a license to protect a vessel laden with provisious aud bound to Lisbon, from capture by British cruisers, for which he was to pay one dollar per barrel for what the vessel would carry, payable $500 in cash, and the balance on the safe arrival of the vessel at Lisbon; that the said license was in blank, for inserting the names of any vessel aud master, and that the blanks in the said license were filled up in his presence. This witness, as well as others, states that these licenses form an article of traffic in market, as much so as flour.

The vessel and cargo were acquitted in the District Court, and a *pro forma* decree of affirmance made in the Circuit Court; from which decree an appeal to this court was taken.

In the case of *The Julia*, decided at this court, it was laid down in general terms, "that the sailing on a voyage under the license and passport of protection of the *enemy, in [***450** furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war;" and, as explanatory of the general reasons for that opinion, a reference was made to the opiuion of the learned judge who decided that case in the Circuit Court.

It is contended by the counsel for the claimants, that the facts in this case differ so materially from those which appear in the case of *The Julia*, that the principles of law which ruled that case are inapplicable to this, and, consequently, ought not to govern the decision of the court upon it.

There certainly are some differences in the two cases; and these were considered sufficiently strong by the district judge who acquitted this vessel and cargo to condemn the Julia and her cargo.

The important circumstance which appears to have influenced the decision of the district judge in that case, was, that the license contemplated the means of insuring a constant supply of dry provisions to the allied armies in Spain and Portugal, and, consequently, an unlawful conuection with the enemy to supply his armies, and a subserviency to the interests of that enemy. In this case, no such views are expressed in the license of Admiral Sawyer; yet the court must be wilfully blind not to see that this was, in reality, the object of Admiral Sawyer and of Mr. Allen, and that it must have been so understood by those who sailed under this license.

In both cases, the allied armies were to be supplied, not by sales made directly to their agents (for this is uot required by either), but by carrying supplies to the Peninsula, which would indirectly come to their use. The license,

as well as the letter of Allen accompanying it, points out the great importance of such supplies being sent to Spain and Portugal; and the latter adds, that, in furtherance of these views of His Majesty's government, he had been directed by Admiral Sawyer to furnish a copy of his letter to vessels so laden and destined. Can it be said that an American citizen, sailing under the protection of papers professing such to be the views of the British government, does not act in such a manner as to subserve the **451***] *views and interests of the enemy? Upon the whole, the court is of opinion that there is no substantial difference between this case and that of *The Julia;* and that this is fully within the principle laid down by this court in deciding that case, and the reasoning to which it refers.

It was stated, on the behalf of the claimants of the cargo, that they ought not to be affected by the illegal act of the owner of the vessel in sailing under the protection of this license. It is a sufficient answer to this argument to observe that, in this case, the court must presume that the license was known to the owners of the cargo, if it was not the joint property of all. It is inconceivable that the owner of the vessel should expend about $1,600 for the protection of a cargo in which it appears he was not largely concerned, without communicating such an advantage to his shippers, and even requiring some reimbursement, either by demanding higher freight or compensation in some other way. But what is conclusive on this point is, that an order for further proof in relation to this license was made, and yet no affidavit or proof is offered by any of the owners, denying a knowledge of these documents being on board.

The decree must be reversed, and the vessel and cargo condemned to the captors as prize of war.

S. C. 1 Wheat. 440.
Cited—2 Wheat. 145; 3 Wheat. 207, (n); 2 Gall. 235, (n).

THE JOSEPH, SARGEANT, MASTER.

Case of hostile trade. Not excused by the necessity of obtaining funds to pay the expenses of the ship; nor by the opinion of an American minister, expressed to the master, that by undertaking the voyage he would violate no law of the United States.

If an American vessel be captured on a circuitous voyage to the United States, in a former part of which voyage she has been guilty of conduct subjecting her to confiscation, though at the time of capture she is committing no illegal act, she must be condemned.

Where the termini of a voyage are already fixed, the continuity of such voyage cannot be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade.

A capture as prize of war may lawfully be made within the territorial limits of the United States, at any place below low water-mark.

THIS was the case of a vessel, the Joseph, owned by American citizens, captured by the privateer Fame, on the 16th of July, 1813. The Joseph sailed from Boston with a cargo of freight, on or about the 6th of April, 1812, on a voyage to Liverpool and the north of Europe, and thence directly or indirectly to the United States. She arrived in Liverpool, and there discharged her cargo; and, on the 30th of June following, with another cargo, of mahogany, taken in at Hull, sailed for St. Petersburg under the protection of a British license, granted on the 8th of June, 1812, authorizing the *export of mahogany to St. Petersburg, [***452** and the importation of a return cargo to England. The brig arrived at St. Petersburg, and there received news of the war between the United States and Great Britain. About the 20th of October, 1812, she sailed from St. Petersburg for London, with a cargo of hemp and iron on freight, consigned to merchants in London; and, having wintered in Sweden, in the spring of 1813 she sailed, under convoy instructions from the British ship Ranger, for London, where she arrived and delivered her cargo. About the 29th of May she sailed for the United States, in ballast, under a British license; and was captured on the 16th of July, at no great distance from Boston light-house. She was sent into the port of Salem for adjudication, as prize.

In the District Court of Massachusetts the claim of the owners, Messrs. Dall & Vose, was rejected, and the property condemned to the United States. From this decree the captors and claimants appealed.

In the Circuit Court the property was condemned to the captors. From this decree the claimants and the United States appealed.

It was contended, on the part of the claimants,

1. That it was lawful, in June, 1812 (before the war), to take the license to go from England to the north of Europe, and to bring back a cargo to England.

2. That the taking a freight from the north of Europe to England was from necessity to obtain funds to pay the debts of the ship, the master not having been able to sell the cargo at St. Petersburg for any price.

3. That the opinion of the minister of the United States at St. Petersburg, who told the captain of the Joseph that there was no law against his returning to England under the protection of his license, and who also sent dispatches by the Joseph to the government of the United States, though he knew of the intention to return to England and thence to the United States, was, in effect, a license, especially as to the claim of the United States.

*4. That there was no trade with the [***453** enemy, but with neutrals only; the freight having been taken on neutral account, in a neutral territory, and delivered to a neutral house in Great Britain.

5. That if any offense was committed, it was completed upon the delivery of the freight in Great Britain; and that therefore the vessel was not liable to capture or seizure, on that account, in a subsequent voyage from Great Britain to the United States.

6. That if she was liable to seizure for having adopted the character of an enemy vessel by any act contrary to the allegiance of the owners, yet she was not to be condemned as prize to the captors, as she was voluntarily returning to the United States and her port of discharge, and had actually arrived within the District of Massachusetts. That the capture, therefore, was not the occasion of her being brought in; so that if she was liable at all, even as enemies' prop-

erty, the condemnation must be to the United States as a droit of admiralty. But,

7. That the vessel was not liable to be condemned to the United States, because the declaration of war was, in effect, an invitation, if not a command, to the citizens of the United States, abroad at the time, to return home, and the law allowed a reasonable time and way to effect that return.

Pitman, for the captors, contended,

1. That the facts appearing in the case proved a trading with the enemy, which subjected the vessel to confiscation as prize.

2. That the vessel was not captured within the territorial jurisdiction of the United States; that this appeared from the preparatory examinations of the master and the mate, the first of whom stated "that he was captured in sight of Half-way-rock, off Salem harbor," which was a marine league from the shore; and the latter, "that the vessel was captured about two leagues east from the Boston light-house."

454*] *3. That, though the fact be admitted as contended for by the claimants, yet the captors were authorized by their commission to capture within the territorial jurisdiction of the United States on the high seas, which were stated in their instructions as extending to low water-mark.

Wednesday, March 16th. *Absent*—MARSHALL, *Ch. J.*

WASHINGTON, *J.*, after stating the facts of the case, delivered the following opinion of the court:

After the decision of this court in the cases of *The Rapid* and of the ship *Alexander*, it is not to be contended that the sailing with a cargo, on freight, from St. Petersburg to London, after a full knowledge of the war, did not amount to such a trading with the enemy as to have subjected both the vessel and cargo to condemnation as prize of war, had she been captured whilst proceeding on that voyage. The alleged necessity of undertaking that voyage to enable the master out of the freight to discharge his expenses at St. Petersburg, countenanced, as the master declares, by the opinion of our minister at St. Petersburg, that by undertaking such a voyage he would violate no law of the United States, although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision. (See *The Hoop*, 1 Rob; *Potts & Bell*, 8 T. Rep.)

The counsel for the claimants seemed to be aware of the insufficiency of this ground, and applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged, at London, and being captured on her return home and in ballast. It is not denied that if she be taken during the same voyage in which the offense was committed, though after it was committed, she is considered as being still *in delicto*, and subject to confiscation; but it is contended that her voyage ended at London; and that she was, on her return, embarked on a new voyage. This position is directly contrary to the facts in the case. The voyage was an entire one from the United States to England, thence to the north of *Europe, and thence [***455** directly or indirectly to the United States. Even admit that the outward and homeward voyages could be separated, so as to render them two distinct voyages, which is not conceded, still it cannot be denied that the termini of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage cannot be broken by voluntary deviation of the master for the purpose of carrying on an intermediate trade. That the going from St. Petersburg to London was not undertaken as a new voyage, is admitted by the claimants, who allege that it was undertaken as subsidiary to their voyage to the United States. It was, in short, a voyage from St. Petersburg to the United States by the way of London; and, consequently, the vessel, during any part of that voyage, if seized for conduct subjecting her to confiscation as prize of war, was seized *in delicto*.

Another objection relied upon by the claimants is, that this vessel was captured within the territorial limits of the United States. The fact upon which this objection is raised is not clearly established one way or the other. But admit it to be as contended for by the claimants, the law is nevertheless against them. The commission granted to privateers authorizes them to seize and take any British vessels found within the jurisdictional limits of the United States, or elsewere on the high seas, and to bring them in for adjudication; and also to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable thereto according to the law of nations and the rights of the United States, as prize of war. The first instructions given by the President to the private armed vessels of the United States, define the high seas, referred to in the commission, to extend to low water-mark, with the exception of the space of one league, or three miles, from the shore of countries at peace with Great Britain or the United States. The general expressions of the commission, explained by these instructions, and containing no exception but in relation to friendly powers, prove incontestibly that all captures as prize of war may lawfully be made within the territorial limits of the United States, at any place below low water-mark.

The court is also of opinion that there is no weight *in another objection made by [***456** the claimants, that this vessel was on her way and near to an American port at the time she was captured. The right of the captor to the property which he may seize as prize of war is derived under his commission, which is general and unqualified as to place and circumstances, and not from any peculiar merit which he may claim in any particular case. It is not for him to know whether a vessel which has offended against the law of nations, and is apparently destined to a port of the United States, will certainly enter the port; and certainly he is bound by no law to forego the opportunity which chance or his own vigilance may have presented to him to acquire property which, under his commission, he is authorized to appropriate to himself.

Decree affirmed.

Aff'g—S. C. 1 Gall. 545.
Cited—8 Cranch, 460; 18 How. 114.

THE GROTIUS, SHEAFE, MASTER.

Question as to the validity of capture; one man only having been put on board; the ship's papers and the navigation of the vessel being left to the master. Further proof ordered.

APPEAL from the sentence of the Circuit Court for the District of Massachusetts.

The Grotius, an American ship owned by Thomas Sheafe and Charles Coffin, the claimants, sailed from Portsmouth, New Hampshire, March 2d, 1812, on a voyage, according to the shipping paper, from Portsmouth to one or more southern ports, and from thence to one or more ports in Europe, and back to her port of discharge in the United States, and to Portsmouth if required. She arrived at New York, and sailed from thence with a cargo for St. Petersburg, and arrived at Cronstadt on the 17th of June, 1812. The cargo was owned by American merchants, and was consigned to a house at St. Petersburg. The consignees furnished a return cargo on the credit of the outward cargo. After the return cargo was put on board, the French armies having entered Russia and threatening to approach St. Petersburg, the consignees were apprehensive that their security for the return cargo might be lost. They arrested the ship and cargo, and **457*]** would not permit her to *depart, but on condition that she should proceed to London with the cargo then on board, and that the captain should sign bills of lading to deliver the property in London to the order of the consignees; they stipulating that if they should have obtained payment from the proceeds of the outward cargo, the bills of lading should be given up to their owners or agents in London, and the cargo then to be at the disposition of the captain.

The news of the war between the United States and Great Britain having reached St. Petersburg, the American ships in that port (fifty or sixty in number), with the knowledge and approbation of Mr. Adams, the American minister at the Court of St. Petersburg, sailed for England with British licenses. This was resorted to as the only course in which it was possible to get home. The Grotius sailed, among others, with such license. Owing to the lateness of the season, she put into Carlscrona, Sweden, where she lay from the 28th of November, 1812, until the 25th of March, 1813. On the 2d day of May following she arrived at London, and there discharged her cargo, consisting of iron, hemp and cordage, and, on the 17th of June following, departed for the United States, in ballast. On the 29th of July she was captured by the privateer Frolic, John O'Dionne, commander, who put one man on board of her from the privateer. The captain of the Grotius kept his papers and the command of his ship, and navigated her to Boston. On her arrival, she was libeled in the District Court of Massachusetts.

In this court a question was made by the claimants as to the fact of capture.

The master, in answer to the 2d interrogatory, swore that he never considered the ship Grotius to have been taken or seized as prize; that he was present when an armed schooner under English colors met with her, the commander of which represented her to be a British privateer called the Bream, and requested him to take on board a man and treat him as a gentleman until he arrived in the United States, to which he consented.

Gilman, the mate, in answer to the 2d and 3d interrogatories, stated that, until his arrival, he never knew *that the Grotius had **[*458** been taken as prize; that the master had been ordered on board the schooner, and returned with Very, the man who had been taken on board the Grotius.

Chambers, a seaman, in answer to the 3d interrogatory, stated that the Grotius was met by an armed schooner under English colors which obliged the mate of the ship to go on board her, and afterwards sent him back with a man who, on the next day, declared himself to be put on board as prize-master, saying that if they should fall in with a French vessel he should be obliged to show his commission.

The affidavit of Very, the alleged prize-master, confirms the statement of the mate—that the captain was ordered on board the privateer, and that he, Very, was directed by his commander, in presence of the captain of the Grotius, to go on board as prize-master; but that the master of the ship was to keep possession of the papers, and to navigate her into port.

In the District Court the ship was condemned to the United States. From this decree the captors and claimants appealed.

In the Circuit Court the decree of the District Court was affirmed, *pro forma*, by consent of parties.

Webster, for the claimants, contended.

1. That, in this case, the ship was not captured, only one man having been put on board. That this case was not affected by the decision in the case of *The Alexander*. That a capture, as well as the bringing the vessel into port after the capture, must be the effect of power either actual or constructive. That the master of the ship did not know of the intention to capture, nor had he any idea that his vessel was captured, till long after the alleged prize-master was put on board. That there was no agreement to consider it as a capture. And, lastly, that there was no bringing in.

2. That the proceeding to London, under the circumstances of this case, was not such a trading with the *enemy as induced a for- **[*459** feiture of the ship. That it was an act justified by the necessity of the case, there being no other way to get the ship home. That the master was further justified in acting as he did, by the advice of Mr. Adams, the minister at St. Petersburg, where the ship was when the war was first known there. (1 Rob., 184, 220, *The Betty Cathcart.*)

3. That the ship was not taken *in delicto;* that there was no trade with the enemy; that the master merely delivered the cargo in London; that the voyage was not to be considered as a continued voyage from the United States to Russia, from Russia to England, and from England to the United States, but merely as a voyage from Russia to London.

4. That the privateers of the United States had no authority, either under the prize act or their commissions, to capture American vessels found in circumstances like those of the Grotius; that is to say, bound directly to the United States, and within two or three days' sail of her des-

tined port. That if she was to be condemned at all, it must be as a *droit* of admiralty, not as prize to the captors. That privateers claim under a grant from the United States, and must be limited by the express terms of such grant, which ought to have a fair construction, and cannot be supposed to extend to cases where there is no risk, no trouble, no labor on the part of the captors. That the grant is to be considered as a reward for their services. That if a vessel is in port, either voluntarily or by stress of weather, she is no subject of capture.

Pitman, contra, for the captors,

Contended, that the Grotius was liable to condemnation for having sailed from Russia to England with a British license, after knowledge of the war between Great Britain and the United States, and with contraband of war on board; that the voyage was to be considered as one continued voyage from Russia to the United States; that the vessel, therefore, if taken at any time before her arrival in the United States and in a place of safety, must be considered as captured *in delicto*. That the case was analogous to that of a vessel captured **460***] *while coming out of a blockaded port into which she had previously slipped by stealth. (1 Rob., 126, 150, *The Vrow Judith;* Id. 72, 86, *The Frederick Molke.*) That physical force was not necessary to constitute capture; that it had been so decided in the case of *The Alexander;* and that, if any doubt existed in the mind of the court with regard to the capture, it was a case for further proof. That the privateers of the United States were authorized to capture even within the jurisdiction of the United States.

Dexter, in reply,

Urged that although the master of the Grotius had heard of the war, he had also heard of the repeal of the orders in council, and that an armistice was about to be agreed upon, if it had not already taken place; that, therefore, it was as if they had not heard of the war at all. That, in order to subject a vessel to condemnation, she must be captured in the prosecution of the voyage in which she was guilty of the offense; that the Grotius was not captured on that voyage; that the voyage from Russia to England was to be considered as a distinct voyage, after the completion of which the vessel was not liable to condemnation for any offense committed on that voyage. That even if the proceeds of the cargo previously deposited in England had been on board at the time of the capture, it would have been no cause of condemnation. That when the cargo was deposited, the offense was deposited with it. (Park, 239, Amer. Ed.; 1 Rob., 193, 230, *The Rebeckah*, note; 2 Br. Civ. Law, 58; Id. 250; Id. 262.)

Wednesday, March 16th. *Absent*—MARSHALL, *Ch. J.*

WASHINGTON, *J.*, delivered the opinion of the court in this case, as follows:

This case differs in no material respect from that of *The Joseph*, just decided, except that in this a question arises as to the validity of the capture. The master of the Grotius, in answer to the second standing interrogatory, swears that he hath never considered the ship to have been taken or seized as prize. That he was present when an armed schooner under English colors met with her, the commander of which represented her *to be a British privateer called the Bream, and requested him to take on board a man, and treat him as a gentleman until he arrived in the United States; to which he consented. This testimony of the captain is confirmed by Gilman, the mate, in answer to the 2d and 3d interrogatories, who adds, that Very, the man who was put on board, never conducted as prize-master, nor in any other manner than a passenger would, during the voyage. Pierce, one of the seamen, who accompanied the captain on board the schooner, swears that he never knew the ship was seized as prize until after her arrival within the Boston light-house. Chambers, another seaman belonging to the Grotius, in answer to the third interrogatory, says that she was met by an armed schooner under English colors which obliged the mate of the ship to go on board her, and afterwards sent him back with a man who, on the next day, declared himself to be put on board as prize-master, saying that if she should fall in with a French vessel, he should be obliged to show his commission. That he knows not upon what pretense or for what reason she was taken, not knowing, in fact, that she was made prize of, until her arrival at Boston. [*461

Daniel J. Very, the alleged prize-master, has deposed on oath that he was present at the capture of the Grotius by the Frolic; that the captain of the ship was ordered on board the schooner with his papers, and that he, Very, was directed by his commander to go on board as prize-master, and this in the presence of the captain of the Grotius; that the master of the ship was to keep possession of the papers, and to navigate her into port. That he accordingly went on board as prize-master, carrying with him a copy of the commission of the Frolic; and instructions, in writing, from the commander to him (Very) as prize-master. That the captain of the Grotius informed his crew that in case a British cruiser should board the Grotius, and they should be asked respecting the said Very, they were to answer that he was a passenger.

Without giving any opinion as to the regularity of admitting the affidavit of the prize-master as a part of the preparatory evidence, the court is of opinion that the facts necessary for deciding upon the validity of the capture *are not sufficiently clear; and that it will be proper to make an order for further proof, to be furnished by the captors and the claimants, with respect to all the circumstances of the capture. [*462

This point appears not to have been made or considered in the court below.

S. C. 9 Cranch 368.

ALEXANDER AND OTHERS *v.* PENDLETON.

If the case be clear, a court of equity will interpose to quiet the title. A purchaser with notice is protected by his vendor's want of notice. An adversary possession of 50 years, though with knowledge of a better title, constitutes a good defense against that title. A purchaser without notice has a right to join his adversary possession to the os-

tensible adversary possession of his vendor, so as to give himself the benefit of the statute of limitations.

THIS was an appeal from the Circuit Court for the District of Columbia, sitting at Alexandria, as a Court of Equity.

The case, as stated by MARSHALL, *Ch, J.*, in delivering the opinion of the court, was as follows:

This suit was brought in the year 1806, in the Circuit Court for the county of Alexandria, for the purpose of quieting the title of Nathaniel Pendleton, the plaintiff in that court, to 83 acres of land contiguous to the town of Alexandria which have been in his possession, and in the possession of those under whom he claims, from the year 1732, to the present time.

Robert Alexander, being seized of a large tract, on part of which the the town of Alexandria now stands, on the 17th of January, in the year 1731–2, executed to Dade Massey, then about to intermarry with his daughter Parthenia Alexander, his bond in the penalty of £800 with a condition that he would convey to his daughter Parthenia and her heirs, on demand, four hundred acres of land lying on Potomac, "beginning on the river side, and from thence running to his back line, making a long square so as to have the same breadth on the river as on the back line."

The marriage soon afterwards took effect, and she was put into possession of the land by the following bounds, that is to say: "Beginning at the mouth of Goings gut, on the river Potomac, and extending down the river so as to **463***] *include four hundred acres of land between the river and the back line."

The back line called for in the patent was a due north course; that by which Robert Alexander then held was north 6 west. Claims have been since successfully asserted which would vary the back line so as to run north 17 west. The appellants insist that those who hold under Parthenia shall be compelled to extend to the back line, as now established, and proportionably to contract their line down the river, so that the parallelogram shall still comprize four hundred acres. Pendleton, who is a purchaser under Parthenia, insists on being limited on the west by the line north 6 west, which was the back line when the title of Parthenia accrued.

In the year 1735, Robert Alexander departed this life, having first made his last will in which he devised as follows: "Item—I give to my daughter Parthenia Massey four hundred acres in Prince William county, according to my bond. Item—I give to my daughter Sarah Alexander, four hundred acres joining Parthenia Massey, the same length on the back line and the same breadth on the river."

Parthenia survived her husband, Dade Massey, and intermarried with Townshend Dade. Sarah intermarried with Baldwin Dade, and was put into possession of the land devised to her.

John and Gerard Alexander were the only sons of Robert, and were the co-devisees of the bulk of his estate. In April, 1740, John instituted a suit against Gerard for partition; and to this suit Townshend Dade and Parthenia, his wife, and Baldwin Dade and Sarah, his wife, were parties defendants. A decree of partition was made, directing that the lands of the Dades also should be allotted to them to be held in severalty. Commissioners were appointed to execute this decree, with directions to report their proceedings to the court.

Under this interlocutory decree the land was surveyed by Joseph Berry, and a division made. Four hundred acres were allotted to Townshend Dade and Parthenia, his wife, and the same quantity to Baldwin Dade and *Sarah, [**464** his wife. This allotment was made on the idea that north 6 west was the true back line. But as the Alexanders intended to institute suits for the purpose of recovering lands lying west of the north 6 line, it was agreed between all the parties that the partition then made should not be conclusive, but should depend on the suits about to be instituted. In consequence, as is presumed, of this verbal agreement, the survey and proceedings under this interlocutory decree were not returned; and in May, 1741, the suit was dismissed agreed.

Townshend Dade and Parthenia, his wife, remained in quiet possession of the four hundred acres devised to Parthenia by her father, according to those boundaries which had been marked out on the idea that north 6 west was the true back line.

Sarah Dade died without issue; on which event her land was limited to her two brothers John and Gerard, who entered thereon and continued to hold it according to Berry's survey.

John Carlyle claimed the land west of north 6 west; and, in April, 1766, commenced an ejectment against Alexander, who appears to have recovered part of the land between north 6 and north 17 west in a previous ejectment against one of his tenants. In May, 1771, a verdict and judgment were rendered in his favor.

In the year 1774, Townshend Dade and Parthenia, his wife, instituted a suit against John Alexander for a title to the land mentioned in the bond of Robert Alexander. To this suit John Alexander filed his answer, stating the death of Dade Massey leaving a son by Parthenia, her subsequent marriage with Townshend Dade, and the doubt who was entitled to the land, as the reasons for its not having been previously conveyed.

In the same year Charles Alexander, son and heir of John, filed his answer, in which he states the doubt respecting the back line, admits the north 6 west to be the present back line, and prays that, should a more western boundary be at any time established, he and his heirs might be at liberty to vary the boundaries of Parthenia's land so as to conform to such future back line.

*In 1776, a deed was executed by [**465** Charles Alexander to Parthenia Dade conveying 400 acres of land according to the bond of Robert Alexander. This deed specifies no boundaries and contains no stipulation respecting the future change of the back line. It would confirm the will of Robert Alexander, if that will wanted confirmation. In the year 1779, this suit was dismissed, neither party appearing.

In May, 1778, Parthenia Dade conveyed this tract of land with no other description of the metes and bounds that was expressed in the

bond and will of her father, to William Hartshorne, who took possession of the land and held it according to Berry's survey, which makes north 6 west the back line.

William Hartshorne laid off the northern part of the tract from the river to north 6 west in twenty-three lots, which he sold to various persons; and then, in May 1779, conveyed the residue of the land, which includes that in controversy, to William Harman, of Pennsylvania, by metes and bounds taking north 6 west to be the true back line.

In the year 1786, Mordecai Lewis, executor of William Harman, conveyed this land to Elisha Cullen Dick, who, in 1796 conveyed eighty-three acres, the land now in dispute, to Henry Lee, who, in June, 1797, conveyed to Baldwin Dade, who, on the 29th day of December, in the year 1801, conveyed to Philip Fitzhugh, who, on the 18th of February, 1802, conveyed to Nathaniel Pendleton. In the same deed Fitzhugh conveys also to Pendleton three acres of land, other part of the tract of 400 acres, with notice that Charles Alexander claims north 17 west as the back line.

Previous to the conveyance from Baldwin Dade to Philip Fitzhugh, the said Dade had conveyed the land in controversy to Thomas Swan to secure a debt due to William Hodgson. Swan conveyed to William B. Page, in trust for Hodgson, who conveyed to Hodgson, who, in July, 1803, conveyed to Pendleton.

Soon after the decision in favor of Carlyle in May, 1771, Charles Alexander brought an [**466*] ejectment for the *same lands, and in 1790 a verdict was given in his favor, on which a judgment was rendered, which was affirmed on appeal in 1792. In 1796, Charles Alexander instituted a suit in the Court of Chancery in Virginia, for the purpose of altering the boundaries by which the land of Parthenia had theretofore been held, and of laying off that tract so as to extend it to north 17 west, thereby narrowing its breath where it stretches towards the town of Alexandria, and giving it more length. To this suit, those under whom Pendleton claims, with others, were made defendants.

Charles Alexander departed this life in the year 1806, and the suit has not been revived.

Nathaniel Pendleton being about to sell the land in controversy, tendered to Charles Alexander a deed for quieting the title; and, on his refusing to execute it, instituted a suit to compel him so to do. After the death of Charles Alexander this suit was brought against the defendant, his widow and children.

In the Circuit Court a decree was rendered in favor of the plaintiff, from which the defendants have appealed to this court.

The cause was argued last term by *Swann* and *Jones*, for the appellants, and by *E. I. Lee* and *C. Lee*, for the appellee.

Swann, for the appellents.

The only question is, whether the long possession according to metes and bounds gives a good title, notwithstanding the claim of Alexander to carry his back line so as to run north 17 degrees west; instead of north 6 degrees west.

The bond to convey to Parthenia in 1731–2, calls simply for the back line; R. Alexander's will, in 1735, devises the land to her by the same description; and the deed of confirmation from Charles Alexander in 1776 still refers to the back line. Whatever should be the back line to Alexander's tract was to be the western boundary of Parthenia's 400 acres. In 1740 a suit was *instituted for partition, in [**467** which Parthenia was a party. A survey and partition was made, but was not acted upon by the court, because the parties all understood that the back line was unsettled, and the partition then made was agreed to be temporary, and to be reformed if the back line should be carried farther to the westward than north 6 degrees west. This agreement, although verbal, was binding on Parthenia, at least so far as to prevent her possession from being considered as adversary to Alexander as to that part of the land which might be taken away upon settling the back line.

There was therefore no adverse possession until 1778, when Parthenia sold to Hartshorne. From 1778 to 1796, when C. Alexander instituted his suit in the Court of Chancery in Virginia, to alter the boundaries of the tract, there had not been twenty years of adverse possession. If Pendleton had looked back to his title he would have found that it was never conveyed by metes and bounds, prior to 1778, and that the question of boundary was still unsettled. He purchased while that suit was pending, and therefore must be presumed to have had notice of the claim.

E. I. Lee and *C. Lee*, contra.

This case is not affected by the question, which was the true back line of Alexander's land. Neither Parthenia nor those claiming under her were parties to any suit in which that question was litigated, and cannot therefore be bound by any decision on that point. At the date of the bond, and of Robert Alexander's devise to Parthenia, he held only to the line north 6 west. The conveyance is to be taken most strongly against the grantor. In 1776, when C. Alexander made the deed to Parthenia, he held only to the same line, and it had been at that time established as his back line by a judgment in the year 1771.

If there were sufficient evidence of a parol agreement, it could only be an agreement to reconvey the land, if the back line should be settled further to the westward. Being a parol agreement to convey land, it would have been void by the statute of frauds.

*If Pendleton had notice of the pend- [**468** ency of C. Alexander's suit in chancery to alter the boundaries, yet that suit was afterwards discontinued, and there is no evidence that Hartshorne, or those claiming under him, had notice of the claim until after they had made their purchases. Pendleton holds their rights, and can protect himself by their want of notice.

Jones, in reply.

There was nothing in the title to deceive purchasers. There was sufficient evidence on the face of the deed to show that the possession was temporary. They all referred to the back line of Howsen's patent; and every purchaser would necessarily inquire where that line was. Upon the inquiry he would find either that the line was in dispute and unsettled, or that it had been settled at north 17 degrees west.

The agreement was merely evidence of the

nature of the possession, and was no more affected in this respect, by the statute of frauds, than would be a simple declaration of the tenant; that he held not adversely to, but under R. Alexander.

If the title is to be quieted, it must be upon the principle that long possession by certain metes and bounds induces a presumption that some deed had been made conformable to the possession. But such a presumption is rebutted by the agreement.

March 12th. MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court as follows:

"This being an application to restrain a person from the assertion of title in the ordinary course of judicial proceedings, the prayer of the bill ought not to be granted in a doubtful case; but if the case be a clear one, the interposition of equity is allowable; and the situation of the land adjoining a growing city, the number of persons who are consequently interested in the settlement of the question, and **469***] the numerous titles which depend *on it, give it peculiar claims to the attention of the court.

By the laws which govern this case, a possession of thirty years under some circumstances, and of fifty years under any, constitutes a title against all the world. The appellee claiming under a possession perhaps from the year 1732, certainly from the year 1741, has a complete title, unless something can be alleged by the plaintiffs in error which shall deprive him of the advantages of that possession.

It is urged that the contract of 1741, between the Alexander's and the Dade's, made the latter trustees for the former with respect to that portion of the land included in Berry's survey, which they had agreed to surrender in the event of establishing a more western back line. And that, therefore, in computing time, we must commence with the sale from Parthenia Dade to William Hartshorne, in May, 1778.

Had the land continued in possession of Parthenia Dade and her heirs, the question whether this contract was of unlimited duration, or contemplated some particular suit then intended to be brought, would merit consideration. But as the contract does not appear on the title papers, but was verbal, a purchaser for a valuable consideration could not be affected by it unless he was a purchaser with notice. Finding Parthenia Dade in the quiet and undisturbed possession of four hundred acres of land, forming a parallelogram, limited on the west by the line north 6 west, he had a right to consider that line as established, so far as respected the land of Parthenia. He was not bound to know that a private parol agreement existed, which would control the possession. This trust, therefore, no more passed with the land to Hartshorne than would any other secret trust of which he had no knowledge.

The various suits which have been instituted by, and against the ancestors of the appellants cannot affect this cause. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a *pendente lite* purchaser; and were the law otherwise, those suits, until that instituted in 1796, would convey no notice **470***] of the *private agreement made in 1741. A knowledge of the suits, therefore, would not imply a knowledge of the trust; and possession for fifty years, though with knowledge of a better title, if adversary, constitutes a good defense against that title.

In 1796, Charles Alexander instituted a suit against sundry persons claiming the land in controversy for the purpose of altering the boundaries which had been held by Parthenia, and those claiming under her, from the year 1732, and which had been surveyed under an interlocutory decree made by the Court of Chancery in the year 1741. In defending themselves against this claim, the purchasers of the land had a right to unite the possession of Parthenia Dade to their possession, without being affected by a secret trust of which they had no notice. If, upon the trial of that suit, a possession of fifty years could not have been established, and if the court should have been of opinion that this was not a case in which an adversary possession of thirty years would have constituted a bar, the merits of the title would have been necessarily investigated. But if Charles Alexander had permitted that suit to be dismissed, and had filed a new bill, he would not have been at liberty, in the computation of time, to avail himself of the pendency of the former suit, unless he could have connected the two suits together. The law is the same where a suit terminates by abatement and is not revived; such a suit takes no time out of the act of limitations. The title of Pendleton, therefore, has from that act all the benefit which can be derived from a possession from the year 1741—when a possession ostensibly adversary by metes and bounds unquestionably commenced—to the institution of this suit in the year 1806. The deduction which the laws of Virginia make from all computations of time in consequence of the war of the revolution, will not be sufficient to take this case out of the act of limitations. The appellee's title, being secured by a possession of more than fifty years, is unquestionably good, and it is proper that the doubts which hang over it should be removed.

There is no error in the proceedings of the Circuit Court, and the decree is affirmed.

Cited—9 Wheat. 288 (n); 1 McLean, 489; 2 Wood. & M. 36, 198.

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*PRATT AND OTHERS [*471
v.
CARROLL

After a lapse of seven years, the court will refuse to decree a specific performance of a contract, in the part execution of which the complainants, or those under whom they claim, have expended large sums of money, although the first default was on the part of the defendant, and although it be probable that the failure of the defendant in that respect has prevented the completion of the execution of the contract on the part of the complainants

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NOTE.—If the plaintiff has been guilty of gross laches, or if he has not applied for relief until after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed. A court of equity will not administer relief to gross negligence any more than a court of law. Brashier v. Gratz, 6 Wheat. 528; King v. Hamilton, 4 Peters, 311, 329; 1 Madd. Ch. 414, 415; Finch v. Parker, 49 N. Y. 1; Delavan v. Duncan, 49 N. Y. 485.

The party, to entitle himself to the aid of the

circumstances having so changed that neither party could derive, from the execution of the contract, all the benefits which were at first expected.

THIS case appears to be fully stated by the Chief Justice in delivering the opinion of the court.

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is an appeal from a decree of the Circuit Court for the District of Columbia, whereby a bill brought by the plaintiffs for the specific performance of a contract was dismissed. The material facts are these:

Daniel Carroll, the defendant, was, previous to the establishment of the city of Washington, proprietor of a large tract of land, part of which lies within its present limits. This part was conveyed to trustees, one moiety for the use of the public, and the other moiety for the use of the said Carroll.

After the place for the seat of government had been selected, and the boundaries of the city marked out, the legislature of Maryland authorized the appointment of commissioners to superintend the affairs thereof, and, among other powers, authorized them to divide the lots in the said city between the public and the original proprietors, and declared that such divisions made in a specified form and certified by them should revest in the original proprietors the legal estate whereof they were formerly seized in the lots and squares assigned to them respectively. The commissioners were also authorized to sell the lots retained for the public use, and on receiving the purchase money, to convey to the purchasers. On the 23d of September, 1793, James Greenleaf purchased from the commissioners three thousand lots lying in that part of the city which had been conveyed by Carroll; and on the 24th of December, 1793, James Greenleaf and Robert Morris made from the commissioners an additional purchase of three thousand lots. Neither the purchase money being then paid nor a division made, the legal title remained in the trustees, and was a security for the purchase money. These contracts, if executed by conveyances, would have **472***] *vested in Greenleaf and Morris all the public lots which were intermingled with those hereinafter stated to have been purchased by Greenleaf from Carroll.

On the 26th day of September, in the year 1793, the said Daniel Carroll and James Greenleaf entered into articles, whereby Daniel Carroll covenanted in consideration of £5 and of the covenants thereinafter mentioned, to convey to the said Greenleaf twenty lots of ground in the city of Washington, fronting on South Capitol street, in all convenient speed after the lots in that part of the said street should be divided between the said Carroll and the Commissioners of the Public Buildings. The said conveyances to be on condition to be void in case the said Greenleaf should not, within three years from this date, erect a good brick house on each lot at least 25 feet front, 40 feet deep, and two stories high. And the said Carroll further covenanted, that after the division, to be made of the land lying between the fork of the canal, between him and the commissioners should be completed, he would sell to the said Greenleaf every other lot belonging, after such division, to the said Carroll, for the consideration afterwards mentioned in the said articles; and would lay out the whole amount of the purchase money, when received, in building houses as near as well might be to those erected and erecting by the said Greenleaf; and in case of selling any of his property, he would cause buildings, to the amount of the purchase money, to be erected thereon. The said Greenleaf agreed to erect, on each of the first-mentioned twenty lots, one good brick house, at least 25 feet front, 40 feet deep, and two stories high, within three years from the date, and to reconvey any of the said 20 lots not built upon within the time, and pay £100 for each of the said lots not so built upon; to pay £30 for each of the other lots to be purchased; to lay out on the last mentioned lots the sum of £3,000 within two years, and the further sum of £3,000 within four years; to pay one half of the amount of the purchase money with interest within two years, and the remainder, with interest, within four years. Carroll to make deeds for the last mentioned lots purchased as the money should be paid. The parties bind themselves each to the other in the penal sum of £20,000.

*On the 8th June, 1795, it was agreed [***473** between the same parties to change the contract so far as that the said Greenleaf should build twenty brick houses of such description as he should judge proper, provided they are two stories high, and cover an equal extent of ground with the houses before mentioned, and of which the one moiety or ten houses shall be built on the south part of the square numbered 651, and the residue on the east side of said square.

In July, 1794, a partial division was made between Carroll and Greenleaf, by which the square No. 651 was allotted to the latter. It

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court, for the specific execution of the contract, should show himself ready and desirous to perform on his part. 1 Fonb. Eq. B. 1, ch. 6, § 2, note E.; Goman v. Salisbury, 2 Vern, 240; Botsford v. Burr, 2 John Ch. 416; Baldwin v. Salter, 8 Paige, 473.

If the party voluntarily abandons a written contract, though the abandonment be by parol, he cannot afterwards demand specific performance. Nor will equity interpose if the agreement has not been insisted on for many years. Powell v. Hankey, 2 P. Wms. 82.

It should be clear that the remedies are mutual. 1 Fonb. Eq. book 1, ch. 6, § 12, note C, and cases there cited; that there has been no change of circumstances affecting the character or justice of the contract. Pratt v. Law, 9 Cranch, 456, 493, 494; Mech. Bk. v. Lynn, 1 Peters, 383; Holt v. Rogers, 8 Pet. 420; Payne v. Mellor, 6 Ves. 349; McNeil v. Magee, 5 Mas. 244; Garnett v. Macon, 2 Brock. Marsh. 185; Cooper v. Brown, 2 McLean, 405; Taylor v. Longworth, 14 Peters, 172. That compensation for the delay can be fully and beneficially given. Pratt v. Lane, 9 Cranch, 456, 493, 494. That he who asks specific performance is in condition to perform his own part of the contract. Morgan v. Morgan, 2 Wheat. 290; Sugden on Vendors, ch. 8, § 2, p. 365 to 375 (7th edit.) And that he has shown himself ready, desirous, prompt and eager to perform the contract. Milward v. Earl of Thanet, 5 Ves. 420, note; Alley v. Deschamps, 13 Ves. 228; Moore v. Blake, 1 B. & Beatt. 62, 68, 69; Newland on Cont. ch. 12, p. 242 to 248; King v. Hamilton, 4 Pet. 311; King v. Wilson, 6

was on this square that the twenty houses mentioned in the contracts between the parties were intended to be built.

On the 13th of May, 1796, James Greenleaf, in pursuance of articles made July 10th, 1795, assigned his contract with Carroll to Morris and Nicholson, to whom he also transferred his interest in a large portion of the lots purchased from the commissioners. In the summer of 1796 Morris and Nicholson came to the city of Washington, when a division of the lots was completed, which was reported to the commissioners on the 14th of September, by whom it was then ratified. Twenty brick houses were erected on the square 651, and covered in by the 26th September, 1796, the time specified in the contract. Some of them were completed. In May, 1797, Daniel Carroll entered into the square 651, and took possession of the buildings thereon, which he has held ever since, and has permitted them to be greatly injured.

Morris and Nicholson conveyed their property in the city to the plaintiffs, in trust for certain creditors, by deed bearing date the 26th day of June, 1797, and became bankrupts. This bill was filed in December, 1804, claiming a specific performance of the whole contract of September, 1793, or, if the court should be of opinion that the contract ought to be divided, the plaintiffs pray for a specific performance of that part of it which respects the twenty lots, on which they say houses have been erected in conformity with their agreement. They contend that the non-execution on their part of so much of the contract of September, 1793, as **474***] remains to be *performed is not to be ascribed to any fault of theirs, but to the failure of Carroll to convey the lots he had stipulated to convey.

On the part of the defendant it is contended that he could not convey until a division should be made and sanctioned by the commissioners, and that it was as much the duty of Greenleaf as of himself to attend to the division. That his great motive for entering into the contract was, by improving that part of the city in which his property lay to increase its value and to give the town that direction. That this, from the failure of the other contracting party to perform his covenants, has become impossible; that the consideration on which he was to convey, cannot now be received; and that it would, therefore, be iniquitous to compel a conveyance.

This court is clearly of opinion that by the contract of September, 1793, Daniel Carroll was bound to convey to Greenleaf the property therein mentioned without waiting for the execution of the contract on the part of Greenleaf. Being so bound, he ought to have taken those steps which were within his power, and which were necessary to be taken in order to enable him to perform his engagements. He ought, therefore, to have obtained from the commissioners that act which would revest in himself the property to be conveyed.

It is true that Greenleaf, having purchased the public lots, must have concurred in the division, and, had he declined coming to one, his default would have excused Carroll. But it is not pretended that he ever declined a division. It is true that his omitting to press one is a proof that, for some time at least, he was not anxious on the subject; and this diminishes the blame which might otherwise attach to Carroll for his inattention to so material a circumstance.

But in July, 1794, a division between Carroll and Greenleaf of several squares was made, and the square on which the twenty houses were to be erected was, among others, assigned to Greenleaf. There is no excuse for the delay of Carroll in enabling himself to convey the lots assigned to Greenleaf in this division. He *alleges that, as the calculations of [***475** their contents were inaccurate, the confirmation of this division by the commissioners was necessarily deferred until this matter should be adjusted. But the court cannot admit the sufficiency of this apology. Any inaccuracy in the calculations would be adjusted by allowances in the divisions afterwards to be made of the remaining lots.

It appears that in February, 1796, Robert Morris offered the first payment stipulated in the contract of September, 1793, with the interest which had accrued thereon, and demanded deeds for the twenty lots. In this letter Morris consents that these deeds should be executed as an escrow, to be delivered on their fulfilling that part of the contract by building twenty houses on the said lots, and proposes that separate deeds should be executed, that so many might be delivered as Morris and Nicholson should entitle themselves to. He also demanded a conveyance of so many lots as the money offered would pay for, and required that Carroll should perform that part of his contract which required him to lay out half the money received in improving adjacent lots. This is the substance of Morris's letter, dated 22d February, 1796, directed to Mr. Cranch, the agent of Morris, which appears by Carroll's letter, written on the 29th of the same month,

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Beav. 124; Marquis of Hertford v. Bore, 5 Ves. 720; Guest v. Homfray, 5 Ves. 818; Newman v. Rogers, 4 Brown's Ch., c. 391, 393.

Where no step had been taken from the day of the sale, and six months after the expiration of the time at which the contract was to be completed, the conduct of the vendor was considered as evidence of the abandonment of the contract. 1 Madd. ch. 417; Lloyd v. Collett, 4 Bro. C. C. 469; S. C. 1 Atk. 12, note. So, where nothing had been done towards a performance of the agreement, until the premises by a subsequent event proved to be much more valuable than they were when the contract took place, a specific performance was refused. Alley v. Deschamps, 13 Ves. 225; Crofton v. Ormsby, 2 Sch. & Lefr. 604.

Specific performance refused on the ground of laches and change of circumstances. Boono v. Mis. Ins. Co., 17 How. 340, McNeil v. Magee, 5 Mas. 244; Peters v. Delaplaine, 49 N. Y. 362.

Specific performance will not be refused where the delay has been by common consent, and defendant has not in any way been injured thereby; nor from delay caused by defendant. Laird v. Smith, 42 How. Pr. R. (N. Y.), 56; S. C. 44 N. Y. 618; Delavan v. Duncan, 4 Hun. 29.

Mere efflux of time will not of itself cause denial of equitable relief. Merch. Bk. v. Thomson, 55 N. Y. 7. Nor where delay is excused, and situation of parties and property unchanged, and party reasonably vigilant. Hubbell v. Von Schoening, 49 N. Y. 326.

to have been laid before him, although Mr. Cranch does not recollect the fact. The conveyances, however, were not made nor the money paid.

Although the covenant to convey is not a condition precedent on the performance of which the covenant to build depends, yet both from the words of the contract and the nature of the transaction, it was apparently the expectation of the parties that the conveyance would precede the building. Nor was the conveyance an immaterial circumstance. In any state of things it was an important part of the contract, and in the events which have actually occurred, it was so important as to render it probable that the failure of Carroll in this respect has prevented the completion of the twenty buildings. Under this view of the case, had the bill demanding a specific performance been brought immediately after the entry of Mr. Carroll in May, 1797, the claim of the plaintiffs would certainly have been **476***] entitled *to serious attention, and might perhaps have prevailed. It was not then too late, by executing the contract, to have effected its great object. But the state of things is now entirely altered. The effort to give the city that direction would now, according to every reasonable calculation, be unavailing. Time, therefore, in this contract was essential; and although, in consequence of the failure of Carroll to convey, the court might have relieved against a forfeiture so long as an execution of the contract could place the parties essentially in the situation in which they would have stood had exact punctuality been observed; yet equity cannot relieve where it is impossible to place the parties in the same situation, and when real fault is imputable to the person praying the aid of the court. So far, then, as Morris and Nicholson have failed to execute the contract of September, 1793, the plaintiffs are too late to be entitled to the aid of this court.

But it is contended that Morris and Nicholson have fully complied with that part of the contract which respected building twenty houses, and are therefore entitled to a conveyance of the twenty lots. The description of the houses to be built is so indefinite as to be satisfied, it is said, by running up the brick walls, and putting on the roofs.

The court is not of that opinion. On fair construction the contract requires that the houses should be fit for the habitation of families. No particular degree or kind of finishing is prescribed; but a building cannot be fairly denominated "a good brick house" until it be rendered a comfortable dwelling, fit for the reception of a tenant. This was certainly contemplated by the parties, and a different construction would tolerate an unfair and fraudulent execution of the agreement.

But, although the twenty houses were not all completed, some of them were, and on examining the contract it appears that Greenleaf and his assigns were entitled to a lot for each house they should build. The contract, with respect to the twenty lots, was not entire. It was not necessary to perform the whole contract, or to forfeit the whole property—that which was, as well as that which was not improved. This will be clearly perceived on a reference to the contract itself.

*Carroll covenants to convey twenty [***477** lots with conditions to be void if Greenleaf shall not within three years erect a good brick house of stipulated dimensions on each lot. Greenleaf agrees to erect the houses, and covenants to reconvey any lot not built upon within the time, and to pay £100 for each lot not so built upon. This stipulation obviously severs the contract with respect to each lot. Only those not built upon were to be reconveyed, and for each lot reconveyed there was a forfeiture of £100.

So far as the contract has been executed by Greenleaf or his assigns, he and they ought to be placed in the same situation as if it had been executed by Carroll also. Had it been executed by him, the title of Morris and Nicholson to as many lots as they had erected houses of the description agreed upon, would have been absolute. It could not have been defeated by their failure to perform the residue of the contract. Carroll ought not to enable himself to defeat it by having broken his contract.

The plaintiffs, then, ought to have a conveyance of so many lots as shall be equal to the number of houses they have completed under the agreement of September, 1793, and as Carroll's entry in May, 1797, was so far tortious he ought to be accountable for the injury sustained by the property, and for rents and profits from that time. But as the same contract binds Greenleaf and his assignees to pay £100 for each lot not improved, and as the court does not consider this as a mere penalty, but as damages assessed by the parties themselves, the plaintiffs will not be entitled to a conveyance of the lots which were improved without paying £100 with interest from the 6th of May, 1797, the time when the contract was determined by the entry of Carroll, on each unimproved lot. It is at their election to obtain a specific performance on these terms, or to abandon their claim.

It is the opinion of this court that the decree of the Circuit Court ought to be reversed and annulled, and the cause remanded with directions to take an account of rents and profits which have been or might have been received by the defendant on the houses which have *been completed by Morris and Nichol- [***478** son on the twenty lots in the proceedings mentioned; and also to take an account of the money with interest thereon, which was demandable by the defendant on each unimproved lot; and that an issue, to be tried either in Alexandria or Washington, be directed to ascertain what damages have been sustained by the houses built by Morris and Nicholson previous to the 6th of May, 1797, whether finished or unfinished, on those lots which shall be decreed to be conveyed to the plaintiffs, since the entry then made by the defendant; and that on receiving the balance, if any, which may remain due to the said Carroll after deducting the rents and profits before mentioned, and the damages aforesaid, he be directed to convey to the plaintiffs a number of standard lots which shall be equal to the number of houses completed by the said Morris and Nicholson in pursuance of the contract of September, 1793; the said lots to be those on which the houses stand, which may have been completed, and if there be more than one house standing on the same standard

lot, so that it may be necessary to convey lots not fully improved in order to make the quantity of ground equal to the superficial contents of the standard lots to be conveyed, then such standard lots are to be laid off by direction of the Circuit Court, in such manner as may be equitable and convenient; provided, that the ground improved or built upon by Morris and Nicholson under the said contract, and re-entered upon by the defendent in May, 1797, be appropriated in the first instance as far as the same shall suffice or be necessary to make up the quantity of ground to be conveyed to the plaintiffs, but so appropriated that no lot shall be divided, unless it be necessary to convey part of a lot in order to make up the full quantity of six standard lots.

Cited—14 Pet., 175; 8 How. 158; 5 Mason, 259; 1 McLean, 517; 1 Wood. & M. 111; 3 Wood. & M. 474.

[END OF FEBRUARY TERM, 1814.]

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl.	Atlantic Reporter,	**So.**	Southern Reporter,
Pac.	Pacific Reporter,	**S. E.**	Southeastern Reporter,
N. E.	Northeastern Reporter,	**S. W.**	Southwestern Reporter,
N. W.	Northwestern Reporter,	**S. Ct.**	Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

VIII CRANCH.

8 Cr. 9-30, 3 L. 471, GRIFFITH v. FRAZIER.

Executors and administrators.— When there is one qualified executor, court is without jurisdiction to appoint another, p. 27.

Cited and principle applied in Kane v. Paul, 14 Pet. 40, 10 L. 345, holding appointment of administrator during life of qualified executor, void; Cuyler v. Ferrill, 1 Abb. (U. S.) 178, F. C. 3,523, holding decree of partition by court without jurisdiction is void; Holmes v. Oregon & Cal. R. R. Co., 6 Sawy. 282, 5 Fed. 531, holding decision of State court on inhabitancy not open to examination in Federal court; rehearing, 7 Sawy. 383, 9 Fed. 231, same holding; Nettleton v. Mosier, 3 Fed. 388, 389, holding appointment of guardian to nonresident infant open to collateral attack; In re Haynes, 30 Fed. 770, holding order of remission of indictment by court without jurisdiction, is void; Matthews v. Douthitt, 27 Ala. 276, 62 Am. Dec. 766, holding void, appointment of administrator de bonis non before office of his predecessor is vacant; Hooper v. Scarborough, 57 Ala. 514, holding appointment of administrator void, with first letters unrevoked; Haynes v. Meeks, 10 Cal. 119, 70 Am. Dec. 708, holding, accepting resignation of administrator, without an accounting, voidable, hence not subject to collateral attack; Terry's Appeal from Probate, 67 Conn. 187, 34 Atl. 1033, holding after court approves of the executor in a will, he cannot appoint an administrator; Davis v. Shuler, 14 Fla. 445, 447, holding acts of sheriff not empowered by court as administrator do not bind estate; Epping & Co. v. Robinson, 21 Fla. 49, holding letters granted by County Court, where want of jurisdiction appeared on record, void; Mathews v. Durkee, 34 Fla. 562, 16 So. 412, holding revocation of letters cannot be attacked collaterally; Justices, etc. v. Selman, 6 Ga. 442, holding a second administrator cannot be appointed until office is vacant; Thompson v. Knight, 23 Ga. 401, holding acts of administrator after revocation of his powers, pending appeal, are void; Heirs v. Baker, 23 Ill. 436, holding sale by administrator will be declared void, if record does not show jurisdictional facts authorizing his appointment; Nool v. Bradley, 3 Blackf. 159, holding appointment of a justice of peace in anticipation of vacancy, void; Koehler v. Hill, 60 Iowa, 631, 15 N. W. 623, holding recital in joint resolution by succeeding general assembly, not conclusive upon courts as to its original form; Perry v. St. J. & W., etc., Co. 29 Kan. 423, holding issuing of letters on estate of nonresident, leaving no property here, void; Sneed v. Ewing, 5 J. J. Marsh. 460, after foreign will is

recorded here, appointment of administrator, without annexing it, is void; Holyoke v. Haskins, 5 Pick. 27, 16 Am. Dec. 376, holding administration void, acquires no validity from acquiescence; Waters v. Stickney, 12 Allen, 13, 90 Am. Dec. 132, holding Probate Court has power to approve a codicil, after admitting will to probate; Mousseau's Will, 30 Minn. 206, 14 N. W. 889, declaring proceedings to re-probate will, when it has been regularly probated, void; Vick v. Mayor, etc., 1 How. (Miss.) 440, 31 Am. Dec. 180, holding appointment of administrator, without stating jurisdictional facts, is void; Thomas v. Burrus, 23 Miss. 557, 57 Am. Dec. 156, holding appointment of second guardian void.

Elsewhere it is cited and applied as follows: Post v. Caulk, 3 Mo. 36, holding appointment of a second administrator void; Johnson v. Beazley, 65 Mo. 259, 264, 27 Am. Rep. 282, 286, holding appointment of administrator by court of general jurisdiction cannot be questioned, collaterally; dissenting opinion, State v. Benton, 12 Mont. 80, 29 Pac. 429, majority holding appointment of second administrator not proper case for writ of prohibition; Morgan v. Dodge, 44 N. H. 260, 82 Am. Dec. 217, limiting power of court to a revocation only of letters granted without jurisdiction; State v. Sheriff, 15 N. J. L. 71, holding judgment of court with jurisdiction cannot be redressed by habeas corpus; Hyman v. Gaskins, 5 Ired. 273, holding, if court under any circumstances could have granted letters in such a case they are not void; Adams v. Jeffries, 12 Ohio, 274, 40 Am. Dec. 480, holding administrator's sales, under order of court not showing heirs parties, is without jurisdiction and void; Ramp v. McDaniel, 12 Or. 116, 6 Pac. 460, holding appointment of administrator out of order, fixed by code not a nullity; Camp v. Wood, 10 Watts, 120, 122, holding decree of justice of peace void, where record did not show jurisdiction; Franklin v. Franklin, 91 Tenn. 127, 18 S. W. 63, holding appointment of administrator by court of general jurisdiction only voidable; State v. de Casinova, 1 Tex. 404, holding court must exercise power conferred by statute in prescribed way, otherwise it has no jurisdiction; Fisk v. Norvel, 9 Tex. 19, 58 Am. Dec. 132, holding it cannot be proved collaterally that Probate Court acted erroneously upon subject-matter within its cognizance; Brockenborough v. Melton, 55 Tex. 501, holding decree of court of general jurisdiction is conclusive against collateral attacks, as to jurisdictional facts; Ex parte Barker, 2 Leigh, 720, where first court had no jurisdiction, a second administrator may be appointed; Fisher v. Bassett, 9 Leigh, 140, 33 Am. Dec. 238, holding appointment of administrator by court without jurisdiction, only son, 39 W. Va. 306, 45 Am. St. Rep. 918, 919, 19 S. E. 625, holding where Probate Court of general jurisdiction errs in taking jurisdiction of a particular case, its decree is voidable; Evans v. Johnson, 39 W. Va. 306, 45 Am. St. Rep. 918, 919, 19 S. E. 625, holding act of clerk, appointing committee for insane person without

notice to him, void; Atchison v. Rosalip, 3 Pinn. 291, holding sale under judgment of justice of peace, defendant not being served or appearing, void; Sitzman v. Pacquette, 13 Wis. 311, holding appointment of administrator de bonis non, when office was not vacant, void. See also the following notes: 24 Am. Dec. 379; 33 Am. Dec. 240; 23 Am. St. Rep. 116. Cited in Tison v. McAfee, 50 Ga. 287, 290, 291; McArthur v. Scott, 112 U. S. 399, 28 L. 1034, 5 S. Ct. 672, general discussion and without particular application to the point at issue.

Distinguished in Noble v. Railroad Co., 147 U. S. 173, 37 L. 126, 13 S. Ct. 273, holding that quasi-jurisdictional facts once established, a decision of secretary of interior is final; Veach v. Rice, 131 U. S. 313, 33 L. 170, 9 S. Ct. 737, holding under code, where one joint executor dies, ordinary can appoint another; Brock v. Frank, 51 Ala. 92, holding appointment of administrator here, after will had been probated in South Carolina, voidable; Roach v. Martin, 1 Harr. 559, 560, 27 Am. Dec. 760, 762, holding order for sale of land is conclusive as to facts necessary to order; Ponder v. Moseley, 2 Fla. 267, 48 Am. Dec. 201, and Tucker v. Harris, 13 Ga. 8, 17, 58 Am. Dec. 492, 500, declaring that judgments of courts of general jurisdiction are never void; Gray v. State, 78 Ind. 73, 41 Am. Rep. 549, holding that sureties on guardian's bond, after he has sold real estate, are estopped from denying he is guardian; Ames v. Williams, 72 Miss. 771, 775, 17 So. 765, 767, holding appointment of guardian by court of general jurisdiction cannot be collaterally attacked by showing nonresidence of minor; Scobey v. Gano, 35 Ohio St. 554, holding that where first guardian was ineligible, another could be appointed without vacating first; Levy v. Riley, 4 Or. 396, holding sale by disqualified administrator not absolutely void; McPherson v. Cunliff, 11 S. & R. 430, 14 Am. Dec. 651, holding good a decree of court, though heirs were not parties, and plaintiff was estopped from denying it.

Executors and administrators.— Appointment of administrator by court without jurisdiction is void, p. 28.

Rule applied in Scott v. McNeal, 154 U. S. 40, 42, 38 L. 899, 900, 14 S. Ct. 1110, 1111; Stevenson v. Superior Court, 62 Cal. 62; Thomas v. People, 107 Ill. 522, 525, 47 Am. Rep. 459, 462; Burns v. Van Loan, 29 La. Ann. 564; Springer v. Shavender, 116 N. C. 16, 47 Am. St. Rep. 792, 21 S. E. 399; Devlin v. Commonwealth, 101 Pa. St. 277, 47 Am. Rep. 712; D'Arusment v. Jones, 4 La. 354, 40 Am. Rep. 13; Melia v. Simmons, 45 Wis. 338, 30 Am. Rep. 747, all holding administration of estate of a living person is void. Cited in Lavin v. Bank, 18 Blatchf. 36, 1 Fed. 674, holding payment to administrator appointed under statute, where party has been absent, etc., is no defense in action by creditor; United States v. Payne, 4 Dill. 389, F. C. 16,014, holding grant of letters on estate of Indian void; Jochumsen v. Savings Bank, 3 Allen, 93, allowing person to

recover deposit, though it had been paid to administrator; Roderigas v. Savings Institution, 76 N. Y. 320, 322, 32 Am. Rep. 311, 312, where 63 N. Y. 469, 20 Am. Rep. 562, is distinguished, and holding letters received by administratrix from clerk on petition upon information void; Blakely v. Frazier, 20 S. C. 155, declaring that appointment by Probate Court of executor not nominated in the will is a nullity. Cited, arguendo, in Hamilton v. Brown, 161 U. S. 267, 40 L. 697, 16 S. Ct. 589. See also notes in 33 Am. Dec. 239; 73 Am. Dec. 126; 79 Am. Dec. 66; 27 Am. Rep. 286; 30 Am. Rep. 748, 749, 752, and 47 Am. Rep. 465, on general subject.

Denied in Roderigas v. Savings Institution, 63 N. Y. 469, 20 Am. Rep. 562, holding that money being paid to administrator is a bar to an action.

Execution.— No title passes by a levy under a judgment, void because obtained against one as administrator who is not such in fact, pp. 29, 30.

Executors and administrators.— Executor who absents himself from the State is still bound to perform all his duties, p. 22.

Rule applied in Edmonds v. Crenshaw, 14 Pet. 169, 10 L. 404, holding that the removal of an executor from the State does not disqualify him from continuing to execute his trust.

Miscellaneous.— Cited dissenting opinion, May v. May, 7 Fla. 231; Hatch v. White, 2 Gall. 162, F. C. 6,209; Walker v. Torrance, 12 Ga. 607, but without particular application.

8 Cr. 30–35, 3 L. 478, VAN NESS v. FORREST.

Bills and notes.— Note payable to A. B., as president of a company, is suable by A. B., in his own name, though the proceeds belong to the company, p. 34.

The case is cited to this point and the rule applied as follows: Bank of United States v. Lyman, 1 Blatchf. 306, F. C. 924, 20 Vt. 675, holding parol evidence inadmissible to show who is real party in interest to a promissory note; Pacific Guano Co. v. Holleman, 4 Woods, 464, 12 Fed. 62, holding proof admissible to show principal is owner of note, and he may sue in his own name; Coursly v. Baker, 7 Harr. & J. 32, holding note given in individual's name for partnership debt may be sued on by him; Hymer v. Ijams, 56 Md. 473, holding that where note was given in name of treasurer, suit should be brought in his name; as also Haynes v. Covington, 13 S. & M. 412, where note was made payable to president of board; Underhill v. Gibson, 2 N. H. 357, where note was to agent of corporation; Hunt v. Van Alstyne, 25 Wend. 611, where action was in name of president, plea as to illegality of corporation not good. See also note in 12 Am. Dec. 710, 715, on general subject. Cited in Blanchard v. Ely, 21 Wend. 345, 34 Am. Dec. 252, arguendo.

Partnership.— Rule prohibiting one partner suing another does not apply where a note was given by one partner to an individual partner, p. 34.

Cited and rule applied in Lyon v. Malone, 4 Port. 500, holding where one partner after dissolution pays firm's debts, he may sue others; Grigsby v. Nance, 3 Ala. 351, holding partner may sue on note given as part of capital stock; Huyck v. Meador, 24 Ark. 194, holding that in transactions not connected with the partnership partners stand as individuals; Caswell v. Cooper, 18 Ill. 535, holding one partner can sue on note received after dissolution for sale of goods to another; dissenting opinion, Causten v. Burke, 2 Harr. & Gill, 302, 18 Am. Dec. 299, majority holding one partner cannot sue for work done on account of partnership; Cook v. Canny, 96 Mich. 401, 55 N. W. 987, holding one partner can sue another upon agreement in partnership articles; Gibson v. Moore, 6 N. H. 554, holding partner can sue on award for general balance; Gridley v. Dole, 4 N. Y. 492, holding one partner can sue on note received after dissolution; Crater v. Bininger, 45 N. Y. 548, holding partner can sue, if obligation, though relating to partnership, is distinct; Wilson v. Wilson, 26 Or. 258, 38 Pac. 188, holding partner can sue another on note given for particular items; Collamer v. Foster, 26 Vt. 759, holding one partner can sue on express agreement on distinct matter; Willis v. Barron, 143 Mo. 457, 65 Am. St. Rep. 676, 45 S. W. 290, holding one partner can sue another to compel him to pay his share of a partnership note.

Pleading.— Where defense is matter of fact in denial of contract alleged, it amounts to the general issue, p. 35.

Cited in Little v. Bolles, 12 N. J. L. 174, holding, under statute, that the defendant cannot give notice of special matter when general issue is proper plea.

8 Cr. 36–39, 3 L. 479, BANK OF ALEXANDRIA v. HERBERT.

Trustee of an insolvent debtor represents the creditors and is not bound by irregularly recorded mortgage, though debtor would be, p. 39.

Principle applied in Casey v. Cavaroc, 96 U. S. 489, 24 L. 788, holding pledgee cannot recover from receiver of pledgor, when there was no change of possession. Cited, arguendo, in McGuire v. Briscoe, 16 Fed. Cas. 138.

Distinguished in Haskill v. Sevier, 25 Ark. 161, 162, holding irregularly recorded mortgage good against administrator of mortgagor.

8 Cr. 39–50, 3 L. 481, MARCARDIER v. CHESAPEAKE INS. CO.

Admiralty.— A charter-party for a cargo of a vessel is mere contract of affreightment sounding in covenant, and the freighter is

not responsible as owner where the general owner retains possession, command and navigation, p. 50.

The following citing cases affirm and apply this principle: Reed v. United States, 11 Wall. 601, 20 L. 220, where vessel was ordered by government to take a cargo, but master was in command and possession, held, he and not the government was the owner; Leary v. United States, 14 Wall. 611, 20 L. 756, if owner retains command and possession, he is still liable as owner; Shaw v. United States, 93 U. S. 241, 23 L. 881, is to the same effect; United States v. Shea, 152 U. S. 187, 38 L. 406, 14 S. Ct. 521, where government was to have control of vessel for stated time, held to be only a special owner; Donahoe v. Kettrell, 1 Cliff. 138, F. C. 3,980, where owner is to furnish men and have control, it is a mere letting; as also in effect Richardson v. Winsor, 3 Cliff. 399, F. C. 11,795; Webb v. Peirce, 1 Curt. 106, F. C. 17,320, if master is to have possession and navigation of vessel, he is liable as owner; Kleine v. Catara, 2 Gall. 76, F. C. 7,869, holding if ship is to be navigated at expense of owner, charterer is not owner for voyage; Hill v. Steamer Golden Gate, Newb. 314, F. C. 6,492, if charterers are to have possession and control, they are the owners; as also in Eames v. Cavaroc, Newb. 530, F. C. 4,238; The Ship Panama, Olcott, 362, F. C. 10,703, holding agent purchasing ship and furnishing money not owner, though bill of sale is in his name; The Schooner Volunteer, 1 Sumn. 568, F. C. 16,991, and Kerry v. Marine Co., 121 Cal. 568, 66 Am. St. Rep. 65, 54 Pac. 90, holding general owner will be deemed owner for the voyage, notwithstanding charter-party, if he retains control; as also in Certain Logs of Mahogany, 2 Sumn. 595, 596, F. C. 2,559; Ship Nathaniel Hooper, 3 Sumn. 577, F. C. 10,032, and Palmer v. Gracie, 4 Wash. 120, F. C. 10,692. Cited and rule applied in Perkins v. Hill, 2 Wood. & M. 165, F. C. 10,987, holding freight should be paid to charterer, even if owner mans vessel; The Aberfoyle, Abb. Admr. 250, F. C. 16, construing the charter-party to be an affreightment for the voyage; T. A. Goddard, 12 Fed. 178, holding owners of a chartered vessel, retaining control of her navigation, are liable to injuries to cargo, because of dangerous goods taken aboard; Scull v. Raymond, 18 Fed. 550, holding part owner excluded from participation in management not liable for collision; L. L. Lamb, 31 Fed. 32, holding where owner went with vessel, but charterers were to pay crew, latter had lien on ship for wages; The Terrier, 73 Fed. 267, holding where owner appoints officers and crew and retains control, he is liable as owner; as also in Bramble v. Culmer, 78 Fed. 502, 42 U. S. App. 303, holding charterers not liable for loss of vessel through negligence of pilot hired by them; Hayes v. Campbell, 55 Cal. 425, 36 Am. Rep. 46, holding owner of chartered vessel has lien on cargo; Slark v. Broom, 7 La. Ann. 341, holding owners liable; State v. Baltimore, etc., Co., 13 Md. 189, holding general owner retaining possession and control

is the owner; Pickman v. Woods, 6 Pick. 254, holding where charterer appointed master, but owner victualed and manned her, latter had no lien; Adams v. Homeyer, 45 Mo. 550, 100 Am. Dec. 393, where owner reserved rent but gave up all control, charterer is owner for the term; to same effect Clarkson v. Edes, 4 Cow. 476, 478, 480, holding general owner had lien on freight; Hagar v. Clark, 78 N. Y. 51, holding charter-party a contract of affreightment; Schooner Argyle v. Worthington, 17 Ohio, 465, where owner furnished master and crew. See also note in 13 Am. Dec. 89.

Marine insurance.— To justify abandonment for technical total loss on ground of deterioration in value of cargo, the deterioration must be of a moiety, excluding memorandum articles, p. 49.

Cited and principle applied as follows: Moreau v. United States Ins. Co., 1 Wheat. 228, 4 L. 78, declaring insurer of memorandum articles is never liable for total loss, where part have reached destination; Humphreys v. Union Ins. Co., 3 Mason, 443, F. C. 6,871, holding, even if all of one article is lost, insurers not liable for total loss under memorandum clause; Robinson v. Insurance Co., 3 Sumn. 224, F. C. 11,949, holding there must be a total loss of cargo; Washburn v. Insurance Co., 82 Fed. 297, holding underwriters not liable for constructive total loss, under warranty against partial loss; Woodside v. Canton Ins. Office, 84 Fed. 284, where clause was construed as a severable contract, and insured recovered for each article lost; Williams v. Insurance Co., 54 Cal. 451, 35 Am. Rep. 79, holding total loss does not mean extinction; Poole v. Insurance Co., 14 Conn. 60, holding there was a total loss, where goods couldn't reach destination; Brooke v. Insurance Co., 4 Mart. (La.) (N. S.) 641, holding under memorandum clause insurers are liable only for a total loss; Brooke v. Insurance Co., 5 Mart. (La.) (N. S.) 536, 541, holding that a constructive loss is excluded in all memorandum articles; Willard v. Insurance Co., 24 Mo. 566, holding there can be no recovery on freight insured against "total loss," in case of constructive total loss; Waln v. Thompson, 9 S. & R. 120, 11 Am. Dec. 677, holding same as to loss of profits insured. And see note to 2 Am. Dec. 179. Cited also in Mayo v. India M. Ins. Co., 152 Mass. 176, 23 Am. St. Rep. 817, 25 N. E. 81; Heebner v. Insurance Co., 10 Gray, 135, 137, 69 Am. Dec. 310, 311; Insurance Co. Glasgow, 9 Mo. 420 (415), but without particular application to the point at issue.

Distinguished in Insurance Co. v. Fogarty, 19 Wall. 643, 22 L. 218, holding machinery a total loss, though of value as old iron.

Barratry.— Master, being owner, cannot commit barratry, p. 50.

Rule applied in Wilson v. Insurance Co., 12 Cush. 365, 59 Am. Dec. 191, holding master, part-owner, cannot commit barratry.

8 Cr. 50–52, 3 L. 484, HALL v. LEIGH.

Joint owners consigning goods, each giving direction for his share, may individually sue consignee, p. 52.

Cited and rule applied in Shipman v. Mining Co., 158 U. S. 362, 39 L. 1017, 15 S. Ct. 888, where three parties contracted to ship coal, rendering separate bills, contract was held several; Jewett v. Cunard, 3 Wood. & M. 321, F. C. 7,310, holding separate action could be maintained, where there is a separate interest and consideration; Gray v. Buck, 78 Me. 478, 7 Atl. 16, holding same where one owner collects all the insurance on vessel; Parker v. Elder, 11 Humph. 548, holding where one joint party has been paid, other may sue alone. Cited, generally, in Welch v. Insurance Co., 23 W. Va. 311, and Scott v. McKinney, 98 Mass. 348.

Distinguished in Suydam v. Combs, 15 N. J. L. 135, holding where two parties delivered a horse to be sold, their action for price was joint; Angus v. Robinson, 59 Vt. 589, 59 Am. Rep. 760, 8 Atl. 499, holding settlement with one joint contractor is not a severance, unless all parties agree to it.

8 Cr. 53, 54, 3 L. 485, ALEXANDRIA v. PRESTON.

Taxes.— Purchaser of property in District of Columbia is not liable for taxes assessed prior to his purchase, p. 54.

No citations.

8 Cr. 55–59, 3 L. 486, PLEASANTS v. MARYLAND INS. CO.

Marine insurance.— In adjusting loss of cargo under policies in only one of which the invoice ruble is valued, the whole cargo should be estimated in dollars, p. 57–59.

Miscellaneous citations.— Cited to no point decided by main case in Insurance Co. v. Sugar Ref. Co., 87 Fed. 494.

8 Cr. 59–66, 3 L. 487, McCALL v. MARINE INS. CO.

Marine insurance.— Insurance against unlawful arrests, restraints and detainments is not infringed by restraint from entering a blockaded port, because that is not an unlawful restraint, p. 66.

No citations.

8 Cr. 66–70, 3 L. 490, SMITH v. EDRINGTON.

Wills.— In Virginia, after-acquired realty does not pass under will, unless such was the clearly expressed intention of testator, p. 70.

Rule applied in Carroll v. Carroll, 16 How. 284, 14 L. 940, holding after-acquired lands did not pass; Meador v. Sorsby, 2 Ala. 716, 36 Am. Dec. 433, holding after-acquired land does not pass by general devise; Gibbon v. Gibbon, 40 Ga. 577, holding under code, after-

acquired land does not pass under will made before code; Walton v. Walton, 7 J. J. Marsh. 59, holding after-acquired slaves passed by will, where it was testator's intention; Warner v. Swearingen, 6 Dana (Ky.), 199, holding there was no intention to devise after-acquired realty; Flournoy v. Flournoy, 1 Bush (Ky.), 523, holding, if nothing in will to show intention to devise after-acquired land, it will not pass; Williams v. Neff, 52 Pa. St. 335, holding where one devised all property to children, share of child dying before testator went to heirs; Waterman v. Greene, 12 R. I. 485, query, whether statute applies to wills executed before its enactment; Raines v. Barker, 13 Gratt. 131, 67 Am. Dec. 764, holding after-acquired land did not pass. See valuable note on this point in 57 Am. Dec. 144.

Distinguished in Hardenbergh v. Ray, 151 U. S. 126, 38 L. 87, 14 S. Ct. 309, holding after-acquired lands did pass; Hardenbergh v. Ray, 13 Sawy. 165, 33 Fed. 817, and McClasky v. Barr, 54 Fed. 786, 787, 797, holding after-acquired land passed under a clause devising "all his property;" Wynne v. Wynne, 23 Miss. 256, 57 Am. Dec. 142, holding after-acquired land passed, though will was executed before passage of statute.

8 Cr. 70, 71, 3 L. 491, BEALE v. THOMPSON.

Evidence.— Deposition opened out of court is inadmissible, p. 71.

Cited, Roscius, Brown, 444, F. C. 12,042, refusing to admit deposition opened out of court; Shankwiker v. Reading, 4 McLean, 241, F. C. 12,704, holding, if certificate does not state deposition was retained by judge, it is inadmissible; Phelps v. City of Panama, 1 Wash. Tr. 616, holding where clerk filed deposition without order of court, it was inadmissible.

8 Cr. 72–74, 3 L. 491, CLEMENTSON v. WILLIAMS.

Statute of limitations.—Acknowledgment of original justice of claim insufficient to revive a debt. Acknowledgment must go to fact that claim is still due. Accordingly, partner's statement after dissolution, that he has not paid a debt, will not remove bar of statute, p. 74.

The following citing cases rely upon this holding, and apply it in their decisions: Wetzell v. Bussard, 11 Wheat. 314, 6 L. 483, holding acknowledgment must be unqualified; Thompson v. Peter, 12 Wheat. 567, 6 L. 731, holding acknowledgment by personal representative will not revive debt; Bell v. Morrison, 1 Pet. 361, 7 L. 179, holding same as to acknowledgment of partner, after dissolution; Moore v. Bank of Columbia, 6 Pet. 91, 8 L. 331, holding that in addition to acknowledgment there must be a promise to pay; Shepherd v. Thompson, 122 U. S. 235, 236, 30 L. 1157, 7 S. Ct. 1231, 1232, holding where intention of instrument was that property should be applied

to debts, it did not revive personal liability; Nicholls v. Warfield, 2 Cr. C. C. 429, F. C. 10,234, holding conditional promise will not revive debt; Jenkins v. Boyle, 2 Cr. C. C. 120, F. C. 7,262, holding that an acknowledgment accompanied with refusal to pay will not remove bar; Bispham v. Patterson, 2 McLean, 90, F. C. 1,441, holding admission of one partner, after dissolution, does not bind firm; in Wilson v. Torbert, 3 Stew. 306, 21 Am. Dec. 637, is to the same effect; St. John v. Garrow, 4 Port. 226, 29 Am. Dec. 281, admission that a liability exists held sufficient; Crawford v. Childress, 1 Ala. 488, holding verbal acknowledgment will not prevent its running against a bond; Lowther v. Chappell, 8 Ala. 355, 42 Am. Dec. 643, holding admission of maker will not revive debt as against surety; Biscoe v. Jenkins, 10 Ark. 116, holding part payment by one joint debtor will not revive debt as against other; Brown v. State Bank, 10 Ark. 136, holding express written acknowledgment of its existence revives debt; Cooper v. Wood, 1 Colo. App. 106, 27 Pac. 886, holding no acknowledgment of surviving partner, made after death of co-partner, will revive debt against the estate; Lord v. Shaler, 3 Conn. 133, 8 Am. Dec. 161, holding its acknowledgment as a subsisting debt takes it out of the statute; Bound v. Lathrop, 4 Conn. 339, 10 Am. Dec. 148, holding that acknowledgment of one joint maker of note revives it as to all; Marshall v. Dalliber, 5 Conn. 486, holding an untrue declaration of payment not an acknowledgment; De Forest v. Hunt, 8 Conn. 185, holding unqualified acknowledgment removes bar; Coit v. Tracy, 8 Conn. 277, 20 Am. Dec. 113, holding an acknowledgment by a joint debtor, long after their separation and for his advantage, will not remove bar; Dickinson v. McCamy, 5 Ga. 488, 48 Am. Dec. 299, holding acknowledgment of note and claim of discharge will not take case out of the statute; Dawson v. Godkins, 28 Ga. 312, holding new promise is governed by same statute as original demand; Chambers v. Garland, 3 G. Greene, 323, holding a promise to pay made to avoid litigation, not an acknowledgment; Penley v. Waterhouse, 3 Iowa, 440, holding there must be an acknowledgment of a subsisting debt, and a promise to pay it. As also in Head v. Manner, 5 J. J. Marsh. 261; Perley v. Little, 3 Me. 101, holding a conditional acknowledgment insufficient; Peavey v. Brown, 22 Me. 103, holding a promise to renew a note and appointing a time for it, a sufficient acknowledgment; Johnston v. Hussey, 89 Me. 495, 36 Atl. 994, holding acknowledgment, by statute, must be in writing; Lingan v. Henderson, 1 Bland Ch. 278, holding an acknowledgment to take joint debt out must be equivalent to a renewal by all; Stockett v. Locke, 8 Md. 380, holding acknowledgment of debt and resistance of payment will not remove bar of statute. As also in the following: Bangs v. Hall, 2 Pick. 377, 13 Am. Dec. 442; Ten Eyck v. Wing, 1 Mich. 45, 46, 47; Davidson v. Morris, 5 S. & M. 572, and McLean v. Thorp, 4 Mo. 259; Leach v. Asher, 20 Mo. App. 660, holding part payment by

trustee does not arrest running of statute as to residue of debt; Farmer v. Stewart, 2 N. H. 99, holding where there is a submission to arbitrators, surety need not be notified of their sitting; Belles v. Belles, 12 N. J. L. 347, holding if anything is said to repel the presumption of a promise to pay, acknowledgment is insufficient; Gulick v. Turnpike Co., 14 N. J. L. 548, holding defendant does not waive statute by setting up outlawed accounts; Sands v. Gelston, 15 Johns. 521, holding submitting to arbitration, but denying claim, not a sufficient acknowledgment; Roosevelt v. Mark, 6 Johns. Ch. 290, holding any payment or act of assignee insufficient to revive; Stafford v. Bryan, 1 Paige Ch. 243, holding claim barred; Henry v. Root, 33 N. Y. 531, holding infant's exercising acts of ownership over land after majority is a ratification; Searight v. Craighead, 1 Pen. & Watts, 138, holding acknowledgment by partner, after dissolution, does not revive debt as against others; Fries v. Boisselet, 9 Serg. & R. 132, 11 Am. Dec. 685, holding a qualified acknowledgment insufficient; also Eckert v. Wilson, 12 Serg. & R. 397; Levy v. Cadet, 17 Serg. & R. 129, 17 Am. Dec. 653, holding acknowledgment by partner, after dissolution, does not revive debt against others; Montgomery v. Montgomery, Rich. Eq. Cas. 76, holding claim barred; Russell v. Gass, Mart. & Y. 273, holding a promise to settle by the books of the plaintiff is an insufficient acknowledgment; Steel v. Matthews, 7 Yerg. 315, holding part payment insufficient; Belote v. Wynne, 7 Yerg. 541, holding admission with refusal to pay insufficient; Kuhn v. Mount, 13 Utah, 115, 44 Pac. 1038, holding promise to pay on contingency will, on proof the contingency has happened, bar the debt; Hayes v. Morse, 8 Vt. 319, holding indorsement of payment insufficient; Farmers' Bank v. Clarke, 4 Leigh (Va.), 606, holding conditional promise, without performance of condition, insufficient; Aylett v. Robinson, 9 Leigh (Va.), 52, holding a promise "to settle," insufficient; as also in Sutton v. Burruss, 9 Leigh (Va.), 384, 33 Am. Dec. 247; Rowe v. Marchant, 86 Va. 181, 9 S. E. 996, where the acknowledgment was held sufficient.

Cited also, but without particular application, in dissenting opinion, Campbell v. Holt, 115 U. S. 632, 29 L. 488, 6 S. Ct. 215; Beard v. Smith, 6 T. B. Mon. 491; Kegler v. Miles, 1 Mart. & Y. 428, 17 Am. Dec. 821; Stubblefield v. McAuliff, 55 Pac. 638, holding payments on mortgage note by husband did not keep alive his wife's original liability thereon.

Distinguished in Warner v. Allee, 1 Del. Ch. 54, holding payments by a surviving partner take debt out of the statute.

Statute of limitations is entitled to same respect as other statute, and should not be explained away, p. 74.

Cited in United States v. Wilder, 13 Wall. 256, 20 L. 682, holding statute of limitations is to be enforced; The Sam Slick, 2 Curt. 485, F. C. 12,282, holding court cannot except a case from statute; Merrill v. Town of Monticello, 66 Fed. 166, holding action in con-

structive trust barred; Hale v. Lawrence, 21 N. J. L. 743, 47 Am. Dec. 206, holding where cause of action arose out of the State, and both parties were then nonresidents, it is barred; Faysoux v. Prather, 1 Nott & McC. 305, 9 Am. Dec. 698, holding, when statute has begun to run, no subsequent disability can stop it.

8 Cr. 75–84, 3 L. 492, GRACIE v. MARINE INS. CO.

Marine insurance.— Policy on goods from Baltimore to Leghorn is satisfied upon the landing of the goods at the Lazaretto under the usage of trade, p. 83.

Cited and applied in Hostetter v. Park, 137 U. S. 40, 34 L. 572, 11 S. Ct. 4, holding touching at port out of course, if within general usage, is no deviation; Constable v. Steamship Co., 154 U. S. 66, 38 L. 912, 14 S. Ct. 1068, holding berthing of ship at a pier not her own is not a deviation; Mobile, etc., Ins. Co. v. McMillan, 27 Ala. 102, holding port of New Orleans, in marine policy, means usual place of landing goods on wharf at Lake Ponchartrain (also cites Gracie v. Maryland Ins. Co., 8 Cr. 84, 3 L. 495). Cited in The Gazelle, 5 Hughes, 395, 11 Fed. 432, admitting evidence of usage in construing charter; as also in Bradstreet v. Heron, Abb. Adm. 211, F. C. 1,792, construing bill of lading; Hostetter v. Gray, 11 Fed. 181, and Devato v. Barrels of Plumbago, 20 Fed. 517, as to place of delivery. Cited, arguendo, in Mansur v. Marine Ins. Co., 12 Gray, 524.

Distinguished in Hearn v. Insurance Co., 3 Cliff. 326, F. C. 6,301, holding evidence of usage inadmissible, when terms of policy are precise and clear.

8 Cr. 84–93, 3 L. 496, RICHARDS v. MARYLAND INS. CO.

Statute of limitations.— Failure of executor of an assignee to prosecute a suit begun by the assignee in his lifetime amounts to an abandonment, and the statute of limitations begins to run again against the claim, pp. 92, 93.

Cited and rule applied in Bauserman v. Blunt, 147 U. S. 657, 37 L. 320, 13 S. Ct. 471, holding statute stopped by death of debtor for a reasonable time so administrator may be appointed; Rhea v. Rhea, 54 Ala. 70, holding, unless appeal is prosecuted within time allowed, it is barred; Doe ex dem. Cofer v. Flanagan, 1 Ga. 542, holding statute does not run against administrator until grant of letters; Adams v. Davis, 47 Ga. 341, declaring statute should be construed strictly; Baker v. Baker, 13 B. Mon. 409, holding where suit abates by death of party, under statute, it may be commenced again within a year, such time being without the statute of limitations; Hernandez v. Montgomery, 2 Mart. (La.) (N. S.) 433, prescription does not run against him who cannot sue; Reilly v. Chouquette, 18 Mo. 226, holding statute does not begin to run against a town until it is incorporated and thus has capacity to

sue; Sanford v. Sanford, 62 N. Y. 555, holding statute will not cease running between death and grant of letters, except by statute; Taylor v. Thorn, 29 Ohio St. 574, holding statute does not run against creditors, after allowance of claims by executor; Barino v. M'Gee, 3 McCord (S. C.), 453, where plaintiff was nonsuited for laches, his right was held to be barred; Anderson v. Bedford, 4 Cold. 470, holding action barred where suit was dismissed for champerty; Brown v. Brown, 14 Lea, 292, holding action not barred, where plaintiff cannot sue. Cited generally in Beard v. Smith, 6 T. B. Mon. 491. And see note in 65 Am. Dec. 594.

Statute of limitations.— Object of it is to secure the individual against the machinations of dishonesty when attempted under the advantages attendant upon lapse of time, loss of papers and death of witnesses, p. 93.

Miscellaneous citations.— Cited, but not in point, in Louisville, etc., R. R. Co. v. County Court, 1 Sneed, 670; Life Association v. Goode, 71 Tex. 97, 8 S. W. 640; Balch v. Blagge, 157 Mass. 148, 31 N. E. 765. Cited also in Hoguet v. Wallace, 28 N. J. L. 526, construing a remedial statute liberally.

8 Cr. 94–98, 3 L. 499, CROWELL v. McFADON.

Embargo officer detaining a vessel in the honest belief that there was intention to evade the embargo law is not liable, and he need not show that the suspicion was reasonable, p. 98.

Rule applied in Otis v. Watkins, 9 Cr. 356, 3 L. 757, holding collector honestly detaining vessel justified, without showing probable cause for his opinion.

Distinguished in Bailey v. Berkey, 81 Fed. 741, holding assessor liable for a malicious excessive assessment; Campbell v. Thompson, 16 Me. 120, holding justice of peace liable for detaining goods before issuance of complaint.

8 Cr. 98–108, 3 L. 500, BEATTY v. BURNES.

Statute of limitations.— Assumpsit upon a statutory remedy is as much within the statute as assumpsit upon common-law claim, p. 108.

Cited in Campbell v. Haverhill, 155 U. S. 619, 39 L. 283, 15 S. Ct. 220, holding State statutes of limitation apply to actions for the infringement of letters-patent. Cited also without particular application of this principle in Michigan I. B. v. Eldred, 130 U. S. 696, 32 L. 1081, 9 S. Ct. 691; Metropolitan R. D. v. District of Columbia, 132 U. S. 13, 32 L. 236, 10 S. Ct. 24; Adams v. Davis, 47 Ga. 341; Lightfoot v. Polgreen, 13 S. & R. 401; Williams v. Williams, 5 Ohio, 446, and Brunswick T. Co. v. National Bk., 88 Fed. 612.

Statute of limitations is a statute of repose, p. 108.

8 Cr. 109, 110, 3 L. —, HARTFORD v. UNITED STATES.

Statutes.— Repeal by implication is never presumed, unless unavoidable, p. 110.

Rule applied in Chew Heong v. United States, 112 U. S. 550, 24 L. 774, 5 S. Ct. 260, holding repeal by implication is never admitted where both acts can stand; as also in Hogan v. Guigon, 29 Gratt. 709; Davies v. Creighton, 33 Gratt. 698; State v. Bowen, 38 W. Va. 98, 18 S. E. 377, and Cooke v. Ford, 2 Flipp, 32, F. C. 3,173.

Duties.— Penalty for landing goods imported without a permit applies to goods whose importation is prohibited, p. 109.

Distinguished in Jackson v. United States, 4 Mason, 190, F. C. 7,149, holding that vessel engaged in coasting trade is not subject to penalty for landing foreign goods without a permit.

8 Cr. 110–154, 3 L. 504, BROWN v. UNITED STATES.

Admiralty.— Timber on mud at low-water mark and prevented from floating away at high water by booms is to be considered as landed, p. 122.

Confiscation.— Courts may not adjudge confiscation of enemy's property found in this country in time of war, without previous enabling act of congress, p. 123.

This principle has been affirmed and applied by the citing cases, as follows: Dissenting opinion, Prize Cases, 2 Black, 687, 17 L. 483, majority holding vessel in blockaded port could be confiscated; dissenting opinion. Sprott v. United States, 20 Wall. 468, 22 L. 374, majority holding purchaser of cotton from Confederate States could not recover for its confiscation; Conrad v. Waples, 96 U. S. 284, 24 L. 722, holding until a law provided for the condemnation of rebel's land, courts could not decree its confiscation; Briggs v. United States, 143 U. S. 356, 36 L. 185, 12 S. Ct. 395, holding a certain act was a surrender by United States of its rights to confiscate that kind of property; United States v. Stevenson, 3 Ben. 120, F. C. 16,396, holding seizure of enemy's property on land must be authorized by statute; as also in United States v. One Thousand Seven Hundred and Fifty-six Shares of Capital Stock, 5 Blatchf. 237, F. C. 15,961; Britton v. Butler, 9 Blatchf. 462, F. C. 1,903, holding statute did not include money in hands of drawees, where a draft was captured; Seventy-eight Bales of Cotton, 1 Low. 15, F. C. 12,679, holding property abandoned by person engaged in breaking blockade may be taken as prize; Wagner v. Schooner Juanita, Newb. 358, 361, 363, 364, 365, F. C. 17,039, returning property confiscated without authority of congress; United States v. Bales of Cotton, Woolw. 262, F. C. 16,583, holding captures on land are brought within the prize jurisdiction, only by statute; The Parkhill, 18 Fed. Cas. 1197, holding power of confiscation lies in congress; Norris v. Doniphan, 4 Met. (Ky.) 391, 396, 399, holding act confiscating property as punishment

for treason, unconstitutional; dissenting opinion, Price v. Poynter, 1 Bush (Ky.), 389, majority holding capture of property for Confederate army under military authority, excusable; Terrill v. Rankin, 2 Bush (Ky.), 459, 92 Am. Dec. 503, holding Confederate general had no right to seize money in a bank; as also in Ferguson v. Loar, 5 Bush (Ky.), 691, holding same upon similar facts; Kershaw v. Kelsey, 100 Mass. 567, 570, 97 Am. Dec. 130, 133, 1 Am. Rep. 147, 150, holding contract made during war, between citizen and rebel, valid; Clark v. Mitchell, 64 Mo. 571, holding act of congress confiscating debts unconstitutional; Mutual Benefit L. Ins. Co. v. Hillyard, 37 N. J. L. 465, 18 Am. Rep. 745, holding policy not forfeited for nonpayment of premiums during war time; Cummings v. Diggs, 1 Heisk. 72, holding seizure of arms by Confederate officer justifiable; State v. Bank, 5 Baxt. 35, holding government cannot nullify contract between rebels, which is in no way connected with the rebellion; McVeigh v. Bank, 26 Gratt. 200, holding war does not ipso facto operate as a confiscation of enemies' property; Ex parte Hunter, 2 W. Va. 142, holding pardon to rebels restores them to the rights derived from pardoning power; Hedges v. Price, 2 W. Va. 231, 94 Am. Dec. 516, holding person liable for acts done during rebellion; Ex parte Quarrier, 4 W. Va. 219, 226, holding act requiring attorney to take test oath is constitutional. See also note to 89 Am. Dec. 615, as to confiscation of private property; note to 91 Am. Dec. 280, as to who are enemies; cited in note to Chancely v. Bailey, 95 Am. Dec. 361, in dissenting opinion in that case, where majority held contract to serve as substitute against United States was void.

Distinguished in dissenting opinion, Miller v. United States, 11 Wall. 316, 20 L. 148, majority holding act confiscating property of persons doing overt acts of treason constitutional; Burbank v. Conrad, 96 U. S. 309, 24 L. 729, and United States v. Shares, 27 Fed. Cas. 337, where property was confiscated under a statute.

War.— Contracts with enemy, made during war, are void, p. 136, per Story, J., dissenting.

Cited in Coppell v. Hall, 7 Wall. 557, 19 L. 248, holding contract between consul of neutral power and citizen of belligerent State to protect property in hostile territory, void; Tait v. New York Life Ins. Co., 1 Flipp. 308, 312, F. C. 13,726, holding policy which indemnifies public enemy is unlawful; Griswold v. Waddington, 16 Johns. 476, holding partnership between enemies dissolved.

International law.— Prize cases are governed by rules of admiralty disclosed in English Reports, p. 137, per Story, J., dissenting.

Cited in Prize Cases, 2 Black, 671, 17 L. 477, holding president has right to institute blockade of ports in possession of rebels: Prince Leopold, Blatchf. Pr. C. 90, F. C. 11,428, holding prize cases governed by rules of English courts; as also in Ella Warley, Blatchf.

Pr. C. 207, F. C. 4,371; One Thousand Two Hundred and Fifty-three Bags of Rice, Blatchf. Pr. C. 212, 213, F. C. 10,535, and Packard v. Sloop Louisa, 2 Wood. & M. 52, F. C. 10,652, as to jurisdiction.

War.— Right to confiscate enemy's property, wherever found, is undeniable, p. 122.

Cited to this point in Hanger v. Abbott, 6 Wall. 537, 18 L. 942, collecting authorities and discussing the power generally.

Miscellaneous.— Cited in United States v. Bales of Cotton, Woolw. 250, 251, F. C. 16,583, noting that Story, J., reserved opinion on a question of admiralty jurisdiction.

8 Cr. 155–168, 3 L. 520, THE RAPID.

War stops all intercourse as well as trade between citizens of hostile countries, p. 161.

Cited and principle applied in Scholefield v. Eichelberger, 7 Pet. 593, 8 L. 796, holding contract between enemies void; Hanger v. Abbott, 6 Wall. 535, 18 L. 941, holding war suspends statutes of limitations; Coppell v. Hall, 7 Wall. 557, 19 L. 248, holding contract between consul of neutral power and enemy to protect property in hostile country void; Philips v. Hatch, 1 Dill. 577, F. C. 11,094, holding cotnract with rebel void; The Bark Coza, Newb. 391, 399, F. C. 3,113, holding war stops all commercial intercourse between citizens of belligerents; The Planters' Bank v. St. John, 1 Woods, 588, 589, F. C. 11,208, holding declaration of war dissolves partnership between citizens of hostile States; Tait v. New York Life Ins. Co., 1 Flipp. 310, F. C. 13,726, holding policy which indemnifies a public enemy against loss in time of war is unlawful; United States v. One Hundred Barrels of Cement, 27 Fed. Cas. 293, holding there can be no intercourse between enemies, except by special license; Tarleton v. Bank, 49 Ala. 235, holding bill of exchange void when drawn between cities between whom intercourse is prohibited; Worthington v. Insurance Co., 41 Conn. 413, 19 Am. Rep. 508, holding nonpayment of premiums during war discharges policy; Perkins v. Rogers, 35 Ind. 145, holding contracts made during war void; Berry v. Bank, 2 Duv. (Ky.) 381, holding war renders presentment of bill unnecessary; Durden v. Smith, 44 Miss. 553, holding after war is begun, all trade between citizens of belligerents is unlawful; Shacklett v. Polk, 51 Miss. 391, holding contract made during war, but providing for licenses, is valid; dissenting opinion, De Jarnette v. De Giverville, 56 Mo. 457, majority supporting sale of land, though owner was within Confederate lines; Griswold v. Waddington, 16 Johns. 477, 499, 500, holding war stops all commercial intercourse between the nations; Cohen v. Insurance Co., 50 N. Y. 617, 10 Am. Rep. 527, holding nonpayment of premiums during war merely suspends policy; Dillard v. Alexander, 9 Heisk. 723, holding war stops commercial intercourse between citizens of belligerents; Lacy v. Sugarman, 12 Heisk. 360, holding bill of exchange

void; dissenting opinion. Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 654, majority holding policy void for nonpayment of premium during war; McVeigh v. The Bank, 26 Gratt. 841, holding note made by person within Confederate lines, to be discounted within Union lines, void; Caldwell v. Express Co., 1 Flipp. 89, 90, F. C. 2,303, holding, where carrier was prevented by war from delivering goods, he becomes a bailee, and is liable for value of goods at close of war, when demand was made.

Distinguished in Kershaw v. Kelsey, 100 Mass. 566, 567, 97 Am. Dec. 130, 1 Am. Rep. 147, holding lease between a citizen of Massachusetts and of a rebel State, of a plantation in latter State, is valid.

Confiscation.— In time of war, goods of enemy are subject to, p. 163.

Cited and principle applied in The Alexander, 8 Cr. 179, 3 L. 528, holding vessel leaving enemy's country for this, a lawful prize; as also in The Joseph, 8 Cr. 454, 3 L. 622, and Jecker v. Montgomery, 18 How. 114, 15 L. 312, holding property captured on high seas, intended for enemy's port, is lawful prize; The William Bagaley, 5 Wall. 405, 18 L. 589, holding property left in enemy's country subject to confiscation; Burbank v. Conrad, 96 U. S. 301, 302, 24 L. 727, holding, by confiscation, the government acquires only the actual interest of the party; The Sarah Starr v. The Aigburth, Blatchf. Pr. 74, F. C. 12,352, holding property of neutral trading in belligerent port subject to confiscation; The Hannah M. Johnson, Blatchf. Pr. 162, F. C. 6,031, holding master had no claim against property condemned for wages; The Diana and Cargo, 2 Gall. 98, F. C. 3,876, holding vessel sent to enemy's country a lawful prize; The Wando, 1 Low. 21, F. C. 17,140, holding corn belonging to neutral, in vessel taken, is liable to condemnation; United States v. The F. W. Johnson, 25 Fed. Cas. 1232, holding wrecking vessel taking cargo from neutral vessel wrecked on hostile shore not subject to condemnation.

Distinguished, Amory v. M'Gregor, 15 Johns. 36, 8 Am. Dec. 208, holding citizen of one belligerent may withdraw his property from enemy's country within reasonable time after war is declared.

Miscellaneous citations.— Cited incidentally in dissenting opinion, Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 492.

8 Cr. 169–180, 3 L. 524, THE ALEXANDER.

Confiscation.— American vessel carrying on commerce with enemy is subject to, p. 179.

Cited in The Joseph, 8 Cr. 454, 4 L. 622, condemning vessel for conduct in former part of voyage; The Diana and Cargo, 2 Gall. 98, F. C. 3,876, holding shipment after declaration of war illegal.

Prize.— Capture is not abandoned, though only a prize master is put on board, p. 180.

8 Cr. 181–203, 3 L. 528, THE JULIA.

War renders illegal all commercial intercourse between citizens of hostile countries, p. 193.

Cited, The Planters' Bank v. St. John, 1 Woods, 589, F. C. 11,208, holding war dissolves partnership between citizens of hostile States; Worthington v. Insurance Co., 41 Conn. 414, 19 Am. Rep. 509, holding nonpayment of premiums during war discharges policy; dissenting opinion, De Jarnette v. De Giverville, 56 Mo. 456, holding equity will not interpose to set aside sale of land made while party was within Confederate lines; Griswold v. Waddington, 16 Johns. 480, 505, 506, 509, war dissolves partnership between citizens of belligerents; dissenting opinion, Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 653, majority holding policy void for nonpayment of premium during war; McVeigh v. The Bank, 26 Gratt. 841, holding note made between one in Confederate lines, to be discounted within Union lines, void; Caldwell v. Express Co., 1 Flipp. 90, F. C. 2,303, holding where carrier was prevented by war from delivering goods, he becomes a bailee, and is liable for value of goods at close of war when demand is made.

Confiscation.— Sailing under license issued by the enemy, and in furtherance of enemy's interest, subjects American ship to capture as prize of war, p. 190.

The following citing cases affirm and apply this principle: The Aurora, 8 Cr. 219, 3 L. 541, holding use of enemy's license to a neutral port is illegal; The Hiram, 8 Cr. 449, 3 L. 620, condemning vessel, whose object to supply enemy with provisions, while not expressly stated in the license, was plainly inferable; Coppell v. Hall, 7 Wall. 558, 19 L. 248, holding intercourse within military lines could be licensed only by president; dissenting opinion, Burbank v. Conrad, 96 U. S. 302, 24 L. 727, holding government, by confiscation, acquires only actual interest of possessor; Maisonnaire v. Keating, 2 Gall. 336, F. C. 8,978, declaring that provisions destined to port of equipment of enemy rendered vessel and cargo liable to confiscation; The Alliance, Blatchf. Pr. C. 264, F. C. 245, holding sailing under enemy's license is illegal; The Gondar, Blatchf. Pr. Cas. 268, F. C. 5,526, condemning vessel for having an export license from enemy; Schooner Amado, Newb. 404, F. C. 12,005, holding vessel sailing under enemy's flag liable to seizure; Craig v. Insurance Co., 1 Pet. C. C. 416, F. C. 3,340, and Chauncey v. Yeaton, 1 N. H. 156, holding sailing under enemy's license is illegal; Tait v. New York Life Ins. Co., 1 Flip. 309, F. C. 13,726, holding policy void indemnifying public enemy against loss in time of war; Colquhoun v. Insurance Co., 15 Johns, 353, holding policy providing that vessel should have enemy's license aboard void. See also 3 Wheat. 207, note, 4 L. 372, note.

8 Cr. 203–221, 3 L. 536, THE AURORA.

Confiscation.—American vessel using enemy's license on voyage, in furtherance of enemy's interest, is liable to confiscation, p. 220.

Cited to the same effect in Craig v. Insurance Co., Pet. C. C. 416, F. C. 3,340; Colquhoun v. Insurance Co., 15 Johns. 353, holding policy void, which provided that vessel should have enemy's license aboard. See also 3 Wheat. 207, note, 4 L. 372, note.

Distinguished in The Sarah Starr, Blatchf. Pr. 85, F. C. 12,352, holding vessel carrying clearance papers issued by enemy is not subject to confiscation — these papers do not profess to protect her.

8 Cr. 221–229, 3 L. 542, THE ADVENTURE.

Prizes.—As between the belligerents, a capture operates as a complete divestiture of property, but to accomplish a donation by the captor to a neutral, condemnation by judicial tribunal is first necessary, p. 226.

Cited in dissenting opinion, The Siren, 7 Wall. 163, 19 L. 134, majority holding United States acquired title at time of capture; Seventy-eight Bales of Cotton, 1 Low. 17, F. C. 12,679, holding title of captors not vested until condemnation; The Schooner Tilton, 5 Mason, 471, F. C. 14,054, holding in cases of salvage, court can decide title. Cited, arguendo, in The Parkhill, 18 Fed. Cas. 1192.

Distinguished, Russell v. Forty Bales of Cotton, 21 Fed. Cas. 44, which was a case of derelict.

Salvage.—Amount of, depends upon the circumstances, p. 228.

Cited in The Astrea, 1 Wheat. 128, 4 L. 52, applying this rule; The Connemara, 108 U. S. 359, 27 L. 753, 2 S. Ct. 758, refusing to alter decree of salvage, where excess was not unreasonable; Rover v. Brig, 1 Mason, 377, F. C. 12,093, declaring rule of salvage in causes of derelict is a flexible rule yielding to circumstances; McGinnis v. Pontiac, 5 McLean, 367, Newb. 137, F. C. 8,801, declaring there is no fixed rule, allowing a fixed sum. Cited in The Philah, 19 Fed. Cas. 495, and Western Transp. Co. v. Great Western, 29 Fed. Cas. 789, upon the general question of compensation for salvage.

War.— Alien enemy cannot sue or be claimant in courts of belligerent captors, p. 228.

Cited in United States v. One Hundred Barrels of Cement, 27 Fed. Cas. 294, holding citizens of rebellious State cannot sue in United States courts; Perkins v. Rogers, 35 Ind. 145, 9 Am. Rep. 655, holding statute of limitations was suspended during war.

8 Cr. 229–251, 3 L. 545, GREEN v. LITER.

Writ of right.— Persons claiming distinct parcels of land by distinct titles cannot be joined in a writ of right, p. 250.

Cited in Harris v. Preston, 10 Ark. 209, applying rule.

Distinguished in South Park Comrs. v. Gavin, 139 Ill. 285, 28 N. E. 827, holding actual occupant and a person claiming any interest in the land may, under the statute, be joined as defendants in action of ejectment.

Adverse possession.— Seisin of one entering with title is coextensive with title, and is not limited to part actually occupied, p. 250.

Rule applied in Hunt v. Wickliffe, 2 Pet. 212, 7 L. 401, holding that party with better right is in constructive possession of all land not actually occupied by another; Peyton v. Smith, 5 Pet. 493, 8 L. 203, where one entering without title afterwards attorns to holder of legal title, his actual possession becomes the actual possession of the latter of the entire tract described in patent, from the moment of entry; Clarke v. Courtney, 5 Pet. 354, 8 L. 153, holding possession is coextensive with title, though deed be defective; United States v. Arredondo, 6 Pet. 743, 8 L. 566, holding words "in possession of land" in treaty do not require actual occupancy; as also in Mitchel v. United States, 9 Pet. 735, 9 L. 292; Clymer v. Dawkins, 3 How. 690, 11 L. 786, if a tenant in common enter on part of the land, under a partition, claiming that part in severalty, his possession is adverse to cotenants, though partition be invalid; Shepley v. Rangely, 2 Ware, 248, F. C. 12,756, holding entry good to foreclose the house, was also good to foreclose the lot; Shepley v. Rangeley, 1 Wood. & M. 216, F. C. 12,707, holding entry on one piece of land to foreclose mortgage covering several pieces is good for all; Ledbetter v. Fitzgerald, 1 Ark. 452, holding a party need not be in actual possession to maintain trespass; Conway v. Kinsworthy, 21 Ark. 17, and Wiggins v. Holley, 11 Ind. 7, one holding legal title to lands is constructively in possession of them; Hicks v. Coleman, 25 Cal. 135, 85 Am. Dec. 114, holding one entering on a portion of a tract of land under a deed describing all acquires possession to the entire tract; Unger v. Mooney, 63 Cal. 593, 49 Am. Rep. 105, a holding under deed of tenant in common, purporting to convey the whole, is hostile; Rangely v. Spring, 28 Me. 157, holding an entry on one of the parcels mentioned in the mortgage suffices; James v. Rowan, 6 S. & M. 402, holding possession of one joint owner is deemed the possession of both unless there be evidence of an ouster; Cattle v. Sydnor, 10 Mo. 770, declaring that actual possession is the only adverse possession as against the true owner in possession of part; Smith v. Hitchcock, 38 Neb. 109, 56 N. W. 792, holding that one occupying concurrently with owner does not occupy adversely. Cited, but applying the doctrine of the case more generally, in Towle v. Ayer, 8 N. H. 59, defining disseizins; Miller v. Shaw, 7 S. & R. 144, holding that one claiming adversely without color of title acquires what he actually occupies; Garrett v. Ramsay, 26 W. Va. 351, 359, 364, holding that second patentee only acquires

possession of what he actually occupies; as also in Ilsley v. Wilson, 42 W. Va. 770, 26 S. E. 555; Strother v. Lucas, 12 Pet. 454, 456, 9 L. 1154, 1155; Koiner v. Rankin, 11 Gratt. 427, 428, deciding that junior patentee settling outside of the interlock, does not acquire possession of land within interlock; and in the following: Boone v. Chiles, 10 Pet. 224, 9 L. 405; Norris v. Haggin, 12 Sawy. 58, 28 Fed. 283, and Harris v. McGovern, 99 U. S. 167, 25 L. 319, in considering what adverse possession will set the statute of limitations in motion.

Public lands.— Under patent, title passes with delivery of instrument, p. 248.

The following citing cases affirm and apply this principle: United States v. Schurz, 102 U. S. 399, 26 L. 173, holding delivery of patent not necessary to pass title; Doe v. Eslava, 9 How. 447, 13 L. 210, holding confirmation by congress passes fee without patent; Fletcher v. Fuller, 120 U. S. 551, 30 L. 764, 7 S. Ct. 676, holding adverse possession is equivalent to deed in evincing ownership; Gilman v. Brown, 1 Mason, 212, F. C. 5,441, holding grant by State conveys seisin; Stokes v. Dawes, 4 Mason, 272, 274, F. C. 13,477, holding commonwealth retains seisin until title is lawfully parted with; Barr v. Galloway, 1 McLean, 480, F. C. 1,037, holding formal entry unnecessary in case of wild lands; Le Roy v. Clayton, 2 Sawy. 496, F. C. 8,268, and Le Roy v. Jamison, 13 Sawy. 391, F. C. 8,271, holding delivery of patent not essential to vesting of title; Potts v. Gilbert, 3 Wash. 478, F. C. 11,347, holding grant from State passes legal possession to grantee; Barclay v. Plant, 50 Ala. 521, holding a deed by party in possession equivalent to livery of seisin; McDaniel v. Grace, 15 Ark. 483, holding title to wild lands draws to it the possession; Wood v. Mansell, 3 Blackf. (Ind.) 130, holding if land is not held adversely, bargainee may bring trespass without entering; Breckenridge v. Ormsby, 1 J. J. Marsh, 244, 19 Am. Dec. 78, holding deed executed and delivered passes complete title; Ward v. Fuller, 15 Pick. 192, holding devisee of vacant land may maintain writ of right without an entry; Smith v. Dennett, 15 Minn. 88, holding by statute deed passes complete title; Washburn v. Cutter, 17 Minn. 367, holding owner of wild lands has constructive possession, unless there be an adverse possession; McKinney v. Bode, 33 Minn. 453, 23 N. W. 853, holding patent is conclusive evidence of legal title; Redus v. Hayden, 43 Miss. 635, holding ownership draws possession, unless there is an adverse occupant; Tush-Ho-Yo-Tubby v. Barr, 45 Miss. 193, holding ownership draws possession; Gale v. Davis, 7 Mo. 547, holding patent gives right of possession; Reaume v. Chambers, 22 Mo. 54, holding actual seisin not necessary to entitle husband to curtesy; Dreyer v. Ming, 23 Mo. 437, holding patentee not in actual possession may maintain trespass; North Pac. R. R. Co. v. Majors, 5 Mont. 126, 2 Pac. 325, holding grant of congress imports livery of

seisin; Greely v. Steele, 2 N. H. 285, holding covenant of seisin not broken if grantor had title or possession; Enfield v. Permit, 8 N. H. 515, 31 Am. Dec. 208, holding grant by legislature vests actual seisin; as also in Enfield v. Day, 11 N. H. 529; Bradstreet v. Clarke, 12 Wend. 678, 680, holding that legal title, without actual seisin, will maintain a writ of right as to vacant lands ,probably as to other land; Vanderheyden v. Crandall, 2 Den. 21, declaring constructive seisin equivalent to actual seisin; Willson v. Betts, 4 Den. 209, holding grantee of wild lands can maintain writ of right, though never in actual possession; Jenkins v. Fahey, 73 N. Y. 363, holding where there is a vested remainder in fee there is a seisin in law; Holt v. Hemphill, 3 Ohio, 237, 238, holding delivery of deed considered as giving possession; Lowry v. Steele, 4 Ohio, 171, holding, where wife before marriage leased land, husband had constructive seisin; Lee v. Summers, 2 Or. 267, holding present grant from United States passes title at once; Dolph v. Barney, 5 Or. 202, holding grant from State under "Donation Act," passes a fee subject to conditions subsequent; McGraw v. Bookman, 3 Hill L. 267, maintaining action of trespass where plaintiff had title, but had never entered; Withers v. Jenkins, 14 S. C. 611, holding constructive seisin of trust estate will not give curtesy; Peeler v. Norris, 4 Yerg. 344, holding that patent passes complete title; Horton v. Crawford, 10 Tex. 388, holding title draws to it the legal seisin; Whitehead v. Foley, 28 Tex. 283, on reconsideration, 289, deciding that legal title draws to it possession; Chandler v. Rushing, 38 Tex. 597, holding one giving up actual possession loses constructive possession of remainder; Robinson v. Douglas, 2 Aiken, 368, where land is held adversely deed does not carry possession; Dickinson v. Hoomes, 8 Gratt. 429, holding entry not necessary in case of wild lands; Bell v. Snyder, 10 Gratt. 354, 355, demandants claiming under seisin of ancestor must prove themselves the heirs; Holloran v. Meisel, 87 Va. 401, 13 S. E. 34, holding grant of commonwealth confers seisin in deed, without entry.

Cited also in valuable note in 50 Am. Dec. 174; also note In 1 Blackf. (Ind.) 89. Cited also in Strothers v. Lucas, 12 Pet. 449, 9 L. 1152, respecting livery of seisin at common law, in holding sufficient solemnities required by Spanish law.

Distinguished in Bell v. Peabody, 63 N. H. 239, 240, 56 Am. Rep. 508, holding that a deed is not evidence of seisin even of wild lands; Farris v. Hayes, 9 Or. 85, holding failure of wife to allege possession was fatal to her action; also in Tucker v. Trustee of Rochester, 7 Wend. 254.

Circuit Court.— Jurisdiction attaches where value of property demanded exceeds $500 although plaintiff recover less, p. 242.

Cited in Kanouse v. Martin, 15 How. 208, 14 L. 664, holding if amount demanded exceed jurisdictional amount, defendant has right

to remove the action; to same effect Simon v. House, 46 Fed. 318, in determining value of matter in dispute; Adams v. Douglas County, 1 Fed. Cas. 108; McCahon, 241, holding tax to be paid by complainant must equal jurisdictional amount; Kohl v. United States, 91 U. S. 375, 23 L. 452, holding writ of right is a "suit" of which Circuit Court has jurisdiction; Ringgold's Case, 1 Bland. Ch. 24, in determining value of "matter in dispute;" Barber v. Kennedy, 18 Minn. 226, and Crawford v. Burnham, 1 Flipp. 117, F. C. 3,366, holding amount laid in declaration is amount in controversy; State v. Dolby, 49 N. H. 487; 6 Am. Rep. 591, holding allegation of value in complaint governs question of jurisdiction, and not the value as found at the trial.

Costs.— Where plaintiff demands jurisdictional amounts, but recovers less, costs are in the discretion of court, p. 242.

Cited in dissenting opinion, Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 166, 41 L. 672, 17 S. Ct. 261, majority holding act giving costs against railway company, if plaintiff's previously filed claim was rejected and he recovered more, unconstitutional; Greene v. Bateman, 2 W. & M. 364, F. C. 5,762, refusing to give costs to defendant, where plaintiff recovered less than jurisdictional amount; Abbott v. Gatch, 13 Md. 335, 71 Am. Dec. 643, following principal case under similar facts.

Denied in Streeter v. Connecticut, etc., R. R. Co., 65 N. H. 202, 18 Atl. 651, holding court may decide whether amount is sufficient.

Writ of right.— Demandant, in a writ of right, may recover less than his writ demands, p. 243.

Cited in Shaefer v. Gates, 2 B. Mon. 454, 38 Am. Dec. 166, holding demandant, in a writ of right, may recover the proportionate interest to which he shows title.

Writ of right.— Statute reforming writ did not affect right to plead in abatement, p. 243.

Cited in Henry v. Thorpe, 14 Ala. 109, holding writ of right not abolished by statute abolishing ejectment; Gaines v. Conn, 2 J. J. Marsh, 105, and Briscoe v. McKee, 2 J. J. Marsh. 372, holding pleas in abatement are still allowable to writ of right.

Writ of right.— Non-tenure is a good plea in abatement to a writ of right, p. 243.

Cited in Fiedler v. Carpenter, 2 Wood. & M. 214, F. C. 4,759, holding that to most real actions in Masachusetts, non-tenure is a good plea, either in bar or abatement; Smith v. Wiggin, 48 N. H. 110, holding if writ of entry be brought against one not seized of the freehold, he can plead non-tenure. Cited without special application in Whidden v. Proctor, 17 N. H. 94.

Writ of right.—Title in third person is not a defense in a writ of right, p. 250.

Distinguished in Green v. Watkins, 7 Wheat. 29, 31, 5 L. 389; Bolling v. Mayor, 3 Rand. 570–582, and Dawson v. Watkins, 2 Rob. (Va.) 268, holding, where demandant relies on constructive seisin, tenant may show a better title in another; Inglis v. Trustees, etc., 3 Pet. 133, 172, 188, 7 L. 629, 643, 648, holding in writ of right tenant may, on the issue joined, set up title in third person.

Miscellaneous citations.— Cited in Groslouis v. Northcut, 3 Or. 399, setting aside patent on ground title had already passed from United States; Johnson v. Towsley, 13 Wall. 86, 20 L. 487. See 2 Neb. 490; Sperry v. Sperry, 8 N. H. 480, and Colburn v. Holland, 14 Rich. Eq. 229.

8 Cr. 251–253, 3 L. 553, CARTER v. CUTTING.

Wills.— Probate of foreign will in domestic court is not void, but may be voidable, p. 252.

Rule applied in Schultz v. Schultz, 10 Gratt. 379, 60 Am. Dec. 348, holding judgment of court, admitting two wills to probate, is not subject to collateral attack.

Miscellaneous.— Cited in Cleveland v. Quilty, 128 Mass. 580, upon right to annul probate.

Appeal lies to Supreme Court, in the matter of the probate of a will in the District of Columbia; remote inferences should not be allowed to withdraw a case from Federal jurisdiction clearly granted by the act, p. 252.

Followed in Railroad Co. v. Church, 19 Wall. 64, 22 L. 98, holding appeal lies to United States court, although by statute of Maryland, as construed by State courts, it would not; Ormsby v. Webb, 134 U. S. 54, 58, 59, 33 L. 809, 810, 811, 10 S. Ct. 481, 482, holding Circuit Court must determine validity of probate of a will, if required.

8 Cr. 253–317, 3 L. 553, THE VENUS.

Confiscation.— Property of citizen of United States domiciled in enemy's country is liable to capture on the high seas, even though shipped before declaration of war, p. 286.

Rule applied in The Frances, 8 Cr. 347, 3 L. 385, and same case, page 371, 3 L. 593, to a similar state of facts; United States v. Guillem, 11 How. 60, 13 L. 604, holding neutral leaving belligerent country entitled to rights of neutral; The William Bagaley, 5 Wall. 408, 18 L. 589, holding neutral staying in enemy's country loses his rights as a neutral; Miller v. United States, 11 Wall. 306, 20 L. 144, declaring property in enemy's country subject to confiscation, whoever be owner; The Sarah Starr, Blatchf. Pr. 76, F. C. 12,352,

holding property of neutral domiciled in enemy's country subject to confiscation; Brown v. Hiatt, 1 Dill. 384, F. C. 2,011, regarding resident of belligerent State, an enemy; The Amy Warwick, 2 Sprague, 131, 140, 145, F. C. 341, confiscating property of permanent resident in belligerent country; Wildes v. Parker, 3 Sumn. 598, F. C. 17,652, holding party acquires the national character of the country of his domicile; The Rover, 2 Gall. 242, F. C. 12,091, condemning property of enemy; The Juanita, Newb. 364, F. C. 17,039, holding enemy's property within our territory cannot be confiscated without an act of congress; United States v. Barrels of Cement, 27 Fed. Cas. 294, holding property of persons in territory under hostile sway may be confiscated; The Parkhill, 18 Fed. Cas. 1187, holding no resident of hostile district can sustain proprietary claim of restitution; United States v. Johnson, 25 Fed. Cas. 1235, holding that domicile of owner at time determines whether the vessel is hostile; Perkins v. Rogers, 35 Ind. 160, 9 Am. Rep. 668, declaring citizens of belligerent State enemies; Micou v. Benjamin, 26 La. Ann. 723, where offender had mortgaged property only, his interest could be confiscated; Griswold v. Waddington, 16 Johns. 496, domicile at commencement of war determines national character. Cited, arguendo, in United States v. Packages, 27 Fed. Cas. 286, and The Gefia, 1 Mason, 90, F. C. 5,296.

Domicile is relinquished where one departs with a bona fide intent not to return, pp. 309–316.

Rule applied in In re William Walker, 1 Low. 238, F. C. 17,061, holding domicile of origin revives instantly, when one gives up domicile of choice; Burnham v. Rangeley, 1 Wood. & M. 10, 12, F. C. 2,176, declaring where one removes with such intent his domicile is immediately changed; Green v. Salas, 31 Fed. 112, holding domicile of birth reverts after a short residence with such intent; United States v. Chong Sam, 47 Fed. 885, holding domicile was regained by a short residence; Comitis v. Parkerson, 56 Fed. 563, holding citizen becoming wife of alien does not lose her citizenship; Marks v. Marks, 75 Fed. 327, 328, holding that one going to a State with such intention becomes domiciled at once; State v. Hallett, 8 Ala. 161, holding that to change domicile there must be an intent and an act; Gravillon v. Richard, 13 La. 298, 33 Am. Dec. 565, declaring intent and short residence fixes domicile; Verret v. Bonvillain, 33 La. Ann. 1308, holding that one coming to place with intent to remain acquires a domicile; Ex parte Blumer, 27 Tex. 738, 740, 742, 743, 745, 746, to acquire a domicile there must be an intent and an act—intent is proved by acts; Rue High, 2 Doug. (Mich.) 524, 526, holding domicile is determined by facts. See also notes to 59 Am. Dec. 111, 93 Am. Dec. 279, and 95 Am. Dec. 60, on general subject of domicile, collecting authorities; dissenting opinion, Fong Yue Ting v. United States, 149 U. S. 734, 37 L. 920, 13 S. Ct. 1030.

Distinguished in First Nat. Bank v. Balcom, 35 Conn. 357, holding that native domicile superseded by one under same nation revives only upon intent and act.

Sales.— Title does not pass from consignor to consignee prior to delivery and upon a mere unaccepted offer by the consignor that his consignee may take a joint interest with him, p. 275.

Cited and applied in McElwee v. Metropolitan Lumber Co., 69 Fed. 305, 37 U. S. App. 266, holding where nothing more remained to be done to put goods in deliverable condition, sale was complete; dissenting opinion, Commonwealth v. Fleming, 130 Pa. St. 168, 17 Am. St. Rep. 772, 18 Atl. 627, majority holding sale of property sent C. O. D. is complete on delivery to carrier; McLaughlin v. Marston, 78 Wis. 677, 47 N. W. 1060, holding same as main case; The San Jose Indiano, 2 Gall. 296, F. C. 12,322, holding shipment to shipper's agent, giving him right to hold them, until he has made arrangements with his correspondent, does not divest title or possession of shipper; Blum v. The Caddo, 1 Woods, 65, F. C. 1,573, holding consignor could not maintain action against common carrier for loss of goods. since title had passed; Treadwell v. Packing Co., 13 Fed. 24, holding title of goods to be delivered on condition passes when condition is performed.

Admiralty.— By statute owner forfeits vessel, if his oath avers that he is "of the city of New York," when he is in fact domiciled in England, p. 276.

Prize.— English prize law is our prize law, p. 284.

Cited to this point in The Parkhill, 18 Fed. Cas. 1192.

8 Cr. 317–334, 3 L. 575, THE MERRIMACK.

Sale.— Title to goods given to carrier, on account and risk of vendee, vests in vendee, but not if the delivery be accompanied by other conditions, pp. 331–333.

Rule applied in The Sally Magee, Blatchf. Pr. 385, F. C. 12,260, where title was declared to have passed; Blum v. The Caddo, 1 Woods, 65, F. C. 1,573, holding where vendor has sold goods on credit, title passes on delivery to carrier; Treadwell v. Anglo-American Packing Co., 13 Fed. 24, holding if goods are to be delivered when draft is paid, title passes on payment; Hobbie v. Smith, 27 Fed. 662, holding delivery to carrier for and at risk of vendee, carries possession to him; Jordan v. James, 5 Ohio, 99, holding right of stoppage in transitu may be exercised, when title is vested in consignee.

Distinguished in The St. Jose Indiano, 1 Wheat. 214, 4 L. 74, holding title of goods consigned to agent who was to come to an understanding with purchaser is in shippers; as also in The San Jose Indiano, 2 Gall. 297, F. C. 12,322.

8 Cr. 335–348, 3 L. 581, THE FRANCES.

Prize.— Naturalized citizen returning to his native land for purposes of trade, but not to reside, and winding up his business in order to return to country of his adoption a year after declaration of war, is to be deemed to have gained a domicile in his native country so that goods shipped by him are liable to capture on the high seas, p. 347.

Distinguished in Davis v. Bradley, 28 Vt. 126, 65 Am. Dec. 232.

8 Cr. 348–353, 3 L. 585, THE FRANCES.

Practice.— Second order for further proof by affidavits allowed in appellate court, where sufficiency of first was impaired by non-production of certain letters referred to, p. 353.

Evidence.— A written paper referred to by testimony and within the power of a party to produce should be produced, p. 353.

No citations.

8 Cr. 354–358, 3 L. 587, THE FRANCES.

Prize.— Goods shipped by British to American trader, with option to accept or reject, remain the property of the consignor and liable to capture, p. 357.

Cited in Sproule v. McNulty, 7 Mo. 66, holding title to property consigned to one to sell and apply proceeds to payment of a debt is in the consignor.

Miscellaneous.— Cited in Perkins v. Rogers, 35 Ind. 145, 9 Am. Rep. 655, and United States v. One Hundred Barrels of Cement, 27 Fed. Cas. 294, apparently not in point.

8 Cr. 358, 3 L. 589, THE FRANCES.

No citations.

8 Cr. 359–363, 3 L. 589, THE FRANCES.

Sale.—To vest title in consignee there must be an acceptance or an agreement to accept, p. 361.

Cited in Treadwell v. Anglo-American Packing Co., 13 Fed. 24, deciding title to goods sent upon condition passes upon performance of condition; Sproule & Agnew v. McNulty, 7 Mo. 66, holding title to property consigned to one to sell and apply proceeds to debt is in consignor.

8 Cr. 363–371, 3 L. 590, THE FRANCES.

Prize.— Domicile of merchant at time of capture determines whether goods are enemies', p. 371.

Cited in note, 59 Am. Dec. 111, on general subject of domicile.

8 Cr. 371–381, 3 L. 593, VOWLES v. CRAIG.

Public lands — Vendor and vendee.— Vendor, having a survey and military land warrant in Virginia for 2,000 acres, and selling his right to the survey and assigning his plat and certificate to the vendee, who obtains a patent, cannot maintain an action against the vendee for the land in excess of 2,000 acres, which the survey proves to contain, pp. 379–381.

No citations.

8 Cr. 382–384, 3 L. 597, THE SALLY.

Prize.— Municipal forfeiture, under non-intercourse law of United States, is absorbed by the more general operation of the law of war, p. 384.

Rule applied in The Sarah Starr, Blatchf. Pr. 84, F. C. 12,352, holding statute did not restrict war powers of United States; and also Amory v. M'Gregor, 15 Johns. 34, 8 Am. Dec. 207, holding, after declaration of war, goods were not forfeited under non-intercourse act, which was virtually repealed by the declaration; The Hampton, 5 Wall. 376, 18 L. 661, holding statutes did not modify the law of prize.

Prize.— Property used in trade with enemy subject to condemnation and goes to the individual captor, not the United States, p. 383.

Cited in Prize Cases, 2 Black, 674, 17 L. 479, declaring neutral vessel in blockaded port lawful prize; The Hannah M. Johnson, Blatchf. Pr. 162, F. C. 6,031, denying application of master to be paid out of condemned cargo; The Diana, 2 Gall. 98, F. C. 3,876, holding shipment made after declaration of war and from an enemy's port illegal; United States v. One Hundred and Twenty-Nine Packages, 27 Fed. Cas. 286, confiscating all goods involved in illegal purpose; cited approvingly in The Parkhill, 18 Fed. Cas. 1194.

Prize act of June, 1812, operates as a grant to privateers of all property rightfully captured, p. 384.

8 Cr. 385–388, 3 L. 598, THE EUPHRATES.

Admiralty.— Further proof, if inconsistent, is not allowed, p. 388.

Cited in Personetté v. Johnson, 40 N. J. Eq. 175, saying that court may allow, where order appealed was a surprise; as also in Scribner v. Williams, 1 Paige Ch. 551; The Adula, 89 Fed. 355, refusing to allow further proof.

8 Cr. 388–398, 3 L. 599, THE MARY.

Admiralty.— In this case Supreme Court ordered further proof, p. 398.

Cited in The Venezuela, 52 Fed. 875, 1 U. S. App. 314, receiving new testimony which was not intentionally withheld in District Court.

8 Cr. 398–416, 3 L. 602. UNITED STATES v. ONE THOUSAND NINE HUNDRED AND SIXTY BAGS OF COFFEE.

Forfeiture, under non-intercourse act, takes place upon commission of offense, and avoids subsequent sale to innocent purchaser, p. 405.

Rule applied in Gelston v. Hoyt, 3 Wheat. 311, 4 L. 398, holding property is divested on commission of offense; Caldwell v. United States, 8 How. 379, 382, 12 L. 1121, 1122, holding, under statute providing for forfeiture of goods or their value, title is not divested until election; Confiscation Cases, 7 Wall. 460, 19 L. 199, holding informer has no interest until after condemnation; Henderson's Distilled Spirits, 14 Wall. 56, 58, 20 L. 817, holding where forfeiture was made absolute by statute, it takes place at time of offense; Burbank v. Conrad, 96 U. S. 299, 24 L. 726, holding under alternative statute, condemnation divests title; United States v. Stowell, 133 U. S. 17, 33 L. 559, 10 S. Ct. 247, holding forfeiture took place from time of offense; as also in United States v. Fifty-six Barrels, 1 Abb. (U. S.) 100, 102, F. C. 15,095, under absolute statute; United States v. One Hundred Barrels, 2 Abb. (U. S.) 314, 320; S. C., F. C. 15,948; S. C., 1 Dill. 57, 63, limiting rule to where intent that it should be absolute is unmistakable; The Florenzo, Blatchf. & H. 60, 61, F. C. 4,886, holding forfeiture occurs at time of sale to an alien; United States v. The Bark Reindeer, 2 Cliff. 68, F. C. 16,144, holding forfeiture takes place at time wrongful act is committed; United States v. Sixty-four Barrels, 3 Cliff. 315, F. C. 16,306, holding where statute gives a choice of remedies title does not vest until seizure; The Maria, Deady, 100, F. C. 9,075, holding if vessel sold to foreigner, is navigated under American register, forfeiture occurs at once; United States v. Mackoy, 2 Dill. 306, F. C. 15,696, holding jurisdiction of court in condemnation proceedings against distillery not defeated by subsequent sale; The Mary Celeste, 2 Low. 357, F. C. 9,202, if forfeiture is alternative, title does not vest until election; The Kate Heron, 6 Sawy. 109, 111, F. C. 7,619, declaring forfeiture not absolute where words of statute were uncertain; Clark v. Protection Ins. Co., 1 Story, 134, F. C. 2,832, when property is forfeited, it vests in government after seizure, which then relates back; Heidritter v. Elizabeth Oil Cloth Co., 6 Fed. 141, holding decree of condemnation relates back to time of offense; Six Hundred Tons of Iron Ore, 9 Fed. 600, declaring freight earned before government's election, must be paid out of proceeds; United States v. Cigars, 18 Fed. 150, holding cigars could be seized in hands of innocent purchasers; Schenck v. Peay, 21 Fed. Cas. 683, limiting to where intention that forfeiture be absolute clearly appears; United States v. Hann, 26 Fed. Cas. 230, holding indictment, under act of congress, lies against one who trades in slaves illegally imported; United States v. One Hundred, etc., 27 Fed. Cas. 286, declaring one who mixes prohibited and unprohibited

goods for fraudulent purposes, loses all; United States v. One Water Cask, 27 Fed. Cas. 345, forfeiting only goods in possession of offender at time of act; United States v. Three Hundred, etc., 28 Fed. Cas. 124, holding forfeiture relates to time of seizure, in absence of declaration that it shall be instantaneous; United States v. High Wines, etc., 28 Fed. Cas. 280, holding forfeiture under statute, direct in its terms, occurs at time of act; Trustees v. Winston, 5 Stew. & P. 27, construing act of legislature to impose absolute forfeiture; Gill v. Taylor, 3 Port. 185, construing statute providing for sale of government land imposed absolute forfeiture; Summers v. Clark, 29 La. Ann. 103, where statute was absolute, and forfeiture was said to take place at once; Mitchell v. Cunningham, 29 Me. 382, holding that title is not divested under revenue law, until condemnation; Kneeland v. Willard, 59 Me. 447, holding forfeiture dated from time of wrongful act; Tracey v. Corse, 58 N. Y. 149, holding title not divested till condemnation; Hollman v. Peebles, 1 Tex. 703, holding abandonment of public land ipso facto restores it. Cited, arguendo, in The Distilled Spirits, 11 Wall. 368, 20 L. 171; The Cloth Cases, Crabbe, 355, F. C. 2,902; Dobbins Distillery v. United States, 96 U. S. 404, 24 L. 640; Williams v. Delano, 155 Mass. 14, 28 N. E. 1123, and Our House No. 2 v. State, 4 G. Greene, 175.

Distinguished in The Nabob, Brown Adm. 118, F. C. 10,002, holding forfeiture did not defeat innocent purchaser where there was no decree; Selma, etc., R. R. Co. v. Tipton, 5 Ala. 802, 39 Am. Dec. 350, declaring forfeiture in favor of a private corporation not absolute; Ingersoll v. Jackson, 14 Mass. 110, where statute was in alternative; Mariatigui v. Insurance Co., 8 La. 69, 28 Am. Dec. 131, declared not applicable.

8 Cr. 417, 418, 3 L. 609, UNITED STATES v. THE "MARS."

Decided upon the authority of 8 Cr. 398–416, 3 L. 602, ante. Cited in Gelston v. Hoyt, 3 Wheat. 311, 4 L. 398, holding property is divested on commission of offense; Caldwell v. United States, 8 How. 379, 382, 12 L. 1121, 1122, holding title not divested under alternative statute until election; Confiscation Cases, 7 Wall. 460, 19 L. 199, holding informer has no interest until after condemnation; Henderson's Distilled Spirits, 14 Wall. 56, 20 L. 817, where forfeiture was absolute; Burbank v. Conrad, 96 U. S. 299, 24 L. 726, holding under alternative statute title not divested until condemnation; United States v. Stowell, 133 U. S. 17, 33 L. 559, 10 S. Ct. 247, holding forfeiture took place at time of offense; as also in United States v. Fifty-six, etc., 1 Abb. (U. S.) 100, 103, F. C. 15,095, and United States v. The Bark Reindeer, 2 Cliff. 68, F. C. 16,144; United States v. Sixty-four, etc., 3 Cliff. 315, F. C. 16,306, holding where statute gives choice of remedies title not divested until seizure; The Maria, Deady, 100, F. C. 9,075, holding if vessel sold to foreigner is navigated under American register, forfeiture occurs at once; United

States v. One Water Cask, 27 Fed. Cas. 345, forfeiting only goods in possession of offender at time of act.

Distinguished in Mariatigui v. Insurance Co., 8 La. 69, 28 Am. Dec. 131, holding this rule not applicable to charge insurers against acts of barratry; Ingersoll v. Jackson, 14 Mass. 111, where statute was in alternative. Cited, arguendo, in The Schooner Tilton, 5 Mason, 471, F. C. 14,054.

8 Cr. 418–420, 3 L. 609, THE FRANCES.

Prize.— Capture of prize of war overrides all previous liens of defendant upon mere agreement of the parties, p. 420. (See 8 Cr. 348, 3 L. 585.)

Rule applied in The Battle, 6 Wall. 498, 18 L. 933, holding same; The Siren, 7 Wall. 162, 19 L. 133, refusing to consider outstanding claims on vessel previous to capture; also The Hannah M. Johnson, Blatchf. Pr. 35, F. C. 6,029a. Cited in The Delta, Blatchf. Pr. 134, 136, F. C. 3,777; The Mary Anne, 1 Ware, 106, F. C. 9,195, holding in case of forfeiture one claiming an interest may make himself a party; United States v. The Arcola, 24 Fed. Cas. 850, where a mortgage duly recorded, not being a secret lien, was not condemned.

Distinguished in The Amy Warwick, 2 Sprague, 155, 156, F. C. 343, where a neutral had not a lien but a jus in re.

Sale.— Delivery of goods sent at risk of shipper to master is to him as the agent of the shipper, p. 419.

Cited in The Hannah M. Johnson, Blatchf. Pr. 37, F. C. 6,029a, holding bill of lading transmitted to party to cover advances does not pass title; The Lynchburg, Blatchf. Pr. 52, F. C. 8,637a, holding where defendants contracted to convey goods to a certain State and there deliver them, the sale was made there; Ruhl v. Corner, 63 Md. 185, holding title to goods shipped to one not ordering does not pass on delivery to carrier; Elliot v. Bradley, 23 Vt. 223, holding goods were sent at risk of consignor, consequently consignee was former's agent, and title remained in consignor; as also in Hobbie v. Smith, 27 Fed. 662.

Factor's lien.— By common law factor has a lien on goods in his possession for money due from his principal, p. 419.

Cited in Jordan v. James, 5 Ohio, 100, holding same.

War.— Enemy cannot sue or be heard as claimant in courts of captors, p. 418.

Cited in Perkins v. Rogers, 35 Ind. 145, 9 Am. Rep. 655, holding same.

8 Cr. 421–431, 3 L. 610, THE THOMAS GIBBONS.

Prize.— A shipment made, even after the knowledge of the war, is deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period as would leave a reasonable presumption that the knowledge of that repeal would suspend hostilities, p. 429.

Affirmed in The Mary, 9 Cr. 140, 3 L. 683, applying the principles to similar facts; Amory v. McGregor, 15 Johns. 37, 8 Am. Dec. 209, holding one belligerent may withdraw his property from the country of the other, within a reasonable time after declaration of war.

Cited generally in McCall's Case, 15 Fed. Cas. 1230, and The Parkhill, 18 Fed. Cas. 1197, as to powers of the president in war.

War.— Mere act of trading with enemy does not ipso facto forfeit property, p. 430.

Privateer's commission is limited by law under which it is issued and the instructions of the executive, pp. 428, 429.

Miscellaneous.— Cited in dissenting opinion, Clements v. Graham, 24 La. Ann. 449, 450.

8 Cr. 431–434, 3 L. 614, PRINCE v. BARTLETT.

Federal and State jurisdiction.— Property in possession of sheriff by execution cannot be taken by subsequent process of United States court, p. 434.

Rule applied in Bayard v. Bayard, 2 Fed. Cas. 1060, holding interest vested in party by mere delivery of execution to sheriff, could not be defeated by subsequent process of Federal courts; Dudley's Case, 7 Fed. Cas. 1154, holding United States court has no power to issue injunction to stay process of State court.

Distinguished in Wall v. The Royal Saxon, 29 Fed. Cas. 64, where the subject of execution was not the same in both courts whose process was in question.

Insolvency.— Priority of United States attaches when the insolvency is legal and notorious, and not a mere inability to pay debts, p. 434.

Cited and principle applied in United States v. Howland, 4 Wheat. 120, 4 L. 530, note, holding assignment of part of his property insufficient; Conrad v. Insurance Co., 1 Pet. 439, 7 L. 212, declaring mere inability of debtor to pay all his debts insufficient; Beaston v. The Bank, 12 Pet. 134, 136, 10 L. 1029, 1030, holding priority can never attach while debtor is in possession of property; United States v. Wilkinson, 5 Dill. 278, F. C. 16,695, holding, under statute, priority is secured when debtor's property is administered for benefit of creditors generally; United States v. The Bank, 3 Story, 81, F. C.

14,715, holding prior attaching creditors take precedence over United States; United States v. McLellan, 3 Sumn. 352, F. C. 15,698, holding conveyance of all property to creditors to discharge debts not such an act; Thelluson v. Smith, Fed. Cas. 13,878, note; S. C., 1 Pet. C. C. 198, holding mere inability to pay debts insufficient; Ex parte Hull, 12 Fed. Cas. 856, holding insolvency must be proved as indicated by the statute; United States v. Couch, 25 Fed. Cas. 674, holding assignment of property of firm and of one partner insufficient; Farmers' Bank v. Beaston, 7 Gill & J. 426, 28 Am. Dec. 229, holding inability of bank to pay her debts could not per se give the priority; Marshall v. Barclay, 1 Paige Ch. 161, holding assignment must be of all debtor's property; United States v. Crookshank, 1 Edw. Ch. 237, construing the statute strictly, and as not giving priority out of estate vested in heir; Wilcocks v. Wain, 10 S. & R. 380, holding mortgage given before general assignment takes precedence; State v. Harris, 2 Bailey L. 600, holding this priority not an incident of sovereignty.

Distinguished in McArthur v. Chase, 13 Gratt. 691, where statute was entirely different; Storm v. Waddell, 2 Sandf. Ch. 528, where the judgment creditor by commencing his action acquired equitable lien in property of the debtor, not impaired by a discharge in bankruptcy.

8 Cr. 434–444, 3 L. 615, THE ST. LAWRENCE.

Admiralty.— Order for further proof in prize causes in the Supreme Court is discretionary and will not be granted where there is reason to suspect suppression of evidence by the applicant, p. 442.

Rule applied in Personette v. Johnson, 40 N. J. Eq. 175, allowing further proof where order appealed from was a surprise to appellant; Scribner v. Williams, 1 Paige Ch. 551, holding it is not a matter of course to receive further proof on an appeal; The Adula, 89 Fed. 361, refusing further proof.

Miscellaneous citations.— Cited in Amory v. McGregor, 15 Johns. 36, 8 Am. Dec. 208, and declared not to have decided that an American could withdraw funds from England after declaration of war.

8 Cr. 444–451, 3 L. 619, THE HIRAM.

Prize.— Using enemy's license in carrying provisions to neutral, who is their ally, subjects ship to condemnation, p. 451.

Rule applied in The Julia, 1 Gall. 598, F. C. 7,575, applying principles to similar facts. Cited in note, 3 Wheat. 207, 4 L. 372, on this subject.

Miscellaneous citations.— Cited in Payson v. Coolidge, 2 Gall. 235, F. C. 10,860.

8 Cr. 451–456, 3 L. 621, THE JOSEPH.

Prize.— American vessel carrying cargo to an enemy's port after war was known is liable to condemnation, even after she has left enemy's port, p. 455.

Rule applied in Jeeker v. Montgomery, 18 How. 114, 15 L. 313, holding forfeiture cannot be evaded by stopping at an intermediate port; The Springbok, Blatchf. Pr. 454, F. C. 13,264, holding vessel destined for enemy's port, subject to capture the moment she departs; United States v. One Hundred Barrels Cement, 27 Fed. Cas. 293, 297, holding all goods shipped during war without a license, forfeited; Caldwell v. Express Co., 1 Flipp. 89, F. C. 2,303, holding carrier prevented from delivering by war becomes a bailee, and is liable for value of goods at end of war when demand is made; Durden v. Smith, 44 Miss. 553, holding war excuses demand by holder of note at that time. Cited approvingly in The Grotius, 8 Cr. 460, 3 L. 624.

Distinguished in Kershaw v. Kelsey, 100 Mass. 567, 97 Am. Dec. 130, upholding lease by rebel of plantation in rebel State to a citizen of Massachusetts.

Privateer may under his instruction capture vessel within waters of the United States, pp. 455, 456.

8 Cr. 456–462, 3 L. 623, THE GROTIUS.

Prize.— Whether acts amounted to a capture being in doubt, further proof was ordered.

No citations.

8 Cr. 462–470, 3 L. 624, ALEXANDER v. PENDLETON.

Adverse possession for fifty years with knowledge of a better title constitutes a good defense against it, p. 469.

Cited in Scott v. Evans, 1 McLean, 489, F. C. 12,529, holding lapse of time a good bar to claim of title, though statute would not operate; Riggs v. Fuller, 54 Ala. 146, holding where there is privity of estate several possessions can be tacked; Cannon v. Stockmon, 36 Cal. 541, 95 Am. Dec. 208, holding title acquired by adverse possession is lost only by adverse possession for statutory period; Parker v. Metzger, 12 Or. 413, 7 Pac. 522, and 420 Min. Co. v. Min. Co., 3 Sawy. 658, F. C. 4,989, holding adverse possession vests a perfect title; McNeely v. Langan, 22 Ohio St. 37, sufficient if possession was in plaintiff or those under whom he claims; Kirk v. Smith, 9 Wheat. 288, 6 L. 92, the possession must be adverse. Cited, arguendo, in Hunter v. Marlboro, 2 Wood. & M. 198, F. C. 6,908.

Cloud on title.— Equity will interpose to quiet title to a property situated near a growing city, and in which numerous persons are interested, p. 468.

Cited in Holland v. Challen, 110 U. S. 20, 28 L. 54, 3 S. Ct. 498, holding, under statute, possession by plaintiff unnecessary; Frost v. Spitley, 121 U. S. 556, 30 L. 1012, 7 S. Ct. 1131, holding it cannot be maintained by one with only equitable title; Dick v. Foraker, 155 U. S. 414, 39 L. 205, 15 S. Ct. 128, holding, under statute, possession by plaintiff unnecessary; Harland v. Bankers, etc., Tel. Co., 32 Fed. 308, holding equity will not entertain a bill to try title to property held adversely; Errett v. Crane, 8 Fed. Cas. 777, holding that person in possession can bring bill to quiet title; Arrington v. Liscom, 34 Cal. 386, 94 Am. Dec. 738, holding person acquiring title by adverse possession may bring such a bill; Butler v. Durham, 2 Ga. 428, refusing to grant equitable relief where there was adequate remedy at law; Bond v. Little, 10 Ga. 400, holding equity will not restrain action in ejectment in a doubtful case; Stockton v. Williams, 1 Doug. (Mich.) 567, refusing to restrain the assertion of a title in a case not free from doubt; Bracken v. Preston, 1 Pinn. 598, 44 Am. Dec. 423, dismissing bill where complaint showed plaintiff disseized. See also note in 50 Am. Dec. 453, note. Cited without special application in dissenting opinion, Davis v. Settle, 43 W. Va. 37, 26 S. E. 565. Cited in Caro v. Pensacola, etc., Co., 19 Fla. 772, holding that equity will interfere in behalf of those in possession of land claimed by a large number; Pierpont v. Fowle, 2 Wood. & M. 36, F. C. 11,152, remarking that parties are usually sent to law to try questions of title.

Distinguished in De Bernardi v. McElroy, 110 Mo. 659, 19 S. W. 628, where party in possession had accepted bond and had agreed to execute a deed.

Notice.— A bona fide purchaser without notice of a verbal trust attachiug to his grautor's title is protected agaiust such trust, p. 469.

Cited in Johnson v. Rogers, 13 Fed. Cas. 797, holding a party taking claim from trustee with notice of fraud cauuot impeach the assignment; Rogers v. Pierce, 12 Neb. 51, 10 N. W. 536, holding purchaser from one without notice not liable for conversiou; Snowden v. Tyler, 21 Neb. 217, 31 N. W. 669; Holmes v. Stout, 4 N. J. Eq. 494; Holmes v. Stout, 10 N. J. Eq. 422, and Griffith v. Griffith, 1 Hoff. Ch. 163, holding grautee of bona fide purchaser is not to be charged with acts kuown to him before he acquired title.

Distinguished in York v. McNutt, 16 Tex. 16, 67 Am. Dec. 608, holding bona fide purchaser of equitable title takes it with imperfections.

Statute of limitations.— Where suit is abated it takes no time out of the statute, p. 470.

Cited in Willard v. Wood, 164 U. S. 523, 41 L. 540, 17 S. Ct. 181, holding if suit is dismissed or abates, limitation runs during pendency; Lytle v. The State, 17 Ark. 662, holding filing of amended bill bringing in new parties to be commencement of suit as to them;

Null v. Canal Co., 4 Ind. 434, holding proceeding abandoned will not avail to save claim from statute; Young v. Mackall, 4 Md. 374, where a suit abates and is not revived it takes no time out of the statute.

Miscellaneous.— Cited in Smith v. Adams, 130 U. S. 175, 32 L. 898, 9 S. Ct. 569, but apparently not in point.

8 Cr. 471–478, 3 L. 627, PRATT v. CARROLL.

Specific performance refused after lapse of seven years and change of circumstances, p. 476.

Cited in Taylor v. Longworth, 14 Pet. 175, 10 L. 406, allowing, specific performance, where delay was caused by state of title; Veazie v. Williams, 8 How. 158, 12 L. 1028, giving relief though there had been a lapse of time; McCabe v. Matthews, 155 U. S. 553, 39 L. 258, 15 S. Ct. 191, whether specific performance will be granted depends on the circumstances; McNeil v. Magee, 5 Mason, 259, F. C. 8,915, holding court will not decree specific performance after long delay, especially where there has been a material change of circumstances; Warner v. Daniels, 1 Wood. & M. 111, F. C. 17,181, holding where there is fraud, or it would work injustice, lapse of time is not a bar; McCabe v. Matthews, 40 Fed. 339, refusing specific performance where there was a long delay, unexplained; Avery v. Kellogg, 11 Conn. 571, allowing specific performance where laches of plaintiff was waived by acts of defendant; The Trustees, etc. v. State, 7 Ind. 183, holding equity can exercise its discretion in enforcing a statute; Mathews v. Gilliss, 1 Iowa, 254, holding unless time is expressly made so, it will not be treated as of the essence of the contract; Kercheval v. Swope, 6 T. B. Mon. 366, where there was part execution, lapse of time was not a bar; Derrett v. Bowman, 61 Md. 528, holding time not of the essence of the contract, and giving specific performance; Dawson v. Sparks, 1 Posey (Tex.), 751, holding if property is of perishable nature party who has been defrauded is not bound to preserve them until suit to rescind is brought. Cited generally in Tufts v. Tufts, 3 Wood. & M. 474, F. C. 14,233; Cheney v. Cook, 7 Wis. 424.

Distinguished in Magee v. McManus, 70 Cal. 559, 12 Pac. 454, declaring it to be inapplicable to a contract of indemnity; Longworth v. Taylor, 1 McLean, 517, F. C. 8,491, refusing to enforce illegal agreement.

Miscellaneous citations.— Cited in Everett Land Co. v. Maney, 16 Wash. 560, 48 Pac. 246, to point that where damages are indefinite, the amount stipulated is considered liquidated damages.

The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series:

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1815.

VOL. IX.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

Potius ignoratio juris litigiosa est, quam scientia.

CIC. DE LEGIBUS, DIAL. I.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

THE HONORABLE JOHN MARSHALL, Chief Justice.

The Honorable BUSHROD WASHINGTON,
The Honorable WILLIAM JOHNSON,
The Honorable BROCKHOLST LIVINGSTON,
The Honorable THOMAS TODD,
The Honorable GABRIEL DUVALL, and
The Honorable JOSEPH STORY,
} Associate Justices

RICHARD RUSH, Esquire, Attorney-General.

Supreme Court of the United States.

FEBRUARY TERM, 1815.

MANDEVILLE
v.
THE UNION BANK OF GEORGETOWN.

Absent—LIVINGSTON, *J.*, TODD, *J.*, *and* STORY, *J.*

By making a note negotiable in a bank, the maker authorizes the bank to advance on his credit to the owner of the note, the sum expressed on its face; and it would be a fraud upon the bank to set up offsets against this note in consequence of any transactions between the parties.

ERROR to the Circuit Court for the District of Columbia, for the county of Alexandria, in an action of debt, by the Union Bank against Mandeville, upon his promissory note to C. I. Nourse, indorsed to the bank.

On the trial below a special verdict was found which states the following facts:

On the 15th of January, 1811, Mandeville, then and always an inhabitant of the town of Alexandria (in the county of Alexandria), for a valuable consideration, made his promissory note at the said town, payable to C. I. Nourse (or order), sixty days after date, negotiable at the Union Bank of Georgetown, payable at the Bank of Potomac, in Alexandria, for $410.51.

The note was delivered to C. I. Nourse, and on the same day indorsed by him, and offered for discount at the Union Bank, where it was regularly discounted for his use.

On the 30th of the same month, Mandeville being informed that this note had been discounted, made no objection, and said that he had funds to meet it.

The note was not paid when it became due, and was protested for non-payment.

10*] *On the 16th of the same month (the day after the date of Mandeville's note) Charles I. Nourse, for a full and valuable consideration, executed and delivered to Mandeville, his note of that date, payable in 60 days, for $400, negotiable at the Bank of Alexandria, payable at the Bank of Columbia (in Georgetown).

On the the 30th of the same month C. I. Nourse became further indebted to Mandeville by the acceptance of his order of that date, drawn at sight, and by acceptance made payable on the 16th of February following, in favor of C. Page, for the use of Mandeville, for $64, neither of which has been paid. The Union Bank transacts its business in Georgetown, in the county of Washington.

On the 2d of February, 1811, Mandeville inserted an advertisement in the Alexandria Gazette, cautioning all persons against receiving assignments of any notes given by him to Nourse, as he had discounts against them.

Mandeville, in the court below, offered to set-off the note and acceptances of Nourse, against his own note, upon which the suit was brought; but upon the special verdict the court below rendered judgment against him for its whole amount; and he brought his writ of error.

By the laws of Virginia, in force in the county of Alexandria, the defendant is allowed to set-off against the assignee of a promissory note any just claim which he had against the original payee before notice of the assignment of the note.

But by the laws of Maryland, in force in the county of Washington, a promissory note, payable to order, is subject to the same rules as in England under the statute of Anne.

On behalf of the plaintiff in error, it was contended that the note, being made at Alexandria and to be paid there, was to be governed by the laws of Virginia, and that as he held Nourse's note, before he had notice of *the assign- [*11
ment of his own, he had a right to offset it in this suit.

On the other side it was said that it was immaterial by which law the note was to be governed; for it was made with a view, expressed on its face, to be discounted by the plaintiffs, whereby the defendant had waived any offset to which he might have a right. Besides which, upon being informed that the note was discounted by the plaintiffs, he did not object, nor insist upon his set-off, but said he had funds (meaning funds of Nourse's) to meet it. By which conduct also he waived his right to the set-off.

Feb. 9th. MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

It is entirely immaterial whether this question be governed by the laws of Virginia or of Maryland. By neither of them can the discounts claimed by the plaintiff in error be allowed.

By making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face.

It would be a fraud on the bank to set up offsets against this note in consequence of any transactions between the parties. These offsets are waived and cannot, after the note has been discounted, be again set up.

The judgment is to be affirmed with damages at the rate of 6 per cent. per annum.

MEIGS ET AL. *v.* M'CLUNG'S LESSEE.

Absent—JOHNSON, *J.*, *and* TODD, *J.*

In the treaty of the 25th of October, 1805, with the Cherokees, the reservation of 3 miles square for a garrison, lies below, and not above the mouth of the Highwassee, where the United States have placed the garrison.

ERROR to the Circuit Court for the District of East Tennessee, in an action of ejectment brought by M'Clung's lessee against Meigs and others.

12*] *On the trial in the court below a bill of exceptions was taken, which stated the case as follows:

The plaintiff's lessor claims the land under a grant from the state of North Carolina to John Donelson, dated the 11th of July, 1788, for 1500 acres lying on the north side of Tennessee River, opposite to a high bluff of rocks of diverse colors. The defendants resided on the land as officers, and under the authority of the United States, who had a garrison there and had erected works at an expense of $30,000. The place where the defendants resided was two miles at least above the termination of the treaty line opposite the mouth of the Highwassee. In 1805 the line between the United States and the Cherokee Indians was run, according to the treaty, under the direction of the defendant, Meigs, who was an agent of the United States for that purpose; and afterwards the garrison reserve of three square miles was laid off by the direction of the defendant, Meigs, opposite and above the mouth of the Highwassee River, making the treaty line from the three forks of Duck River to the point on Tennessee River opposite the mouth of Highwassee the lower line of said reservation, and the Tennessee River the southern line, meandering the river and reducing it to a straight line of three miles in length.

The defendants read a copy of a letter written by D. Smith and the defendant, Meigs, who were commissioners on the part of the United States, at the treaty holden with the Cherokee Indians, on the 25th of October, 1805, dated at Washington, January 10th, 1806, and addressed to the Secretary at War, in which they say "by the treaty with the Indians concluded at Tellico on the 25th day of October, 1805, there was reserved three square miles of land for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of Highwassee. This reservation is ostensibly predicated on the supposition that the garrison at south-west point, and the United States factory now at Tellico, would be placed on the reserve during the pleasure of the United States. But it was stipulated with Doublehead that whenever the United States should find this land unnecessary for the purpose mentioned, then it is to revert to Doublehead; provided, as a condition, that he retain **13***] one of the square miles to his own use, *and that he is to relinquish his right and claim to the other two sections of one mile square each in favor of John D. Chisholm and John Riley, son to Samuel Riley, one of the interpreters in the Cherokee nation, in equal shares."

As it is proper that this be recognized, we have made this statement for your information,

And have the honor to be, &c.,

DANIEL SMITH.
RETURN J. MEIGS.

When the defendant and the other officers of the United States went to look for the place to erect the garrison in pursuance of the reserve, they went first below the mouth of Highwassee; but it was a low and marshy country, affording no good site for a garrison, and no water or spring was to be had there.

The plaintiff's counsel insisted that the Indian title to the land was extinguished and that he had a right to recover, and prayed the court so to instruct the jury; to which the defendant's counsel objected, and insisted that the defendants were entitled to recover against the plaintiff, because the Indian title was not extinguished; and because the land was occupied by the United States troops, and the defendants, as officers of the United States, for the benefit of the United States, and by their direction; and because the garrison was erected on the land really reserved for that purpose by the treaty; as they insisted it was out of the land ceded that the reserve was made. That it must, by the letter of the treaty, be understood to be land reserved to the Indians, out of the part ceded, and not a reserve in favor of the United States, out of the land not ceded by the Indians; and that the term "reserve" in the treaty controlled the other expressions, "opposite and "below the mouth of Highwassee." That the United States had a right by the constitution to appropriate the property of individual citizens; and that the line run was the true line of the reservation.

But the court overruled the objections of the defendant's counsel, and charged the jury that the land reserved *for a garrison was op- [**14 posite to and below the month of the Highwassee, and that the land opposite to and above was ceded to the United States by the Indians by the treaty of Tellico, and that the United States had no right to appropriate the land mentioned in the plaintiff's declaration. And that the plaintiff was authorized by law to recover, if the land covered by his grant lay opposite to and above the mouth of the Highwassee. That if the treaty had expressly reserved the three miles square for the disposal of the United States opposite and above the mouth of Highwassee, the Indian title would be thereby extinguished, as that reserve would be north of the treaty line. That if the land thus reserved was at the time vacant land, the United States could appropriate it as they pleased; but if it was private property the United States could not deprive the individual of it without making him just compensation therefor. And further, that by the expressions used in the said treaty, the Indian title to all land north of the treaty line, from the point opposite the mouth of Highwassee to Fort Nash, except such tracts as were expressly reserved for the Indians, was extinguished; and that the three square miles reserved for the United States must, according to the treaty, be situate opposite and below the mouth of Highwassee. To this opinion the counsel for the defendants excepted.

By the 2d art. of the treaty of 25th October, 1805 (Laws of United States, vol. 8, p. 192), "The Cherokees quitclaim and cede to the "United States all the land which they have "heretofore claimed, lying to the north of the "following boundary line: Beginning at the "mouth of Duck River, running thence up the "main stream of the same to the junction of "the fork, at the head of which Fort Nash "stood, with the main south fork; thence a "direct course to a point on the Tennessee "River bank opposite the mouth of Highwassee River," &c.

After describing the other lines of the cession, the treaty proceeds thus: "And whereas, "from the present cession made by the Cherokees, and other circumstances, the site of the "garrisons at south-west point and Tellico are "become not the most convenient and suitable "places for the accommodation of the Indians, **15*]** "it may become *expedient to remove "the said garrisons and factory to some more "suitable place; three other square miles are "reserved for the particular disposal of the "United States on the north bank of the Tennessee, opposite to and below the mouth of "the Highwassee."

C. Lee, for the plaiutiffs in error.

The points in dispute in this cause are stated in the bill of exceptions. The principal question is, whether the three miles reserved for the use of the United States are to lay below or above the mouth of the Highwassee.

We say that it was the intention of the parties that they should lie above. The expression "reserved" imports an exception to the cession. The reservation must have been out of the land ceded. The United States could not reserve what was not theirs before; but for the accommodation of the Indians they reserve three miles square for the use of the United States. It was intended to prevent the extinguishment of the Indian title to so much iu order to prevent individuals from purchasing it. The letter of Smith and Meigs to the Secretary of War shows that the land was to revert to Doublehead and two others, whenever the United States should cease to have a use for it. It was therefore clearly a reserve, or exceptiou from the general operation of the grant. It would be incousistent with the faith of the treaty to suffer any individual to possess it.

Jones, contra,

Relied upon the plain words of the treaty.

The word "reserve" is the only thing that can justify a question; but it means "to appropriate," to "set apart," to hold it for the use of the United States, for the purpose of a garrison, but uot to make an absolute grant or cession of the land. The expression "three other square miles" shows that they meant other than the land ceded.

The letter is not evidence; it is no part of the treaty; it was never ratified by the senate; aud is unimportant if it was. It, however, shows that there was no mistake in the word "below" in the treaty.

16*] *C. Lee*, in reply.

The word "reserve" was used to keep individuals from appropriating to themselves the lands supposed most convenient for the mutual accommodation of the Indians and the United States. It means the same as the word "retain."

The word "other" is put iu opposition to the former sites of the garrison and factory. It is straiuing the word "reserve" very far to make it mean a new grant.

MARSHALL, *Ch. J.*

Does the question arise in this case whether a grant is good before extinguishment of the Indiau title?

C. Lee.

That question does not come up in this case.

STORY, *J.*

That question has been decided in the case of *Fletcher* v. *Peck*.

February 13th. *Absent*—JOHNSON, *J.*, *and* TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The land for which this ejectment was brought, lies within the territory ceded to the United States by the state of North Carolina, and was claimed by a patent anterior to that cession. At the date of the grant the Indian title had not been extinguished. On the 25th day of October, 1805, a treaty was made betweeu the United States and the Cherokee Indiaus, in which the Indians ceded to the United States "all the land lying to the north of the "following boundary liue: Beginning at the "mouth of Duck River, running thence up the "main stream of the same to the junction of "the fork, at the head of which Fort Nash "stood, with the main south fork; theuce a di-"rect course to a point on the Tennessee River "bank opposite the mouth of the Highwassee "River."

*The question on which the cause has been placed is this: Is the land claimed by the plaintiff in the court below within the ceded territory? **[*17**

The line mentioned in the treaty has been run, and the land in controversy lies on the north side of it, and consequently within the limits ceded to the United States; but there was a further stipulation in the treaty, which the plaintiffs in error say comprehends the lands for which this suit is brought.

After describing the ceded territory, the treaty proceeds to say: "And whereas, from the pres-"ent cessiou made by the the Cherokees, and "other circumstances, the sites of the gar-"risons at South-west point and Tellico are "become not the most convenient and suitable "places for the accommodation of the said Indi-"ans, it may become expedient to remove the "said garrisons and factory to some more suitable "place," three other square miles are reserved for the particular disposal of the United States on the north bank of the Tennessee opposite to and below the mouth of Highwassee.

The ceded territory lies above the mouth of Highwassee, as does the land in controversy; yet the plaintiffs in error contend that this land is within the stipulation for a reserve of three square miles to lie below the mouth of Highwassee.

They attempt to sustain this propositiou by alleging that the word "below" was inserted in the treaty by mistake, when the word "above" was intended.

This mistake ought certainly to be very clearly demonstrated, before the courts of the United States can found upon its existence a judgment which shall deprive a citizen of his property.

The argument, so far as it is drawn from the treaty itself, rests on the word "reserved." It is said that the lands "reserved for the particular disposal of the United States" must necessarily be a part of the ceded territory, or the term would not aptly express the idea of the parties.

*The court cannot accede to this rea- **[*18**
soning. The treaty is the contract of both parties, each having lands. The words are the words of both parties, and the term might, without any strained construction, be applied to the lands of either. No great violence is

done to the known import of the term as used in the treaty, if it be considered as equivalent to the words "set apart." This construction is rendered neeessary by the word "other." "Three other square miles;" that is, other than those before ceded, are reserved for the particular disposal of the United States. The eontext, instead of proving that the word "below" was used by mistake in the treaty, would rather induce the court to put that eonstruction on an ambiguous term, had one been employed.

The counsel for the plaintiffs in error also rely on a letter written by the eommissioners who ncgotiated the treaty to the Seeretary of War on the 10th day of Januâry, 1806. But, without inquiring into the weight to which such a letter is entitled in such a case, it is to be observed that the letter agrees with the terms of the treaty. It says that the three square milcs reserved for the particular disposal of the United States werc "opposite to and below the mouth of the Highwassee." It is unneecssary to make a further eomment on this letter than to say, that there is no expression in it whieh appears to the court to eountenancc, in the slightest degree, the idea that the word "below" in the treaty was used by mistake instead of the word "above."

The facts, that the agents of the United States took possession of this land lying above the mouth of the Highwassee, ereeted expensive buildings thereon, and placed a garrison therc, eannot be admitted to give an explanation to the treaty which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation. This eourt is unanimously and clearly of opinion that the Cireuit Court committed no crror in instrueting the jury that the Indian title was extinguished to the land in eontroversy, and that the plaintiff below might sustain his aetion.

The judgment is affirmed with costs.

Cited—5 Pet. 48; 13 Pet. 201; 17 Wall. 247.

19*] *SIMMS *v.* GUTHRIE ET AL.

Absent—LIVINGSTON, *J.*, STORY, *J.*, *and* TODD, *J.*

The land law of Virginia, which gives a right of pre-emption to those who had marked and improved land before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act, and not to the time when the claim for such pre-emption was made before the Court of Commissioners.

If an entry be made by the assignee of a pre-emption right, it will be good, although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and if it mention an improvement, provided the place be described with sufficient certainty in other respects.

A bill in equity to enjoin a judgment at law is not to be considered as an original bill, and therefore it is not necessary in a court of limited jurisdiction to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court.

A complainant in equity cannot obtain a decree for more than he has asked in his bill.

ERROR to the Cireuit Court for the District of Kentucky, in a suit in chaneery.

The faets of the case, as stated by the Chief Justiee in delivering the opinion of the court, were as follow:

Charles Simms the plaintiff in error, having obtained a judgment in ejeetment for eertain lands lying in Kentucky, in possession of the defendants, for which the said Simms held a patent prior to that under whieh the defendants elaimed, a bill of injunction was filed by them, praying that he might be deereed to convey to them so much of the land in their possession as was ineluded within his patent.

It appeared in evidence that, in the year 1776, a eompany, of whom John Ash was one, marked and improved several parcels of land lying on the waters of Salt River. John Ash made an improvement on the waters of the Town Fork of Salt River, soon after which William M'Collom, another member of the same company, made an improvement at a spring on the same stream, about seven hundred yards below him. Ash eomplained that M'Collom had encroaehed on his rights by approaching too near him; upon which they agreed to deeide by lot who should be entitled to both improvements. Fortune determined in favor of Ash, and M'Collom relinquished his rights, and improved elsewhere. Ash afterwards amended both improvements, and planted peaeh stones at that which was made by himself.

In April, 1780, before the Court of Commissioners appointed in conformity with the act generally denominated the previous title law, John Ash obtained a certificate in the following words: "John Ash, Sen., claimed a pre-emp- "tion of 1,000 acres of land in the District of "Kentueky on account of marking and improv- "ing the same in the year 1776, lying on the "waters of the *Town Fork of Salt Riv- [*20 "er, about two milcs nearly east from Joseph "Cox's land, to include his improvement. "Satisfactory proof being made to the eourt, "they are of opinion that the said Ash has a "right to a pre-emption of 1,000 aeres of land, "to inelude the above location, and that a cer- "tifieate issue aceordingly."

This certifieate was assigned to Terrell & Hawkins, who, in April, 1781, made the following entry thereon in the surveyor's office of the county in which the lands lie: "Terrell & "Hawkins entered 1,000 acrcs, No. 1226, on "the waters of the Town Fork of Salt River, "about two miles nearly east from Josepl Cox's. "land, to inelude his improvement." This entry was surveyed and patented, and the defendants claim under it. The date of this patent was on the 6th of March, 1786.

The entry of Charles Simms was made on the 13th of April, 1780, his survey on the 25th of the same month, and his patent issued on the 19th of April, 1783.

The claim under an improvement being of superior dignity to that of Charles Simms, his title must yield to that of the defendants in error, if theirs be free from objection.

The land law of Virginia, under which all parties claim, requires that loeations shall be made so specially and preeisely that other persons may be enabled with certainty to loeate the adjacent residuum.

The situation of Kentucky, covered with eon-

flicting titles to land, has made it necessary that this requisition of the law should be enforced with some degree of rigor, while the ignorance of early locators, the dangers to which they were exposed, and the difficulty of describing, with absolute precision, lands which were held by a very slight improvement made on a single spot, and which could not be immediately surveyed, induced the courts of that country, for the purpose of preserving entries as far as was consistent with law, to frame certain general rules of very extensive application to cases which occurred. One was, that the designation of any particular spot of general notoriety, or such a description of it in relation to some place of

21*] general notoriety *as would clearly point it out to subsequent locators, would give sufficient notice of the place intended to be appropriated, and that a failure to describe the external figure of the land should be supplied by placing the improvement in the centre, and drawing round it a square with the lines to the cardinal points, which should comprehend the quantity claimed by the location.

The court below was of opinion that there was sufficient certainty in the certificate of John Ash, Sen., and in the entry afterwards made with the surveyor by Terrell & Hawkins, that the improvement intended to be claimed by Ash was that which he won of M'Collom, and that the land should be surveyed in a square form with the lines to the cardinal points, including the improvement won of M'Collom in the centre. A survey having been made in conformity with this interlocutory decree, the court ordered the defendant below to convey severally to the plaintiffs in that court so much of the land claimed by them as was included in his patent. To this decree Charles Simms has sued out a writ of error.

Swann, for the plaintiff in error, contended,

1. That Simms having the first entry and first patent and judgment at law in ejectment, his title must prevail.

The entry of Terrell & Hawkins in 1781 cannot be connected with the settlement of Ash. It does not refer to it, and the want of such reference cannot be aided by any extrinsic evidence. The entry must be in itself sufficient, or it can avail nothing. (Harding's Reports, 108, *Patterson's devisees* v. *Bradford*.)

2. The entry, if it can be connected with the certificate of the commissioners in favor of Ash, is still void for uncertainty. There were two settlements by Ash, and it does not appear to which the commissioners alluded; or if it does appear to which they alluded, it was to the first settlement of Ash, and not to that which was begun by M'Collom. (Hughes's Reports, p. 95, Harding's Reports, 140, *Craig* v. *Dorrain*.) The land ought to have been surveyed from Ash's first settlement, and not from that which he won from M'Collom.

22*] **Jones*, contra.

1. The first objection is, that the right of pre-emption never belonged to this land, because it is said that Simms had a prior claim.

But the act only excludes from the right of pre-emption lands to which a legal title had been acquired prior to the date of the act. The law refers back to the improvement, and gives the pre-emption, notwithstanding an intermediate title. Simms must show that his title commenced before the passing of the land law.

2. The second objection relates to the vagueness of the entry.

The entry of Terrell & Hawkins was made upon warrant No. 1226, and refers to it. That warrant was lodged with the surveyor, and refers to the pre-emption certificate of Ash.

The cases cited to show that you cannot make a vague entry certain by reference to another paper, are of recent date, and if they are to be understood as the opposite counsel contends, would be in opposition to the analagous cases, in the case of *Patterson's devisees* v. *Bradford* (Harding, 108), it is said that if the entry calls for an improvement you may refer to the certificate to show where the improvement was. So in *Greenup v. Kenton* (Harding, 16), the court decided that you might refer to another paper to show what was ambiguous in the entry.

It is also said that it appears by extraneous evidence that there were two improvements by Ash, and therefore that the entry is uncertain.

The question is whether the improvement was sufficiently notorious to give notice to subsequent locators. It might have been as notorious as any other object. The cabin, the spring, the run and the location of Joseph Cox were all well known. But it is in proof that one of the improvements was abandoned. They were near each other and formed only one plantation or settlement. The evidence is that Ash's improvement means the cabin where his widow now lives.

Swann*, in reply. [23**

The pre-emption of Ash ought to be laid off from his first improvement. Ash renewed both improvements, viz.: Ash's and M'Collom's, as such. The question is, which was Ash's settlement at the time referred to in the certificate of the court of commissioners? What did he mark and improve in the year 1776? It is the improvement made in 1776 only to which the commissioners refer. The cabin was built after the certificate.

February 14th. *Absent*—JOHNSON, *J.*, *and* TODD, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

The first error assigned is that the entry and survey of the plaintiff in error being prior to the claim made by Ash before the court of commissioners, gave him a legal right to the land so entered and surveyed, not to be affected by the subsequent claim of Ash.

The words of the act of assembly are: "That "all those who, before the said first day of Jan- "uary, 1778, had marked out or chosen for "themselves any waste or unappropriated "lands, and built any house or hut, or made "other improvements thereon, shall also be en- "titled, on the like terms, to any quantity of "land, to include such improvement, not ex- "ceeding 1,000 acres, and to which no other "person hath any legal right or claim."

The court is clearly of opinion that the words of the law refer to the time when the improvement was made, and to the time of the passage of the act; not to the time when the claim, founded on that improvement, was made to the court of commissioners. If the land, when im-

proved, was waste and unappropriated; if, at the passage of the act no other person had "any legal right or claim" to the land so improved, such right could not be acquired until that of the improver should be lost.

The second error is, that the entry made by Terrell & Hawkins with the surveyor has no **24***] reference to the *pre-emption certificate of Ash, aud is therefore not a good and valid entry of Ash's pre-emption right.

Terrell & Hawkins were assignees of Ash; and this ought to have been expressed in the entry. Those words are omitted. In consequence of their omission it does not appear whose improvement is to be included.

Upon this point the court has felt a good deal of difficulty. If the entry with the surveyor could be connected with the certificate of the commissioners, this difficulty would be entirely removed. But the court is not satisfied that, according to the course of decisions in Kentucky, such reference is allowable.

The court, however, is rather inclined to sustain the location, because its terms are such as to suggest to any subsequent locator the nature of the omission which had been made.

Terrell & Hawkins enter 1,000 acres of land, "to include his improvement." It was then a warrant founded on an improvement; and that improvement was made, not by them, but by a single person. Of that single person Terrell & Hawkins were, of course, the assignees. The place was described with such certainty as would have been sufficient, had the assignment been stated. On coming to the plaee, Ash's improvement would have been found. The mistake, therefore, does not mislead subsequent locators. It does not point to a different place. They are as well informed as they would have been by the insertion of the omitted words. The entry, too, contains a reference to the warrant which the law directed to be lodged with the surveyor, and to remain there until it should be returned with the plat and certificate of survey to the land-office.

3. It is also objected that some of the defendants in error do not show a complete legal title under Terrell & Hawkins, for which reasou they have not entitled themselves to a conveyance from Charles Simms; and that one of them, John Meiggs, has obtained a decree for 140 acres of land, although in the bill he claimed only 100 acres.

25*] *Regularly the claimants who have only an equitable title ought to make those whose title they assert, as well as the person from whom they claim a conveyanee, parties to the suit. For omitting to do so an original bill might be dismissed. But this is a bill to enjoin a judgmeut at law rendered for the defendant in equity against the plaintiffs. The bill must be brought in the court of the United States, the judgment having been rendered in that court. Its limited jurisdiction might possibly create some doubts of the propriety of making citizens of the same state with the plaintiff parties defendants. In such a case the court may dispense with parties who would otherwise be required, and decree as between those before the court, since its decree cannot affect those who are not parties to the suit.

It is certainly a correct principle that the court cannot decree to any plaintiff, whatever he may prove, more than he claims in his bill. Nothing further is in issue between the parties. It is not necessary to inquire whether anything appears in this cause which can prevent the plaintiff from availing himself of this principle; because the decree will be opened on another point, in consequence of which this objection will probably be removed.

4. The fourth error is, that John Ash having two improvements, it is uncertain which he claimed before the commissioners, and his entry is on this account void; or if not so, then his claim was for the improvement made by himself, and not for that won from M'Collom.

It is admitted that if the terms of the entry are sueh as to leave Ash at liberty to select either improvement, it is void; and that if the terms of the entry confine him to either, he must abide by his original election.

Upon considering the testimony ou this point, the court is of opinion that the entry may be construed to refer to one improvement in exclusion of the other; but that the improvement referred to is the one first made by himself.

Let the several members of this description be examined.

*John Ash, Sen., claimed 1,000 acres [***26** of land, &c., "on account of marking and im- "proving the same in the year 1776."

They were both marked and improved in the year 1776, thc one by Ash himself, the other by M'Collom. The description proceeds: "ly- "iug on the waters of the Town Fork of Salt "River, about two miles nearly east from "Joseph Cox's land."

Both improvements are on the same watercourse; but that made by Ash is nearer the distance and the course from Joseph Cox's land, mentioned in the certificate, than that made by M'Collom.

If, then, it be not absolutely uncertain to which improvement reference is made in the certificate, this court is of opinion that the improvement made by Ash himself is designated.

Is there any testimony in the cause which can control the meaning of the terms of the certificate when viewed independent of that testimony?

There is evidence that the improvement at M'Collom's spring was generally known in the neighborhood. But there is no reason to believe that the improvement originally made by Ash himself was not also known, nor is there any reason to believe that he had abandoned it. On the contrary, he added to it by planting peach stones after having won that made by M'Collom.

It is also in proof that, at the court of commissioners, in April, 1780, in conversation with Thomas Polk, whom he then designed to call on to prove his improvement, he said that he intended to settle at M'Collom's spring.

Supposing this to amount to a declaration of his intent to found his claim to a pre-emption on the improvement commenced by M'Collom, and completed by himself, that intent not appearing in the certificate and entry, could not control those documents. But the court is not of opinion that the conversation will warrant this *inference. The whole case shows [***27** that Ash retained his elaim to both improvements, and designed to include both in his preemption. They are both included in his survey. His declaration, therefore, that he meant to settle

at M'Collom's spring, and the subsequent building of a cabin at that spring, no more proves which improvement was the foundation of his title than if he had declared a design to settle at any other place on the same tract of land, and had carried that intention afterwards into execution by building at such place.

This court is of opinion that there is error in so much of the decree of the Circuit Court as directs the survey of Ash's pre-emption to be made on the improvement commenced by M'Collom, which is at black A in the plat to which the decree refers; and that the said pre-emption right ought to be surveyed on the improvement originally made by Ash himself, which is at figure 2 in the said plat. The decree, therefore, must be reversed, and the cause remanded to the Circuit Court, with directions to conform their decree to the opinion given by this court.

The decree of this court is as follows:

This cause came on to be heard on the transcript of the record from the Circuit Court, and was argued by counsel; on consideration whereof the court is of opinion that there is error in so much of the interlocutory and final decrees of the said court as directs Charles Simms to convey to the plaintiffs in that court the land included in his patent and in the survey directed to be made by that court, of the claim of the said plaintiffs, which survey was ordered to be made in a square form, including the improvement at M'Collom's spring, which is designated in the plat by the black letter A in the centre; and that the said decrees ought to be reversed and annulled, and the cause remanded to the Circuit Court with directions to cause the said pre-emption right of the said Ash to be surveyed in a square form, with the lines to the cardinal points, and including the improvement originally made by the said John Ash, Sen., which is designated in the plat filed in the said cause by figure 2 in the centre; and **28***] with further directions *to order the said Charles Simms to convey to the plaintiffs in the Circuit Court respectively the land included in his patent, and lying within their several claims as made in their bill, and as sustained by the evidence in the cause. All which is ordered and decreed accordingly.

Modified—6 Wheat. 558.
Cited—1 Pet. 245; 1 Black, 518; 10 Wall. 333; 14 Wall. 81; 1 Bald. 491; 1 McLean, 32; 3 Blatchf. 263; 2 Cliff. 370.

SPEAKE AND OTHERS
v.
THE UNITED STATES.

Absent—TODD, *J.*

A bond taken by virtue of the 1st section of the embargo law of January 9th, 1808, is not void, although taken by consent of parties after the vessel had sailed.

The obligors are estopped to deny that the penalty of such a bond is double the true value of the vessel and cargo.

The name of an obligor may be erased from a bond and a new obligor inserted, by consent of all the parties, without making the bond void; such consent may be proved by parol evidence; and it is immaterial whether the consent be given before or after the execution of the deed.

ERROR to the Circuit Court for the District of Columbia, in an action of debt for $8,787, upon a bond dated 14th April, 1808, taken by the collector of the port of Georgetown, with condition to be void if the brig Active "should not proceed to any foreign port "or place, and the cargo should be relanded "in some port of the United States." The bond was executed by Speake, the master of the vessel, and by Beverly & Ober, the owners of the cargo, in compliance with the 1st section of the act of Congress of the 9th of January, 1808, entitled "an act supplementary to the act en-"titled an act laying an embargo on all ships "and vessels in the ports and harbors of the "United States." (Vol. 9, p. 10.)

The defendants having pleaded severally sundry pleas, upon which issues in fact were joined, pleaded jointly (after oyer), 1st. "that "they ought not to be charged with the debts "aforesaid by virtue of the writing obliga-"tory aforesaid, because they say that the "said writing obligatory was required and taken "by one John Barnes," collector, &c., "by "color of his said office as collector as afore-"said, and by pretense of an act of Congress, "entitled," &c. (the act of January 9th, 1808, vol. 9, p. 10), "which said writing obliga-"tory and the condition thereof were not taken "by the said *John Barnes," collector, [***29** &c., "pursuant to the said act of Congress, but "contrary thereto in this, viz., that the said "writing obligatory was not sealed or deliver-"ed by the said Robert Ober until after the "vessel in the condition of the said writing "obligatory mentioned had received a clear-"ance in due form from the said collector, "and after she had been allowed to depart and "had actually departed from the said port of "Georgetown under the clearance so as afore-"said granted to her, by reason whereof the said "writing obligatory is void and of no effect in "law; and this, the said defendants are ready to "verify; wherefore they pray judgment if they "ought to be charged with the debt aforesaid "by virtue of the writing obligatory afore-"said."

To this plea there was a general demurrer and joinder.

2d. Joint plea. That they ought not to be charged, &c., "because they say that the said "writing obligatory was required and taken "by one John Barnes," collector, &c., "by "color of his said office as collector, and by "pretense of an act of Congress," &c., (the act of 9th January, 1808), "which said writing "obligatory and the condition thereof were not "taken by the said John Barnes, collector, as "aforesaid, pursuant to the said act of Con-"gress, but contrary thereto in this, to wit: "that the said writing obligatory was taken in "a sum more than double the value of the ves-"sel and cargo in the condition of the said "writing obligatory mentioned; by reason "whereof the said writing obligatory became "void and of no effect in law; and this, the "said defendants are ready to verify; where-"fore," &c.

To this plea also there was a general demurrer and joinder.

3d. Joint plea. The defendants say that the plaintiffs ought not to maintain their action against them, "because they say that on the

"14th day of April, 1808, at," &c., "the said "writing obligatory was signed and sealed by "the said defendants, Josias M. Speake and "Robert Beverly, and a certain Ebenezer "Eliason, and was then and there deliver- "ed to one John Barnes," collector, &c., "for the purpose of obtaining a clearance for "the vessel in the condition of the said writing
30*] "obligatory, *mentioned under the au- "thority of an act of Congress, entitled," &c. (vol. 9, p. 10), "and the said defendants say "that after the said writing obligatory was so "executed and delivered as aforesaid, a clear- "ance was granted in due form of law to the "said vessel, and after she had departed from "the port of Georgetown, under the said clear- "ance, and while the said writing obligatory "was in the custody and keeping of the said "John Barnes," collector, &c., "the said writ- "ing obligatory, by the authority, consent and "direction of the said John Barnes, collector "as aforesaid, was materially altered and "changed in this, to wit: that the name and "seal of the said Ebenezer Eliason were cancel- "led and erased from the said writing obliga- "tory, and the name, signature and seal of the "said defendant, Robert Ober, substituted and "inserted therein, without the license, consent "or authority of the said defendant, Robert "Beverly, whereby the said writing obligatory "was of no force or effect whatever as the "joint deed of them, the said defendants, "Josias M. Speake, Robert Beverly and Robert "Ober; and so the said defendants say that the "writing obligatory is not their joint deed; and "this they are ready to verify; wherefore they "pray judgment if the United States ought to "have or maintain their action aforesaid against "them."

Replication.

"That the said writing obligatory was so "altered and changed," &c., "with the assent "and by the concurrent license, direction and au- "thority of all the said defendants and of the said "Ebenezer Eliason, and not without the license, "consent and authority of the said Josias M. "Speake, Robert Beverly and Robert Ober in "manner and form," &c.

To this replication there was a general demurrer and joinder.

4th. Joint plea. This plea was exactly like the 3d, except that it did not aver that the substitution of Ober for Eliason was without the consent of any of the defendants.

31] *To this plea also there was a replication like that to the 3d plea and a general demurrer and joinder.

The court below decided all the demurrers in favor of the United States. At the trial of the issues of fact, a bill of exceptions was taken by the defendants, which stated that the attorney for the United States produced the bond in the declaration mentioned, and proved its execution by the subscribing witness, who, being cross-examined by the counsel for the defendants, testified, that the defendants, Speake and Beverly, came to the collector's office and executed the bond, but the collector would not grant a clearance without another obligor, when the name of the defendant Ober was mentioned by the other defendants, but as he was then absent, they proposed that one Ebenezer Eliason should be added as the third obligor, and that he should sign and seal the obligation; but that a blank should be left in its body to be filled afterwards with the name of Eliason or Ober, and that it should remain in the possession of the collector for some time to give an opportunity to Ober to execute the same; and it was understood and agreed between the parties aforesaid, that upon the return of Ober, if he should execute the same, the name and seal of Eliason should be stricken out, and that of Ober should be signed in his stead, and that his name should be inserted in the body of the bond. Accordingly with this understanding, the bond was executed by Speake and Beverly in the forenoon, and in the afternoon of the same day by Eliason, in the absence of Speake and Beverly, but upon the condition agreed upon between the collector and himself and Speake and Beverly, that his name should be erased from the bond, upon Ober's executing the same. After the bond was so executed a clearance was granted, and after the vessel had sailed, the defendant Ober came to the office and executed the bond, and the blank in the body of the bond was filled with his name, when that of Eliason, with his seal, was erased; at which time neither Speake nor Beverly was present, nor had they given any assent to the said transaction other than what had taken place at the time of their execution of the bond. The witness further testified that it appeared from the papers in the collector's office that Speake was the sole owner of the vessel, and resided in Washington county, *in the District of Columbia, and [***32** that Beverly and Ober were the owners and shippers of the cargo.

Whereupon the counsel for the defendants prayed the court to instruct the jury, that if they should believe that the bond aforesaid was executed and erased at the periods and under the circumstances stated by the witness on his cross-examination, and that at the time of such execution Speake was the sole owner of the vessel, and the other defendants, Beverly & Ober, the owners and shippers of the cargo, they ought to find the issues for the defendants on the joint and several pleas of *non est factum;* which instruction the court refused to give as prayed; but at the instance of the attorney of the United States instructed them, that if they should find from the evidence that the erasure of the signature and seal of Eliason and the substitution of the signature and seal of Ober, and the insertion of his name in the body of the obligation, was done with the assent and in pursuance of the request and agreement of all the parties to the bond, expressed and well understood at the time they respectively executed the same, then the jury ought to find all the issues of *non est factum,* joined in this cause, for the United States, notwithstanding it should appear that such alteration of the bond was not made till after the vessel had cleared out and sailed from Georgetown. To which refusal and instruction the defendants excepted, and brought their writ of error.

Swann and *C. Lee,* for the plaintiffs in error.

1. As to the first joint plea, that the bond was not executed by Ober until after the vessel had sailed.

The collector was bound to take the bond before the sailing of the vessel. When an officer is authorized by law to do an act he can only

do it as the law requires. The law must be construed strictly, and strictly pursued. (3 Call., 421.) If the defect had appeared upon the face of the bond, this case would be clearly in our favor. Our case is analagous to that of a sheriff who may take bail before the return of the writ, but not afterwards. (2 Chitty's pleading, 478.) So in the case of a sheriff's bond in England, if not taken according to the statute it is void. (2 Saund., 60.) After the departure **33***] of the vessel *the power of the collector to take the bond ceased. The cases all show that such an averment may be made. (1 Lord Ray., 349, *Pullein* v. *Benson;* 2 Wils., 347, *Collins* v. *Blantern*).

2. The same argument applies to the 2d joint plea. The law authorizes a bond to be taken in only double the value of the vessel and cargo. If the officer requires a bond in a larger sum, he exceeds his authority and the bond is void.

3. The third joint plea and the bill of exceptions present a question of great importance; shall a parol agreement authorize an officer to make a material alteration in a sealed instrument? The consequences of such a doctrine would be most dangerous. If one party can be thus substituted for another, why may not the sum be altered? Why not the whole instrument be changed? Why may it not be discharged by parol? Why may not an entirely different contract be substituted? It is in direct hostility to the rule of law that a sealed contract cannot be denied, nor varied, nor discharged by parol. The bond was not delivered as an escrow. It was delivered to the only agent of the United States authorized to receive it. It then became completely executed. No material alteration could be made even by the consent of all the parties, if that consent was evidenced merely by parol. Even if it had been expressly delivered as an escrow, yet if delivered to the collector it could not be as an escrow. A bond cannot be delivered to the obligee as an escrow. (*Riddle* v. *Moss*, ante, vol. 5, p. 351.)

By the delivery it became absolute and binding upon all the parties. A discharge of one was the discharge of all. (9 Co., 137, *Thorowgood's* case; 4 Co., 27, *Henry Pigot's* case.) It is of no consequence whether the name of Eliason were material or not. An immaterial alteration by the obligee avoids the bond. No parol understanding or agreement of the parties can prevent a material alteration from making the deed void. (Cro. Eliz., 627, *Markham* v. *Gonaston*.) The replication admits the erasure and alteration, but relies on the fact that it was done by the consent of all the parties. No subsequent parol consent can vary a written instrument under seal. There would be no safety if **34***] such a doctrine *should prevail as is necessary to support this replication. There would be no safety in a sealed instrument if the subsequent agreement, or even the understanding of the parties at the time of its execution, could be given in evidence by parol, to vary the instrument.

Jones, contra.

1. As to the first plea. The law does not require the bond to be given before the departure of the vessel. By consent of the parties it may be given afterwards. The plea states that one of the obligors executed the bond after the vessel had sailed. There is nothing in the law to make the deed void for that cause.

2. As to the second plea. The obligors are estopped by their bond from denying the value of the vessel and cargo. The bond is their own voluntary act. They have agreed to the value. If the question of value were open after giving the bond, it would lead to endless litigation.

3. As to the erasure. There is no authority which forbids such an alteration by the consent of all parties. In the case in Croke the alteration was made without consent of parties. It is immaterial whether the consent be prior or subsequent.

February 16th. *Absent*—TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

This is an action of debt brought upon a bond given under the first section of the embargo act of the 9th of Jan., 1808, ch. 8. After oyer of the bond and condition, various pleas were pleaded by the defeudants; but it is unnecessary to consider any others than those upon which questions have been argued at the bar.

The second separate plea of the defendaut, Robert Ober, and the first joint plea of all the defendants alleges, in substance, that the bond was taken by the collector of the customs at Georgetown, by color of his office, and by pretense of the act of Congress aforesaid,*and [***35** that the bond and condition were uot taken pursuant to the act of Congress, but contrary thereto, in this, to wit: that the bond was not sealed or delivered until after the vessel in the same condition mentioned had received a clearance in due form, and after she had actually departed from the port of Georgetown, under the clearance, by reason whereof the boud is void.

To this plea there was a general demurrer and joinder in demurrer; on which the court below gave judgment for the United States.

It is argued by the plaintiffs in error, that the act of Congress of the 9th January, of 1808, sec. 1, having declared that no vessel licensed for the coasting trade shall be allowed to depart from any port of the Uuited States, or shall receive a clearance until the owner, &c., shall give bond to the United States in a sum double the value of the vessel and cargo, &c., the time of giving the bond is of the essence of the provision; and that if the bond be not taken until after the clearance or departure of the vessel, it is illegal and void.

We cannot yield assent to this argument. In our opinion, the statute, as to the time of taking the bond and granting a clearance, is merely directory to the collector. It is undoubtedly his duty to comply with the literal requirements of the statute. If he neglect so to do, it is an irregularity which may subject him to personal peril and responsibility. If the state of facts has existed to which the statute provision is applicable, the authority to require and the duty to give the bond attaches; and by the voluntary consent of the parties, it may well be given *nunc pro tunc*. Upon any other construction the owner of the vessel might be involved in great difficulties. If the collector be uot authorized to receive the bond after a clearance, neither is he authorized to grant a clearance before he has received the bond. A clearance,

therefore, granted before such bond should be given, would be illegal and void; and a departure from port under such void clearance would subject the owner, vessel and cargo to the forfeiture inflicted by the third section of the act. There is no error in the judgment of the court below on this plea.

36*] *The second joint plea of the defendants alleges that the bond was not taken pursuant to the act of Congress, but contrary thereto, in this, that the bond was taken in a sum more than double the value of the vessel and cargo, whereby the bond became void. On demurrer to this plea and joinder in demurrer, the court below gave judgment for the United States; and we are of opinion that the judgment so given ought to be affirmed. There is no allegation or pretense that the bond was unduly obtained by the collector, *colore officii*, by fraud, oppression or circumvention, It must, therefore, be taken to have been a voluntary *bona fide* bond. The value was a matter of uncertainty, and the ascertaining of that value was the joint act and duty of both parties. When once that value was ascertained and agreed to by the parties and a bond executed in conformity to such agreement, the parties were estopped to deny that it was not the true value. If an issue had been taken upon the fact, the evidence on the face of the bond would have been conclusive to the jury; and if so, it is not less conclusive upon demurrer. It would be dangerous in the extreme to admit the parties to avoid a sealed instrument by averring that there was an error in the value by an innocent mistake, or by accident, or by circumstances against which no human foresight could guard. A mistake of one dollar would be as fatal as of ten thousand dollars. Suppose the double value were underrated, could the United States avoid the bond, and thereby subject the party to the penalties of the third section? Where the law provides that the penal sum of a bond shall be equal to the double value, and the parties voluntarily and without fraud assent to the insertion of a given sum, it is as much an estoppel as if the bond had specially recited that such sum was the double value.

The third joint plea in substance alleges that after the execution of the bond, and after the clearance and departure of the vessel and cargo, the bond was, by the authority, consent and direction of the collector, materially altered and changed, in this, that the name of Ebenezer Eliason was cancelled and erased from the bond, and the name, signature and seal of the defendant Robert Ober substituted and inserted therein, without the license, consent or author-

37*] ity of the defendant, *Robert Beverly, whereby the bond became of no force. To this plea the United States replied, that the bond was so altered and changed with the assent and by the concurrent license, direction and authority of all the defendants, and of the said Ebenezer Eliason, and not without the license, consent and authority of the defendants, and prayed that the same might be inquired of by the country. To this replication there was a general demurrer and joinder in demurrer, on which the court below gave judgment for the United States; and we are of opinion that the judgment was right. It is clear, at the common law, that an alteration or addition in a deed, as by adding a new obligor, or an erasure in a deed, as by striking out an old obligor, if done with the consent and concurrence of all the parties to the deed, does not avoid it. And this principle equally applies whether the alteration or erasure be made in pursuance of an agreement and consent prior or subsequent to the execution of the deed; and the cases in the books in which erasures, interlineations and alterations in deeds have been held to avoid them, will be found, on examination, to have been cases in which no such consent had been given.

It has been objected that this principle of letting in parol evidence to prove alterations in a deed to be made by consent, exposes to all the mischiefs against which the statute of frauds was intended to guard the public. If this objection were valid, it would equally apply to such alterations when made before the execution of the deed; for if not taken notice of by a memorandum on the deed itself, they must be proved in the same manner. But it is to be considered that the parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are. On *non est factum*, the present validity of the deed or contract is in issue; and every circumstance that goes to show that it is not the deed or contract of the party, is provable by parol evidence. It is of necessity, therefore, that the other party should support it by the same evidence. The fact that there is an erasure or interlineation apparent on the face of the deed, does not, of itself, avoid it. To produce this effect it must be shown to have been made under circumstances that the law does not warrant. Parol evidence *is [***38** let in for this purpose; and the mischief, if any, would equally press on both sides. The principle, however, which has been already stated, is too firmly fixed to be shaken by any reasoning *ab inconvenienti*.

The decision upon the third joint plea renders it unnecessary to examine the bill of exceptions taken at the trial on the issue of *non est factum*. That the bill presents the same point as the third joint plea, with this difference only, that the alteration in the deed by the addition of a new obligor was, in fact, made in pursuance of an agreement entered into between the parties prior to the original execution of the deed.

On the whole, the majority of the court are of opinion that the judgment of the court below must be affirmed.

LIVINGSTON, *J.* In dissenting from the court in its judgment on the issue of the law arising out of the third joint plea, I can only say, that I am not prepared to admit that every alteration whatever in a deed, after its execution—for such is the extent of the opinion just given—may be proved by parol testimony. After perfecting a deed in one form, no material alteration should be set up unaccompanied by a new delivery, and a note or memorandum thereof; otherwise, a bond, which is proved by a subscribing witness to have been actually given for only one hundred dollars may be converted into one for as many thousand, if the obligee can only produce a witness who will say that he understood the obligor as assenting to it. The only case which I have been able to find of those cited (such is the difficulty of procuring books in this place), is the one in Levinz, p.

Cranch 9.

11, 35, which establishes that after the delivery of a bond a new obligor may be added in this way; not that the name of one may be struck out and another substituted in his place. Without denying the authority of the case, my answer to it is, that such addition might be of benefit, but could not injure the first set of obligors; and therefore the court might feel less difficulty in admitting such fact to be proved. It is, therefore, no interference with this decision to say that no change whatever in a sealed instrument, after its execution, which may increase the liability or be, in any way, to the prejudice of the party whose deed it is (and **39***] such *is the ease here), should be palmed on him by parol testimony; and so, *vice versa*, that no alteration which may be, in any way, injurious to the grantee or obligee, should be set up by the other party; but that the terms in which the deed is originally executed should alone be binding, until alterations are introduced into it by the same solemnities which gave existence to the first. Such, in my opinion, is the salutary rule of the common law; and therefore I think that the judgment of the Circuit Court ought to be reversed.

MARSHALL, *Ch. J.*,

Was rather inclined to think that the plea was good, which stated that the bond was given for more than double the value of the vessel and cargo. If the bond was given for more than double that value he thought it was void in law.

He should not, however, have intimated his opinion on this point if a dissenting opinion had not been given on another point in the cause, and his silence might have been construed into an assent to the entire opinion of the court as it had been delivered.

Cited—9 Wheat. 717; 5 How. 274; 11 Blatchf. 6; 2 Brock. 73, 74; 2 Cranch, C. C. 699; 4 Cranch, C. C. 261.

TABER
v.
PERROTT & LEE.

Absent—TODD, *J.*

A, being sole owner of a bill of exchange, indorses it in blank, and delivers it to B to deliver to C for collection, and when collected to place the amount to the credit of A and B, in account. C collects the amount but refuses to place it to the credit of A and B, who settle their account with C and pay him the balance. A afterwards sues C for the amount received upon the bills; B is a competent witness for A.

ERROR to the Circuit Court for the District of Rhode Island, in an action of *assumpsit* to recover from the defendants, Perrott & Lee, the amount of certain bills of exchange put into their hands to collect, by the plaintiff, Taber, and his deceased partner, Gardner.

At the trial below several exceptions were taken, in which the following facts appeared:

The plaintiff produced a witness, John L. Boss, who, being duly admitted and sworn, testified, that Messrs. Taber & Gardner, mer-**40***] chants of Rhode Island, were *holders and owners of French government bills to a large amount, which were by them indorsed in blank, and given to their agent, the said John L. Boss, to take to France for collection. That he, Boss, had no interest in the bills, and received them as agent for the plaintiffs, and this was known to Perrott & Lee. That he carried them to France in 1802, in a vessel of the plaintiffs, with a cargo consigned to the defendants, Perrott & Lee, of Bourdeaux, in which cargo Boss had an interest. That he delivered the bills to Perrott & Lee to negotiate and receive the amount. That Boss went to Paris in October, 1802, and while there received a letter on the 26th October, from Perrott & Lee, informing him that Hotel, Thomas & Co., of Paris, were the house to whom the bills were sent, and introducing him to that house, and they wrote a letter to Hotel, Thomas & Co., directing them, when the bills were paid, to place the money to the credit of Perrott & Bineau, a banking house at Bourdeaux, which Perrott is one of the defendants. On the 12th of January, 1803, Boss called on Hotel, Thomas & Co., and was informed that the bills had been paid by the French government on the 7th of January preceding, and Boss saw the proceeds of the bills credited on the books of Hotel, Thomas & Co. to the said Perrott & Bineau, according to the directions of Perrott & Lee. That Boss, on the 14th January, advised the defendants that the bills were paid, and directed the proceeds to be applied to the credit of the account of Taber, Gardner & Boss with them. On the 29th of January, at Paris, Boss saw bills of exchange drawn by Perrott & Bineau on Hotel, Thomas & Co., and accepted by them at 30 or 40 days sight, which were acknowledged by the defendant Perrott to have been drawn for the said proceeds. That the said bills so drawn and accepted were in the hands of one Charles Bodin, but whether they have been further negotiated or not, or paid or not, Boss could not tell. That Boss returned to Bourdeaux on the 26th of February, and left Bourdeaux about the 6th of April, 1803. That until the day before he left Bourdeaux he had no intimation from the defendants that they would not credit the amount of the said bills to the account of Taber, Gardner & Boss. That the defendants refused to give such credit.

Perrott & Lee, who provided the return cargo, *brought Taber, Gardner & Boss [***41** largely in their debt in account current; and Boss, on the 6th of April, 1803, signed the account, stating that when the moneys were received on the bills from Hotel, Thomas & Co. the amount should be passed to the credit of Taber, Gardner & Boss. Perrott & Lee afterwards received the whole balance of the said account from Taber, Gardner & Boss, not having credited the proceeds of the said bills; and the present suit is brought by Taber, surviving partner of Taber & Gardner, the original holders of the bills, to recover their amount.

The principal exception was to the charge of the judge, who directed the jury to find for the defendants, on the ground that the witness, Boss, had not been made a party plaintiff in the suit.

The case was argued by *P. B. Key* for the plaintiff in error, and by *Hunter* for the defendants.

February 15th. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This suit was brought by the plaintiffs in error, in the Circuit Court of the United States for the District of Rhode Island, to recover from the defendants the amount of certain bills drawn by General Le Clerk on the government of France.

The declaration contains several counts, some special, stating agreements between the parties for the payment of the bills; others general, among which is a count for money had and received by the defendants, to the use of the plaintiffs.

It appeared at the trial that the plaintiffs and John L. Boss were concerned in certain commercial speculations, in the prosecution of which John L. Boss sailed, in 1802 and 1803, to Bourdeaux, in the Polly, with cargoes in which they were jointly interested. On the first voyage Boss carried with him the bills of exchange for the amount of which this suit was brought, indorsed in blank by the plaintiff **42*]** Gardner, which he delivered to *the defendants for collection. The amount, when collected, was to be placed to the credit of the return cargo of the Polly, in which the plaintiffs and John L. Boss were jointly concerned. The account was settled without giving credit for the amount of these bills; and Taber, Gardner & Boss have been compelled to pay the balance acknowledged to be due. This action was brought to charge the defendants with the bills, alleging that their amount has been received.

At the trial the plaintiffs offered Boss as a witness, for the purpose of proving the liability of the defendants for the amount of the bills. He swore that he had no interest in the cause nor in the bills; but his testimony was objected to by the defendants, on the ground of his being interested; and the court was moved to instruct the jury that the action could not be sustained, because Boss was not a party plaintiff in the declaration. This direction was given by the court, and excepted to by the counsel for the plaintiffs. A verdict and judgment were rendered for the defendants, which are brought into this court by writ of error.

The defendants in error contend, that the bills of exchange were part of the cargo of the Polly, and consequently the joint property of the owners of that cargo. But of this there is no other evidence than that Boss was the bearer of those bills indorsed in blank, and that their proceeds, if received, were to be placed to the account of the return cargo. This might very well be, and yet Taber & Gardner remain the sole owners of the bills. Their amount, if received, might be credited to all the partners in their account with Perrott & Lee, and then be credited to Taber & Gardner in settling the accounts of the partnership. Boss then would have no interest in the bills, unless they should be collected and carried to the credit of the return cargo. That account having been settled without including this item, it is not necessarily implied, from the facts in the case, that Boss was interested; and he swears that he was not. This court is of opinion that the Circuit Court erred in directing the testimony of Boss to be disregarded; and also in directing the jury to find for the defendants because he was not made a party plaintiff in the suit.

*Several other opinions were given by [***43** the judge, to which exceptions were taken, but it is unnecessary to review them, as they depended on the opinion that Boss was interested in the bills for which the action was brought.

The judgment is reversed, and the cause sent back for a new trial.

Rev'g.—S. C. 2 Gall. 565.
Cited—1 Wood. & M. 182.

TERRETT AND OTHERS *v.* TAYLOR AND OTHERS.

Absent—JOHNSON, *J.*, *and* TODD, *J.*

The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject as far as it was applicable to the circumstances of the colony. The freehold of the church lands is in the parson.

A legislative grant is not revocable.

The act of Virginia of 1776, confirming to the church its rights to lands, was not inconsistent with the constitution or bill of rights of Virginia; nor did the acts of 1784, ch. 88, and 1785, ch. 37, infringe any of the rights intended to be secured under the constitution, either civil, political, or religious.

The acts of 1798, ch. 9, and 1801, ch. 5, so far as they go to divest the Episcopal Church of the property acquired previous to the revolution by purchase or donation, are unconstitutional and inoperative.

The act of 1798, ch. 9, merely repeals the statutes passed respecting the church since the revolution; and left in full operation all the statutes previously enacted, so far as they are not inconsistent with the present constitution.

Church wardens are not a corporation for holding lands. Church lands cannot be sold without the joint consent of the parson (if there be one) and the vestry.

ERROR to the Circuit Court for the District of Columbia, sitting in the county of Alexandria.

Taylor and others, "members of the vestry "of the Protestant Episcopal Church, common-"ly called the Episcopal Church of Alexandria, "in the parish of Fairfax, in the county of "Alexandria, and District of Columbia, on be-"half of themselves and others, members of "the said church, and of the congregation be-"longing to the said church," filed their bill in chancery against Terrett and others, who were overseers of the poor for the county of Fairfax, in the state of Virginia, and against George Deneale and John Muncaster, wardens of the said church, and against James Wren.

The bill charges that on the 27th of May, 1770, the vestry of the said parish and church, to whom the complainants, together with the defendants, George Deneale and John Muncaster, are the legal and regular successors in the said vestry, purchased of a certain Daniel Jennings a tract of land then situate in the county of Fairfax, and state of Virginia, but now in the county of Alexandria, in the District of Columbia, containing 516 acres, which the said Jennings and his wife, by deed of bargain and sale, on the 18th of September, 1770, by the direction of the then vestry, conveyed to a cer-

tain Townsend Dade, since deceased, and the said James Wren, both then of the county of **44***] Fairfax, and *the church wardens of the said parish and church for the time being, and to their successors in office, for the use and benefit of the said church in the said parish. That in the year 1784 the legislature of Virginia passed an act, entitled "an act for incorporating the Protestant Episcopal Church," by the third section of which power is given to the ministers and vestry of the Protestant Episcopal Church to demise, alien, improve and lease any lands belonging to the church. That the act of 1786, entitled "an act to repeal the act for incorporating the Protestant Episcopal Church, and for other purposes," declares that the act of 1784, shall be repealed, but saves to all religious societies the property to them respectively belonging, and authorizes them to appoint, from time to time, according to the rules of their sect, trustees, who shall be capable of mauaging and applying such property to the religious use of such societies. That under this last law the complainants conceive they have the power of requiring the church wardens of their church, who are the trustees appointed by the vestry, under the directiou of the vestry contemplated by the last-mentioned act, to sell or otherwise dispose of the said land, and to apply the proceeds of the same to the religious use of the society or congregation belonging to the said church, in such manner as the vestry for the time being shall direct. That the complainants have been, according to the rules and regulations of the said society, appointed, by the congregation, vestrymen and trustees of the said church, and have appointed the defendants, Deneale and Muncaster, church wardens of the said church. That some of the present congregation of the church were originally members of the church when the church was built and when the land was purchased, and contributed to the purchase thereof. That some of them reside in the county of Fairfax, and state of Virginia, but have pews in the church, and contribute to the support of the minister. That the lands are wasting by trespasses, &c. That the complainants, as well as the congregation, wish to sell the lands and apply the proceeds to the use of the church; but are opposed in their wishes by the defendants, Terrett and others, who are overseers of the poor for the county of Fairfax, and who claim the land under the act of Virginia of the 12th **45***] of January, 1802, authoriziug the *sale of certain glebe lands in Virginia, which act was not passed until after the District of Columbia was separated from the state of Virginia; in consequence of which claim they are unable to sell the lands, &c.; wherefore they pray that the defendants, Terrett and others, the overseers of the poor, may be perpetually enjoined from claiming the land; that their title may be quieted, and that the defendants, Deneale, Muncaster and Wren, may be decreed to sell and convey the land, &c.

The bill was regularly taken for confessed against all the defendants. The court below decreed a sale, &c., according to the prayer of the bill.

The defendants, Terrett and others, the overseers of the poor, sued out their writ of error.

The cause was argued at last term by *Jones* for the plaintiffs in error, and by *E. I. Lee* and *Swann* for the defendants in error.

The opinion of the court is so full that it is deemed unnecessary to report the arguments of counsel.

February 17th. *Absent*—JOHNSON, *J.*, *and* TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

The defendants not having answered to the bill in the court below, it has been taken *pro confesso*, and the cause is therefore to be decided upon the title and equity apparent on the face of the bill.

If the plaintiffs have shown a sufficient title to the trust property in the present bill, we have no difficulty in holding that they are entitled to the equitable relief prayed for. It will be but the case of the *cestui que trust* enforcing against their trustees the rights of ownership under circumstances in which the objects of the trust would be otherwise defeated. And in our judgment it would make no difference whether the Episcopal Church were a voluntary society, or clothed with corporate powers; for in equity, as to objects which the *laws [***46** cannot but recognize as useful and meritorious, the same reasou would exist for relief in the one case as in the other. Other considerations arising in this case, material to the title on which relief must be founded, render an inquiry into the character and powers of the Episcopal Church indispensable.

At a very early period the religious establishment of England seems to have been adopted in the colony of Virginia: and, of course, the common law upon that subject, so far as it was applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be very early traced; and the subsequent laws euacted for religious purposes evidently presuppose the existence of the Episcopal Church, with its general rights and authorities growing out of the common law. What those rights and authorites are, need not be minutely stated. It is sufficient that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbeucy, seized of the freehold of its inheritable propterty, as emphatically *persona ecclesiæ*, and capable, as a sole corporation, of transmitting that inheritence to his successors. The church wardens, also, were a corporate body, clothed with authority and guardianship over the repairs of the church and its personal property; and the other temporal concerns of the parish were submitted to a vestry composed of persons selected for that purpose. In order more effectually to cherish and support religious institutions, and to define the authorities and rights of the Episcopal officers, the legislature, from time to time, enacted laws on this subject. By the statutes of 1661, ch. 1, 2, 3, 10, and 1667, ch. 3, provision was made for the erection and repairs of churches and chapels of ease; for the laying out of glebes and church lands, and the building of a dwelling-house for the minister; for the making of assessments and taxes for these and other parochial purposes; for the appointment of church wardens to keep the church in repair, and to provide books, orna-

ments, &c.; and, lastly, for the election of a vestry of twelve persons by the parishioners, whose duty it was, by these and subsequent statutes, among other things, to make and proportion levies and assessments, and to purchase **47***] glebes and erect dwelling-houses for *the ministers in each respective parish. (See statute 1696, ch. 11; 1727, ch. 6; and 1748, ch. 28; 2 Tucker's Blackst. Com., Appx., note M.)

By the operation of these statutes and the common law, the lands thus purchased became vested, either directly or beneficially, in the Episcopal Church. The minister for the time being was seized of the freehold, in law or in equity, *jure ecclesiæ*, and, during a vacancy, the fee remained in abeyance, and the profits of the parsonage were to be taken by the parish for their own use. (Co. Lit., 340, b; 341, 342, b; 2 Mass. R., 500.)

Such were some of the rights and powers of the Episcopal Church at the time of the American revolution; and under the authority thereof the purchase of the lands stated in the bill before the court was undoubtedly made. And the property so acquired by the church remained unimpaired, notwithstanding the revolution; for the statute of 1776, ch. 2, completely confirmed and established the rights of the church to all its lands and other property.

The stat. 1784, ch. 88, proceeded yet further. It expressly made the minister and vestry, and, in case of a vacancy, the vestry of each parish respectively, and their successors forever, a corporation by the name of the Protestant Episcopal Church in the parish where they respectively resided, to have, hold, use and enjoy all the glebes, churches and chapels, burying-grounds, books, plate and ornaments appropriated to the use of, and every other thing the property of, the late Episcopal Church, to the sole use and benefit of the corporation. The same statute also provided for the choice of new vestries, and repealed all former laws relating to vestries and church wardens, and to the support of the clergy, &c., and dissolved all former vestries; and gave the corporation extensive powers as to the purchasing, holding, aliening, repairing and regulating the church property. This statute was repealed by the statute of 1786, ch. 12, with a proviso saving to all religious societies the property to them respectively belonging, and authorizing them to appoint, from time to time, according to the rules of their sect, trustees who should be capable of managing and **48***] applying such property to the *religious use of such societies; and the statute of 1788, ch. 47, declared that the trustees appointed in the several parishes to take care of and manage the property of the Protestant Episcopal Church, and their successors, should, to all intents and purposes, be considered as the successors to the former vestries, with the same powers of holding and managing all the property formerly vested in them. All these statutes, from that of 1776, ch. 2, to that of 1788, ch. 47, and several others, were repealed by the statute of 1798, ch. 9, as inconsistent with the principles of the constitution and of religious freedom; and by the statute of 1801, ch. 5 (which was passed after the District of Columbia was finally separated from the states of Maryland and Virginia), the legislature asserted their right to all the property of the Episcopal churches in the respective parishes of the state; and, among other things, directed and authorized the overseers of the poor, and their successors in each parish wherein any glebe land was vacant or should become so, to sell the same and appropriate the proceeds to the use of the poor of the parish.

It is under this last statute that the bill charges the defendants (who are overseers of the poor of the parish of Fairfax) with claiming a title to dispose of the land in controversy.

This summary view of so much of the Virginia statutes as bears directly on the subject in controversy, presents not only a most extraordinary diversity of opinion in the legislature as to the nature and propriety of aid in the temporal concerns of religion, but the more embarrassing considerations of the constitutional character and efficacy of those laws touching the rights and property of the Episcopal Church.

It is conceded on all sides that, at the revolution, the Episcopal Church no longer retained its character as an exclusive religious establishment. And there can be no doubt that it was competent to the people and to the legislature to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. But, although it may be true that "religion can be directed only by reason and conviction, not by force or violence," and that "all men are equally *entitled [***49** to the free exercise of religion according to the dictates of conscience," as the bill of rights of Virginia declares, yet it is difficult to perceive how it follows as a consequence that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations.

Be, however, the general authority of the legislature as to the subject of religion as it may, it will require other arguments to establish the position that, at the revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the state. Had the property thus acquired been originally granted by the state or the king, there might have been some color

(and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefac tions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it; nor of the parliament itself to destroy the grants, unless by **50***] the exercise of a power the most *arbitrary, oppressive and unjust, and endured only because it could not be resisted. It was not forfeited; for the churches had committed no offense. The dissolution of the regal government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state were held. The state itself succeeded only to the rights of the crown; and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law, that the division of an empire creates no forfeiture of previously-vested rights of property. (*Kelly* v. *Harrison*, 2 John., c. 29; *Jackson* v. *Lunn*, 3 John., c. 109; *Calvin's* case, 7, co. 27.) And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the revolution any more than the property of any other corporation created by the royal bounty or established by the legislature. The revolution might justly take away the public patronage, the exclusive cure of souls, and the compulsive taxation for the support of the church. Beyond these we are not prepared to admit the justice or the authority of the exercise of legislation.

It is not, however, necessary to rest this cause upon the general doctrines already asserted; for, admitting that by the revolution the church lands devolved on the state, the statute of 1776, ch. 2, operated as a new grant and confirmation thereof to the use of the church.

If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a **51***] *republican government, the right of the citizens to the free enjoyment of their property legally acquired.

It is asserted by the legislature of Virginia, in 1798 and 1801, that this statute was inconsistent with the bill of rights and constitution of that State, and therefore void. Whatever weight such a declaration might properly have as the opinion of wise and learned men, as a declaration of what the law has been or is, it can have no decisive authority. It is, however, encountered by the opinion successively given by former legislatures from the earliest existence of the constitution itself, which were composed of men of the very first rank for talents and learning. And this opinion, too, is not only a cotemporaneous exposition of the constitution, but has the additional weight that it was promulgated or acquiesced in by a great majority, if not the whole, of the very framers of the constitution. Without adverting, however, to the opinions on the one side or the other, for the reasons which have been already stated, and others which we forbear to press, as they would lead to too prolix and elementary an examination, we are of opinion that the statute of 1776, ch. 2, is not inconsistent with the constitution or bill of rights of Virginia. We are prepared to go yet farther, and hold that the statutes of 1784, ch. 88, and 1785, ch. 37, were no infringement of any rights secured or intended to be secured under the constitution, either civil, political, or religious.

How far the statute of 1786, ch. 12, repealing the statute of 1784, ch. 88, incorporating the Episcopal churches, and the subsequent statutes in furtherance thereof of 1788, ch. 47, and ch. 53, were consistent with the principles of civil right or the constitution of Virginia, is a subject of much delicacy, and perhaps not without difficulty. It is observable, however, that they reserve to the churches all their corporate property, and authorize the appointment of trustees to manage the same. A private corporation created by the legislature may lose its franchises by a misuser or a non-user of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted *that such [***52** exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was orignially purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine. The statutes of 1798, ch. 9, and of 1801, ch. 5, are not, therefore, in our judgment, operative so far as to devest the Episcopal Church of the property acquired previous to the revolution, by purchase or by donation. In respect to the latter statute there is this farther objection, that it passed after the District of Columbia was taken under the exclusive jurisdiction of Congress, and as to the

corporations and property within that district, the right of Virginia to legislate no longer existed. And as to the statute of 1798, ch. 9, admitting it to have the fullest operation, it merely repeals the statutes passed respecting the church since the revolution; and, of course, it left in full force all the statutes previously enacted so far as they were not inconsistent with the present constitution. It left, therefore, the important provisions of the statutes of 1661, 1696, 1727 and 1748, so far as respected the title to the church lands, in perfect vigor, with so much of the common law as attached upon these rights.

Let us now advert to the title set up by the plaintiffs in the present bill. Upon inspecting the deed which is made a part of the bill, and bears date in 1770, the land appears to have been conveyed to the grantees as church wardens of the parish of Fairfax, and to **53***] their successors *in that office, forever. It is also averred in the bill that the plaintiffs, together with two of the defendants (who are church wardens), are the vestry of the Protestant Episcopal Church, commonly called the Episcopal Church of Alexandria, in the parish of Fairfax, and that the purchase was made by the vestry of said parish and church, to whom the present vestry are the legal and regular successors in the said vestry; and that the purchase was made for the use and benefit of the said church in the said parish. No statute of Virginia has been cited which creates church wardens a corporation for the purpose of holding lands; and at common law their capacity was limited to personal estate. (1 B. C., 394; Bro. Corp., 77, 84; 1 Rolle. Abr., 393, 4, 10; Com. Dig. Tit. Esglise, F. 3; 12 H. 7, 27, b; 1, 3 H. 7, 9, b; 37 H. 6, 30; 1 Burn's Eccles. Law, 290; Gibbs. 215.)

It would seem, therefore, that the present deed did not operate by way of grant to convey a fee to the church wardens and their successors; for their successors, as such, could not take; nor to the church wardens in their natural capacity; for "heirs" is not in the deed. But the covenant of general warranty in the deed binding the grantors and their heirs forever, and warranting the land to the church wardens and their successors forever, may well operate by way of estoppel to confirm to the church and its privies the perpetual and beneficial estate in the land.

One difficulty presented on the face of the bill was, that the Protestant Episcopal Church of Alexandria was not directly averred to be the same corporate or unincorporate body as the church and parish of Fairfax, or the legal successors thereto, so as to entitle them to the lands in controversy. But upon an accurate examination of the bill, it appears that the purchase was made by the vestry "of the said parish and church," "for the use and benefit of the said church in the said parish." It must, therefore, be taken as true that there was no other Episcopal Church in the parish; and that the property belonging to the church of Alexandria, which in this respect represented the whole parish. And there can be no doubt that the Episcopal members of the parish of Fairfax have still, notwithstanding a separation from the state of Virginia, the same rights and privileges as they orig- **54***] inally *possessed in relation to that church while it was the parish church of Fairfax.

The next consideration is whether the plaintiffs, who are vestrymen, have, as such, a right to require the lands of the church to be sold in the manner prayed for in the bill. Upon the supposition that no statutes passed since the revolution are in force, they may be deemed to act under the previous statutes and the common law. By those statutes the vestry were to be appointed by the parishoners "for the making and proportioning levies and assessments, for building and repairing the churches and chapels, provision for the poor, maintenance of the minister, and such other necessary purposes, and for the more orderly managing all parochial affairs," out of which vestry the minister and vestry were yearly to choose two church wardens.

As incident to their office as general guardians of the church, we think they must be deemed entitled to assert the rights and interests of the church. But the minister, also having the freehold, either in law or in equity, during his incumbency, in the lands of the church, is entitled to assert his own rights as *persona ecclesiæ*. No alienation, therefore, of the church lands can be made either by himself or by the parishioners or their authorized agents, without the mutual consent of both. And therefore we should be of opinion that, upon principle, no sale ought to be absolutely decreed unless with the consent of the parson, if the church be full.

If the statue of 1784, ch. 88, be in force for any purpose whatsoever, it seems to us that it would lead to a like conclusion. If the repealing statute of 1786, ch. 12, or the statute of 1788, ch. 47, by which the church property was authorized to be vested in trustees chosen by the church, and their successors, be in force for any purpose whatsoever, then the allegation of the bill, that the plaintiffs "have, according to the rules and regulations of their said society, been appointed by the congregation, vestrymen and trustees of the said church," would directly apply, and authorize the plaintiffs to institute the present bill. Still, however, it appears to us that in case of a plenarty of the church, no alienation or sale of the church lands ought to take place without the *assent of the min- [***55** ister, unless such assent be expressly dispensed with by some statute.

On the whole, the majority of the court are of opinion that the land in controversy belongs to the Episcopal Church of Alexandria, and has not been devested by the revolution, or any act of the legislature passed since that period; that the plaintiffs are of ability to maintain the present bill; that the overseers of the poor of the parish of Fairfax have no just, legal, or equitable title to the said land, and ought to be perpetually enjoined from claiming the same; and that a sale of the said land ought, for the reasons stated in the bill, to be decreed upon the assent of the minister of said church (if any there be) being given thereto; and that the present church wardens and the said James Wren ought to be decreed to convey the same to the purchaser; and the proceeds to be applied in the manner prayed for in the bill.

The decree of the Circuit Court is to be reformed so as to conform to this opinion.

Cited—4 Wheat. 663, 664, 695, 707; 8 Wheat. 481,

482; 9 Wheat. 455, 460, 465, 894; 2 Pet. 657; 3 Pet. 153; 4 Pet. 86; 11 Pet. 582; 12 Pet. 296; 6 How. 332, 542, 548; 10 How. 536; 16 How. 389; 1 Black, 373; 4 Wall. 550; 13 Wall. 213; 15 Wall. 489; 7 Otto, 27; 2 Cranch, C. C. 275, 276, 280, 281; 1 Bald. 218, 227, 232; 1 Woods. 424; 3 Woods. 234.

THE BRIG SHORT STAPLE AND CARGO, HALLAWAY AND OTHERS, CLAIMANTS v. THE UNITED STATES.

Absent—JOHNSON, *J.*, *and* TODD, *J.*

Quære. Whether, under the 1st and 2d embargo laws of 1807 and 1808, a registered vessel which had a clearance from one port to another of the United States was liable to condemnation for going to a foreign port.

If a vessel be captured by a superior force and a prize-master and a small force be put on board, it is not the duty of the master and crew of the captured vessel to attempt to rescue her—for they may thereby expose the vessel to condemnation although otherwise innocent.

THIS was an appeal from the sentence of the Circuit Court for the District of Massachusetts, which affirmed that of the District Court condemning the brig Short Staple and cargo.

The facts of the case are thus stated by the Chief Justice in delivering the opinion of the court.

This vessel was libeled in the District Court of Massachusetts, in March, 1809, for having [**56***] violated the embargo *laws of the United States, by sailing to a foreign port. The fact is admitted by the claimants, who allege, in justification of it, that the vessel was captured, while on her voyage to Boston, by a British armed vessel, and carried into St. Nichola Mole, where the government of the place seized the cargo.

It appeared in evidence that the Short Staple sailed from Boston about the 10th of October, 1808, with instructions to procure a cargo of flour and return therewith to Boston, unless the embargo should be removed before the commencement of her return voyage, in which case she was directed to proceed to the island of Guadaloupe. At Baltimore she took on board a cargo of flour, and sailed thence for Boston, about the 28th of October. She was detained several days in Hampton Roads, by contrary winds. During this detention the British armed vessel Ino put into Hampton Roads for the purpose of repairing some damage sustained in a storm on the coast. The Ino had been in the port of Boston while the Short Staple lay there, and had cleared out for the Cape of Good Hope, though her real destination was Jamaica. The reason her captain has since assigned for this imposition was, that by clearing out for the Cape of Good Hope he was allowed to take on board a larger supply of provisions than would have been allowed had he cleared out for any port in the West Indies.

As soon as the wind was favorable the Short Staple, together with another vessel, likewise bound from Baltimore to Boston, called the William King, put to sea, and was followed by the Ino, who soon overtook them, and took possession of them both as prize, alleging that they were bound to a French Island. The captor put a prize-master and two hands on board the Short Staple, and sailed in company with them until they fell in with a British ship of war. The captain of the Ino directed the prize-master to meet the ship of war and submit to her orders; while the Ino, dreading that her hands might be impressed, made sail to the windward and escaped. After their papers had been examined, the Short Staple and the William King were permitted to proceed on their voyage, and were carried into St. Nichola Mole, the place appointed by the captain of the Ino for *meeting them when he was sepa- [**57** rated from them by the ship of war. They arrived at the Mole about two days after parting from the Ino, who followed them, and entered the port soon after them. The government of the place insisted on detaining one of the vessels, as provisions were scarce at the Mole, and the Short Staple was given up to them. Her cargo was landed under the direction of the government, and purchased at about $32 per barrel. Having received about $1,200 in part pay for the cargo, the captain of the Short Staple sailed to Turk's Island, and loaded her with a cargo of salt, with which he returned to a port in Massachusetts, where his vessel was seized as having violated the embargo laws. The William King appears to have been carried to Jamaica, and there liberated without having been libeled. The Short Staple was condemned in both the District and Circuit Courts, and the case is brought before this court by writ of error.

P. B. Key and *R. G. Amory*, for the appellants, contended,

1. That no law prohibited the Short Staple from going to the West Indies; and,

2. That she was carried there by the superior force of a British vessel of war.

1. There was no law then in force by which the brig could be condemned for going to a foreign port.

The only embargo laws then in force which could affect this vessel were the original embargo act of 22d Dec., 1807 (vol, 9, p. 7), and the supplementary act of 9th of January, 1808 (vol. 9, p. 10).

The first act laid "an embargo on all ships and vessels bound to any foreign port or place," and directed that no clearance should be granted for any foreign voyage; and that no registered or sea-letter vessel, having on board a cargo, should be allowed to depart from one port of the United States to another port of the United States, unless the master, &c., should give bond in double the value of vessel and cargo, that the cargo should be relanded in the United States. The act did not *give any for- [**58** feiture. The first section of the 2d embargo law (the supplementary act of January 9th, 1808) relates only to vessels "licensed for the coasting trade." The 2d section relates only to vessels licensed for the fisheries or whaling voyages.

The 3d section enacts, that "if any vessel" "shall, contrary to the provisions of this act, "or of the act to which this is a supplement," "proceed to a foreign port or place," "such "vessel shall be wholly forfeited."

If any forfeiture is given it must be by this section—and this section applies only to such vessels as shall violate the provisions of this or

the former act. The "provisions of this act" do not apply to a registered vessel, but only to licensed coasters and fishing vessels. The first embargo law did not forbid a vessel to sail to a foreign port if she should have a clearance, but relied upon the bond aud security that the cargo should be relanded. It was the violation of a contract, not an offense against law. It was a breach of the condition of the bond, but no crime. Every man has a right to refuse to comply with the condition of his bond if he will pay the penalty. The United States, in the present instance, did resort to the bond. It is true they did not recover, because the jury found a verdict against them upon the issue of fact. But they have had their remedy.

A registered vessel could only violate the provisions of the first or second embargo law by going to a foreign port without a clearance; or by going to a port of the United States without giviug bond. A vessel which had a clearance and had given the bond was not forbidden to go to a foreign port. The Short Staple had a clearance and had given the bond. The provisions of the supplementary act could only be violated by licensed coasters and fishiug vessels, and are not applicable to the present case. The vessel did not go to a foreign port contrary to the provisions of the act, but contrary to the condition of the bond.

Jones, contra.

The only questions are, whether the 3d section of the 2d embargo law superadds the for- [*59 feiture of the vessel *to the penalty of the boud for violation of the previous law, or whether it provides a forfeiture for the violation of a new prohibition.

The expression "contrary to the provisions of this act or of the act to which this is a supplement," mean contrary to the spirit and intention of those acts. The spirit of the former act was unquestionably a prohibitiou of all foreign trade. To go with a cargo to a foreigu port was clearly agaiust the spirit of the embargo. A vessel violates the provisions of the act when she violates the bond which the act provides. The aet declares that an embargo shall be laid ou all vessels bound to a foreigu port. The word embargo is equivaleut to a prohibition. And the words "bound to a foreign port" mean a vessel intending to go to a foreign port; not merely a vessel ostensibly bound to such port.

But if the vessel, by violating the bond does not violate the law which requires the bond, yet the third section of the second embargo act creates a new offense, viz., that of going to a foreign port. It is coupled, in the same sentence, with the prohibitiou to put foreign goods on board of another vessel, which is unquestionably an entirely new offense, aud yet, according to the words of the act, must be done contrary to the provisions of this or the former act. This shows that the legislature did not mean to confine the forfeiture to violations of the first aet, or of the two first sections of the second act.

Amory, iu reply,

Observed that the word embargo meant a restraint, or confinement of vessels already in port, and could not affect the conduct of a vessel after she had left the port. If she has a liceuse to leave the port, the embargo, as such, cannot make her subsequent conduct unlawful.

February 17th. *Absent*—JOHNSON, *J.*, *and* TODD, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

It has been contended by the plaintiffs in error,

*1. That the Short Staple, being a re- [*60 gistered vessel, and having given bond as required by law for relanding her cargo in the United States, is not liable to forfeiture if she has violated the condition of that bond.

2. That her sailing to a foreign port, being under the coercion of a force she was unable to resist, is justifiable under the laws of the Unitcd States.

The first error has been pressed with great earnestness by the counscl for the plaintiffs; but the court is not convinced that his exposition of the embargo acts is a sound one. On this point, however, it will be unnecessary to give an opinion; because we think the necessity under which the claimants justify their going into St. Nichola Mole is sustained by the proofs in the cause.

It is not denied that a real capture and carrying into port by a force not to be resisted, will justify an act which, if voluntary, would be a breach of the laws imposing an embargo. Nor is it denied that if such capture be pretended, if it be made with the consent and connivance of the parties interested, such fraudulent capturc can be no mitigation of the offense. Thc whole question, then, to be decided by the court, is a question of fact. Was this capture real? was the force such as the Short Staplc could not resist? or was it made in consequence of somc secrct arrangements between the captor and captured?

It is contended, on the part of the United States, that the circumstances of this case are such as to outweigh all the positivc testimony in the cause, and to prove, in opposition to it, that the Short Staple was carried into St. Nichola Mole, not by force, but with her consent, and by previous concert between her owners and the captain of the Ino.

Thosc circumstances are,

1. The arrival and continuance of the Ino in the port of Boston while the Short Staple lay iu that port previous to her departure for Baltimore.

*2. Her clearing out for the Cape of [*61 Good Hope while her real destination was Jamaica.

3. The continuance of the Short Staple in Hampton Roads until the arrival of the Ino.

4. Her capture on a coasting voyage which would not justify suspicion.

5. Her being carried to a port where there was a good market, and there given up; and,

6. That the William King, when carried to Jamaica, was also given up without being libeled.

That these circumstances are some of them such as to justify strong suspicion, and such as to require clear explanatory cvidence to do away their influence, is unquestionable. But the court cannot admit that any or all of them together amount to such conclusive evidence as to render it impossible to sustain the defense.

That the Ino should arrive iu the port of Boston while the Short Staple lay in that port is nothing remarkable. It furnished an opportunity of concerting any future plan of operations with the owners of the Short Staple, or of any other vessel, but is certainly no proof of such concert. There is no evidence that the respective owners were acquainted or had auy communication with each other; and the whole testimony is positive that no such communicatiou took place.

That the Ino should have cleared out for the Cape of Good Hope, when her real destination was Jamaica, is sufficiently accounted for. It enabled her to take on board a considerable quantity of provisions—an article in demand in Jamaica—which she would not have been permitted to do had her real destinatiou been known. This may be a fraud in the Ino, but caunot affect the Short Staple.

That the Ino should have arrived in Hampton Roads while the Short Staple remained there, and should have followed her to sea, and have captured her, are unquestionably circumstances **62***] which justify strong suspicion, *and which would be sufficient for the condemnation of the vessel, if not satisfactorily explained; but it is not conceded by the court that they admit of no explauation. These circumstances are not absolutely incompatible with innoceuce.

It is proved by testimony to which there is no exception, and which no attempt has been made to discredit, that the Short Staple was absolutely windbound the whole time she remained in Hampton Roads; and that she attempted to put to sea before the arrival of the Ino, but could not. Had this capture ever been preconcerted in Boston, the Ino and Short Staple would more probably have contrived to meet on the return voyage of the latter than to have adopted the course of the one waiting in port for the arrival of the other, and then sailing out almost together.

The arrival of the Ino in Hampton Roads is completely accounted for. She had suffered by the perils of the sea, and put in for necessary repairs. This fact is proved positivcly, and no opposing testimony is produced.

That the Ino should have pursued the Short Staple on a coasting voyage, and have captured her, was a wrong not to be justified. It is said to have been so atrocious a tort that its reality is incredible. The fact, however, is completely proved. The master of the Short Staple swears that he was on his voyage to Boston; that his intention was to proceed to that port; that he had had no previous communication with the Ino, and had no expectation of being captured by her, or of being turned out of his course. The other persons on board the Short Staple testify to the same facts, as far as their knowledge extends. The owner of the Ino, who was on board, and her officers, swear that they had no previous communication with the Short Staple or her owner; that there was no concert of any sort between them; that they were informed by some person on shore, while the Ino lay in Hampton Roads for repairs, that the Short Staple and the William King were on a voyage to a French Island; that, expecting to find something which would justify condemnation as prize, they determiued to examine those **63***] vessels, aud *although ou examination they found nothing to justify capture, they still hoped that something would appear in future; and that, at the worst, they should incur no risk of damages, because they should carry the vessels aud cargoes to a good market. In this confidence, they determined to take them to Jamiaca.

This disposition in the captors, however indefensible, is very probable. It grew out of the state of the two countries; and uo individual who was captured in consequence of it ought, if his own conduct contributed in no degree to that capture, to be made the victim of it.

That she was carried into St. Nichola Mole, and there given up to the government of the place, is, in itself, a circumstance throwing some suspicion on the transaction, and requiring explanation. The testimony explains it. The Ino was separated from her two prizes by a fact which is fully proved, and which sufficiently accounts for that separation. That her captain should, when about to leave them, appoint some near port as the place of meeting again, was almost of course; and that he should have relinquished one of the vessels to the government of the place ceases to be matter of much surprise when it is recollected that he could not have much expectation of making her a prize; that, in fact, the capture was made with scarcely any hope of condemnation, but with a certainty that it would produce some additional supply of provisions, and could injure no person. The criminalty of this mode of thinking, whatever it might be, was not imputable to the owners of the Short Staple.

It has been contended that, during the separation of the Ino from the captured vessels, a rescue ought to have been attempted. There having been, during that period, but three persons belonging to the Ino on board the Short Staple, they might have been overpowered by the American crew; but the attempt to take the vessel from them was no part of the duty of the Americans, and might, in the event of recapture, have exposed the vessel and cargo to the danger of condemnation, of which, without such rescue, they incurred no hazard.

The abandonment of the William King without libeling *her, is the natural couse- [***64** quence of having been able to find no circumstances of suspicion which might tempt the captors to proceed against her. It undoubtedly proves, what the captaiu of the Ino avows, that he acted under a full conviction of being exposed to no risk by the capture, though he should reap no advantage from it.

The interest which coasting vessels had in fictitious or concerted captures, undoubtedly subjects all captures to a rigid scrutiny, and exposes them to much suspicion. The case of the claimant ought to be completely made out. No exculpatory testimony, the existence of which is to be supposed from the nature of the transaction, ought to be omitted. The absence of such testimony, if not fully accounted for, would make an impression extremely unfavorable to the claim. But where the testimony is full, complete and concurrent; where every circumstance is explained and accounted for in a reasonable manner; where the testimouy to the innocence of the owners aud crew of the ves-

sel is positive, proceeding from every person who can be supposed to have any knowledge of the facts, and contradicted by none; the court cannot pronounce against it. This would be to allow too suspicious circumstances a controlling influence to which they are not entitled.

The sentence of the Circuit Court, condemning the Short Staple, is reversed and annulled, and the cause remanded to that Court with directions to decree a restoration of the vessel to the claimants, and to dismiss the libel.

STORY, *J.*, stated that he dissented from the opinion of the court and adhered to the opinion which he gave in the court below, in which he had the concurrence of one of his brethren.

Rev'g—S. C. 1 Gall. 104.
Cited—2 Wheat. 152.

PARKER *v.* RULE'S LESSEE.

Absent—JOHNSON, *J.*, *and* TODD, *J.*

Under the act of Congress to lay and collect a direct tax (July 14, 1798,) before the collector could sell the land of an unknown proprietor for non-payment of the tax, it was necessary that he should advertise the copy of the lists of lands, &c., and the statement of the amount due for the tax, and the notification to pay, for 60 days in four gazettes of the state, if there were so many.

ERROR to the Circuit Court of the District of West Tennessee, in an action of ejectment.

65*] *The facts of the case were thus stated by the Chief Justice in delivering the opinion of the court:

This was an ejectment brought by the defendant in error in the Circuit Court of the United States for the District of West Tennessee. The plaintiff below claimed under a patent regularly issued by the proper authority. The defendant made title under a deed from the collector of the district, reciting a sale of the said land as being forfeited by the non-payment of taxes, and conveying the same to the purchaser. On the validity of this conveyance the whole case depends. At the trial the defendant produced his deed, and also a general list of lands owned, possessed and occupied on the first day of October, 1798, in assessment district No. 12, in the State of Tennessee, corresponding with the collection district No. 8, returned to the office of the late supervisor of the revenue for the District of Tennessee by Edward Douglass, surveyor of the revenue for said assessment district, among which is the following: "Grant, John, reput-"ed owner in Summer county on the middle "fork of Bledsoe's Creek, 640 acres of land "subject to and included in the valuation, "valued at $2,560, no possessor or occupant." He also produced the tax list furnished by said surveyor to Thomas Martin, collector of the collection district No. 8, in which list said land is described in the same manner as is the said general list, excepting that the said John Grant is described as possessor or occupant of said 640 acres of land, and said land is included in the list of lands belonging to residents. He also produced the advertisements of the sale of the said lands mentioned in the said deed to have been made in the Tennessee Gazette, in which said John Grant is mentioned only as reputed owner of said land, and proved, by a witness present at the sale, that the said Henry Bradford, for himself and Daniel Smith, became the purchaser of the said land; and that the said Daniel and Henry, before the execution of the last said mentioned deed, assigned their interest in the said land to the defendant, Richard Parker. But it did not appear that the said collector had, at any time, caused a copy of the said list, with a statement of the amount of the tax, and a notification to pay the same, to be published for sixty days in four gazettes of the state, if there were so many, *pursuant to the last clause of the 11th [**66** section of the act of Congress, entitled "An act "to lay and collect a direct tax within the "United States," (vol. 4, p. 212). And thereupon the judge instructed the jury that the said sale made by said collector was unauthorized and void, because the said collector had not previously made said last-mentioned publication, and because it appeared that the collector proceeded to collect the taxes due on the said land in the manner prescribed by law for collecting taxes due upon lands where the owner resides thereon, and not in the manner prescribed when the owners are non-residents, and because there is a variance between the surveyor's books and the collector's list. The defendant below excepted to this opinion of the judge, and a verdict and judgment being rendered against him, he has brought the same, by writ of error, into this court.

Jones, for the plaintiff in error.

There is only one question in this cause, viz, whether the collector, in making sale of the land under the 13th section of the act (vol. 4. p. 213), was bound to publish for 60 days in 4 gazettes of the state, the copies of the lists of the lands taxable, &c., with a statement of the amount of the taxes due thereon, and a notification to pay the same in 30 days, as required by the 11th section of the same act.

We contend that this clause of the section applies only to unoccupied lands of unknown proprietors, and not merely to lands of non-residents. Grant, although a non-resident, was a known proprietor.

Such publication is only necessary in case of distress and sale of goods and chattels, which is the only remedy given by the 11th section. If the collector intended to levy the distress, then it was incumbent on him to make the publication. But when the legislature, by the 13th section, give the remedy by sale of the land itself, they make a different provision and require different notice of the sale, and do not refer to the provisions of the 11th section; all of which provisions relate only to the case of distress.

C. Lee*, contra. [67**

The deed from the collector must always recite all the facts necessary to make the title good. In this respect the deed is very defective.

The land appears to have belonged to a non-resident. If his residence was known, the law required that he should have personal notice; if not known, he must have presumptive notice

by publication as the 11th section requires. It cannot be supposed that the law would require less notice to authorize sale of the land than a distress and sale of chattels. It cannot be supposed that the legislature meant to comprise all the prerequisites of the sale of the land in the 13th section; for that section applies as well to residents as to non-residents, and yet it requires no notice of the amount of the taxes, nor a demand of payment before sale. It is rather to be presumed that the legislature meant that all the preceding requisites should be complied with.

Jones, in reply.

It is not necessary that the deed should recite any of the facts preceding the sale. They may all be proved by parol.

February 18th. *Absent*—JOHNSON, *J.*, *and* TODD, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

It is admitted that if the preliminary requisites of the law have not been complied with, the collector could have no authority to sell, and the conveyance can pass no title. On the part of the plaintiff in error it is insisted that these requisites have been performed, and that the instruction given by the Judge is erroneous. The instruction is that the sale was unauthorized and void.

It was proved in the cause that the proprietors of the land in controversy were non-residents of the state of Tennessee when the tax was assessed, and continued to be so to the time of bringing the action, and that they had no known agents in that state.

68*] *The mode of proceeding with respect to non-residents is prescribed in the 11th and 13th sections of the act imposing the direct tax.

The object of the provisions of the 11th section is "lands, dwelling-houses and slaves "which shall not be owned by or in the occu- "pation or under the care or superintendence "of some person within the collection district "where the same shall be situated or found at "the time of the assessment aforesaid."

It is alleged that the plaintiff below did not entitle himself to the provisions of this section by bringing himself within its description. He was a non-resident and had no known agent, but has not shown that there was no occupant of the land.

The testimony offered by both plaintiff and defendant is spread upon the record; and although the plaintiff has not shown that there was no occupant, yet that fact came out in the testimony of the defendant before the opinion of the court was given. One of the tax lists produced by him states the land to be without an occupant; and the other, which states John Grant to be the occupant, is so far disproved, because the case admits John Grant to have been, at the time, an inhabitant of Kentucky, without any agent in the state of Tennessee.

The requisites of the 13th section of the act, which prescribes the course to be pursued where lands are to be sold because the taxes are in arrear and unpaid for twelve months, have been observed. The requisites of the 11th section, which prescribes the duty of the collector after the assessment of the tax before he can proceed to distrain for it, have not been observed. The cause depends on this single point: Was it the duty of the collector, previous to selling the lands of a non-resident in the manner prescribed by the 13th section of the act, to make the publication prescribed in the 11th section?

This will require a consideration of the spirit and intent of the law.

*The 9th section makes it the duty of [***69** the collector to advertise that the tax has become due and payable, and the times and places at which he will attend for its collection. It is then his duty to apply once at the respective dwellings of those who have failed to attend such places, and there demand the taxes respectively due from them. If the taxes shall not be then paid, or within twenty days thereafter, it is lawful for the collector to proceed to collect the same by distress and sale.

The 11th section prescribes the duty of the collector with respect to lands, &c., not owned, &c., by some person within the collection district wherein the same shall be situated.

Upon receiving lists of such lands, &c., he is to transmit certified copies thereof to the surveyors of the revenue of the assessment districts, respectively, within which such persons respectively reside, whose duty it is to give personal notice of the claim to those who are liable for it. If the tax shall not be paid within the specified time after this notice, it then becomes the duty of the collector to collect the same by distress.

If the residence of the owner of such land be unknown, this section requires certain publications to be made as a substitute for personal notice; after which it is the duty of the collector to proceed to collect the tax by distress in like manner as where a personal demand has been made.

The 13th section prescribes the duty of the collector, and the forms to be observed in the sale of land, the taxes on which remain unpaid for one year. This section contains no reference to those which preceded it, but marks out the course of the collector in the specific case. It is therefore contended—and the argument has great weight—that if the requisites of this section be complied with, the sale is valid. This opinion is in conformity with the letter of the section; and it is conceded that the intent must be very clear which will justify a connection of that section with those which precede it, so as to ingraft upon it those acts which must be performed by the collector before he can distrain for taxes. But in this case, when we take the whole statute *together, such intent [***70** is believed to be sufficiently apparent.

There is, throughout the act, an obvious anxiety in the legislature to avoid coercive means of collection, unless such means should be necessary; and to give every owner of lands the most full information of the sum for which he was liable, and to afford him the most easy opportunity to pay it. Thus the accruing of the tax is to be advertised, and the times and places at which the collector will attend to receive it. A personal demand at the dwelling-houses of those who have neglected to attend to this notice must then be made, a reasonable time before the collector can collect the tax by distress. Where lands are owned by non-residents whose

places of residcnee are known, this personal notice is still required; and where their residence is unknown, certain publications are substitutcd for and deemed equivalent to personal noticc and demand. In each case, it is made the duty of the collector to procced to collect the tax by distress and sale.

From this view of the law it is inferred, not only that the legislature was anxious to avoid coercive means of collection, but has also manifcsted a solicitude to collect thc tax by distress and sale of personal property rather than by a sale of the land itself. That all the mcans of collection prescribed in the act must have bcen tricd, and must have failed, before a sale of the land can be made. The duty of the collector to make a personal demand from the resident owner of lands, and to make those publications which the law substitutes for a personal demand where the residence of the owner is unknown, does not depend on the fact that personal property is or is not on the land from which the tax may be levied by distress. It is his duty to proceed in the manner prescribed in the 9th and 11th sections, in every case. After having so proceeded, it is his positive duty to levy the tax by distress, if property liable to distress can be found. If, notwithstanding the proceedings directed in the 9th and 11th sections, the tax shall remain one year unpaid, it is to be raised by a sale of the land. It appears to the court that the 13th scction presupposes everything enjoined in the 9th and 11th sections to have been per-
71*] formed, and that the validity of the *sale of land owned by a non-resident, made by the collector for the non-payment of taxes, must depend not only on his having made the publications required in the 13th section, but on his having made those also which are required in the 11th section. Thosc publications not having been made in this case, it is the opinion of the majority of this court that the sale is void, and that the judge of the District Court committed no error in giving this instruction to thc jury.

The judgment is affirmed with costs.

Cited—4 Wheat. 83; 16 How. 618.

BRIG STRUGGLE, THOMAS LEIGH, CLAIMANT.

v.

THE UNITED STATES.

A party who offers an exeuse for violating a penal statute must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocenee.

Circumstanees will sometimes outweigh positive testimony.

APPEAL from thc sentence of the Circuit Court for the District of Massachusetts, which condemncd the brig Struggle, for violation of the non-intercourse act of 28th of Junc, 1809, vol. 10, p. 13, by going, with a cargo, to a prohibited port.

February 18th. *Absent*—JOHNSON, *J., and* TODD, *J.*

LIVINGSTON, *J.*, delivered the opinion of the court as follows:

This was an information, in the District Court of Massachusetts, against the brigantine Struggle for the violation of the act of Congress of the 28th of June, 1809, in departing from Portsmouth, in the Unitcd States, with a cargo of domestic growth and manufacture, bound to a foreign port with which commercial intercourse was not then pcrmitted.

The libel further states that the vessel arrived at said prohibited port, with her cargo, and that no bond had at any time been given to the United States, in the manner required by law, that she should not proceed to any *inter-
72 dicted port, nor be engagcd directly or indirectly, during such voyagc, in any trade with such port or place.

The claim denies the departure of the brigantine from Portsmouth on a foreign voyage to a port with which commereial intercourse was interdicted, or to any other foreign port or place; but insists that she was duly cleared, at the custom-house at Portsmouth, for Charleston, and that she departcd and was sailing towards her place of destination, when, by the violence of the winds and waves, shc was driven out of her course, and became so much damaged that she could not proceed on to Charleston, but that it was necessary for the preservation of the vessel and cargo, and of thc lives of those on board, to sail for the West Indies; that she accordingly went to Martinico, and thence proceeded to St. Bartholomews.

Thc cause being at issue on this allegation of the claimant, and a number of witnesses having been examined, the District Court condemned the vessel as forfeited to the United States. This decree was affirmed by the Circuit Court, from whose sentence this appeal is taken.

The master of thc Struggle, who was produced as a witness, swears that after being regularly clearcd, shc sailed from Portsmouth to Charleston, the cargo being consigned to Joseph Waldron & Co., on whom he had orders to call for advice; but it being rumorcd, at thc time of his sailing, that the non-intercourse would shortly be removed, he was informed by the owner that orders were given to Waldron & Co., in that case, to send the vessel to the West Indies, provided thc prospects at Charleston should not bc equal to his expectation. That 5 or 6 days after sailing they had a very heavy gale from the south-west, which made such a tremendous sea that it became impossible to keep the vessel to. That they had not less than 65,000 feet of seasoned sawed lumber on the deck, besides loose lumber, all of which, in his opinion, must inevitably have been lost if the vessel had been kept head to. At one time an attempt was made to heave her to, and after laying a few hours thc gale increased and knocked the vessel down, her yards being nearly in the water, and the top of the deck load so shifted that they were obliged to put her before the wind to right *the deck load and clear the companion-
73 way. During several gales they were obliged to scud, and at one time for 23 hours together. They shipped several seas which washed overboard a part of the loose lumber. About the 16th of February, the wind being less violent, the deck load was found so much soaked that it was likc green lumber, which made the vessel so crank that they could not keep on the wind with a six-knot breeze. One of the water casks was entirely leaked out; another partly out;

and the sails and rigging much injured. On a consultation with the people on board, they were all of opinion that it would be extremely dangerous to attempt coming on the coast in the state in which the vessel then was, she being so top-heavy as to be almost water-logged. It being also the worst season in the year, they unanimously thought that the only way they could save the deck load, and probably their lives, would be to make the first port they could. They accordingly bore away for the West Indies, and arrived at Martinico, which was the first port they made. The cargo was there sold at a low price, it not being thought safe to venture to sea again in the then condition of the vessel. After making some repairs they sailed from Martinico for St. Bartholomews, where they took freight for Boston, at which place they arrived in June, 1810.

This is the history of the voyage given by the master, and is substantially confirmed by the mate and two of the seamen, who also swear that they shipped for wages usual on a voyage to Charleston, which were lower than those which were given for a voyage to the West Indies. It also appears by the documentary evidence in the case, that the Struggle had a regular clearance on board for Charleston; that she was chartered, by the claimant, of certain merchants of Portsmouth, "to go to some southern port or to the West Indies;" that the cargo taken on board at Portsmouth was lumber, butter and crackers; and that she returned from St. Bartholomews to the United States with a cargo on freight consisting of 180 casks and 9 barrels of molasses.

On these proofs the court is now to decide whether the claimant has made out his allegation that the vessel was driven out of her course by the violence of the winds and waves, and that her condition was such as to make [*74 *it necessary, for her preservation and the safety of the crew, to sail for a port in the West Indies.

Were the court bound to decide according to positive testimony, without regard to other circumstances, or to the situation and character of the witnesses, it might be difficult to say that the plea of necessity had not been satisfactorily made out. The master, mate and two of the mariners establish everything which the claimant had undertaken to prove, so far as their positive declarations are entitled to credit. But when it is recollected how many cases of fictitious distress have been offered to the courts of the United States, as excuses for violations of the restrictive system, as it has been called, and that these cases, whether real or imaginary, have generally been supported by the same species of testimony, it cannot be wondered at if this court shall receive, with considerable jealousy and caution, evidence which is so perpetually recurring, and which if compared will be found to present the same uniform statement of facts, with very few shades of difference, all calculated to impress a belief that some overwhelming calamity, of which in ordinary voyages so little is heard, has produced a departure from the original legitimate destination of the vessel. When it is considered, too, that the testimony on these occasions comes from men who, whatever their characters may be in other respects, must be viewed as accomplices in the offense, if any has been intentionally committed, and are, to say the least, very much under the influence of those who have projected the voyage and are to be gainers by a violation of the law, it cannot be supposed that such testimony can be examined without very considerable reserve and distrust.

Although mere suspicion, not resting upon strong circumstances unexplained, should not be permitted to outweigh positive testimony in giving effect to a penal statute; yet it cannot be regarded as an oppressive rule to require of a party who has violated it to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if in the course of such vindication he shall pass in silence, or leave unexplained circumstances which militate strongly against the integrity of the transaction, he cannot complain if the court shall lay hold of those circumstances as reasons *for adjudging him *in de-* [*75 *licto*. What, then, are the circumstances in this case which it is difficult to reconcile with the concurrent testimony of the witnesses who have been examined?

1. If the Struggle really encountered so much bad weather and was obliged, to avoid shipwreck and to preserve the lives of the crew, to abandon a coasting for a foreign voyage, it might be expected that, on her arrival at Martinico, the ordinary process of survey would have been called for. Her situation would then have been ascertained by professional and skillful men. The not taking a precaution so common in cases of distress and so necessary for the master's exculpation if he acted without an understanding with his owner, while it leaves us in great doubt as to the magnitude of the injuries sustained, and the imminence of the danger to which the vessel and crew were thereby exposed, is but little calculated to excite a belief of the great extent of either. It is taken for granted that no such survey was had, from the silence of all the witnesses upon the subject, and from the manifest interest which the claimant had in producing it, if it in any degree supported the testimony or the defense which he had set up.

2. A still more common document, and of which, notwithstanding, we hear not a word, is a protest. Perhaps a case never occurs that a vessel is forced to abandon a voyage without stating the reasons of such deviation in the form of a protest at the first port at which she arrives. Although, of itself, it would be no evidence, the master might have stated in his testimony that he had made one at Martinico. His not having done so subjects him to the just presumption of having neglected it altogether, and that his going thither was brought about by a necessity of his own contrivance, and not by the act of God, or adverse winds.

Again. Although it is said that orders were sent by the claimant to the house of Waldron & Co. in Charleston, yet neither these orders nor those to the captain, both of which must be presumed to be in writing, are produced. Their suppression (to say the least) is a circumstance of some suspicion. It may also be asked why, *if the danger was so [*76 pressing, and the vessel nearly on her beam ends, was not relief sought by throwing over the deck load or a part of it? The court does

not meau to say that it was the master's duty to sacrifice the cargo rather thau go to a foreign port; but from his uot disembarrassing himself of an encumbrance which must have been so much in his way, it may well be doubted whether the situation of the brig were as perilous as is now represented, or the lives of the crew exposed to the dangers we now hear of.

From the declarations of the claimant as to his intentions previous to the voyage an argument was drawn in his favor.

It is sufficient to say that such declarations are not evidence, and if they were, might, iu a case otherwise mysterious, rather increase than lull suspicion. As little dependence is to be placed on the fact that, for a foreign voyage, higher wages would have been demanded than for one to Charleston. Although the original agreement with the mariners may have been, and probably was, for Charleston, there can be no doubt that the owner would have an interest, in a case of this kind, to raise them full as high as seamen would have a right to expect, if the vessel were carried, and especially without a palpable necessity, to an interdicted foreign port.

Considering, then, the suspicious source from which the testimony is derived, and the unfavorable and unexplained circumstances which have been stated, the court is unanimously of opinion that the sentence of the Circuit Court must be affirmed.

RANDOLPH *v.* DONALDSON.

Absent—MARSHALL, *Ch. J., and* TODD, *J.*

If a debtor, committed to the state jail under process from the courts of the United States, escape, the marshal is not liable.

ERROR to the Circuit Court for the District of Virginia, in an action of debt brought by Donaldson against Randolph, late marshal 77*] of that district, for the *escape of one Baine, who, bcing taken in execution by the deputy marshal, had been deliverecd over to the jailer of the state prison of Botetourt county, from whose custody he escaped.

The action was in the common form, and the defendant pleaded *nil debet*, upon which issue was joined.

Upon the trial the defendant below took two bills of exception.

The first bill of exceptions sets forth the judgment and execution of Donaldson against Baine, and the marshal's return of the execution in these words: "Executed, and the defendant "imprisoned in the jail of Botetourt the 13th "November, 1797, as per the jailer's receipt in "my possession. Samuel Holt, D. M., for "David M. Randolph, M. V. D." It further sets forth the evidence of the fact that the original debtor, Baine, was seen at large; "whereupon the counsel for the plaintiff prayed the "court to instruct the jury that although the "marshal, the defendant, by his deputy, had "delivered the said original debtor, Baine, to "the jailer of Botetourt county, where he was "committed to jail, yet that the defendant was "liable to the plaintiff for an escape, upon the "discharge of the debtor by the said jailer, un-"less an escape warrant has been taken out, as "the law dirccts; whereupon the court instruct-"cd the jury that in law the marshal would "be liable to the plaintiff if the said Bainc es-"caped out of the said jail, with the consent or "through the negligence of the said jailer; as "the act of the jailer was, in that respect, the "act of the marshal. The court also instructed "the jury, that if the escape of the said Baine "from the jail of the said county of Botctourt "had taken place after the expiration of the "time when the said David Meade Randolph "was marshal of the Virginia District, he would "be liable for such escape, unless he shall prove "that he had assigned over the said Baine to "his successor in office by a deed of assign-"ment; or by an entry on the records of this "court, that he had made such assignment ac-"cording to an act of assembly of the common-"wealth of Virginia upon that subject, entitled "'an act to reduce into one all acts and parts of "acts relating to the appointment *and [*78 "duties of sheriffs;' the section of which act re-"ferred to in the instructions is in the following "words: 'XXII, and for removing all con-"troversies touching the manner of turning "over prisoners upou a sheriff's quitting his "office, Be it further enacted, That the delivery "of prisoners by indenture, between the old "sheriff and the new, or the entering upon "record, in the county court, the names of the "several prisoners and causes of their commit-"ment delivered over to the new sheriff, shall "be sufficient to discharge the late sheriff from "all suits or actions for auy escape that shall "happen afterwards.' To which opinion and "instructious the defendant excepted."

The 2d bill of exceptions stated, that "the "defendant offered evidence of the insolvency "of Baine at the time of his imprisonment and "discharge, and moved the court to instruct "the jury that if they were satisfied of the in-"solvency of Baine, and that Doualdson "neither resided himself, nor had any known "agent, in the county of Botetourt at the time "of Baine's imprisonmeut and discharge, to "whom notice might be given that he was in-"solvent and that security for the prison fees "was required, that in these circumstances the "jailer was legally justified in discharging him "under the act of the general assembly of Vir-"ginia in such case madc and provided. But "the court was of opinion that in the applica-"tion of this act of assembly to the case of a "marshal, the whole District of Virginia was to "be considcred as his county, and it was suf-"ficient if the said Donaldsou had any such "know agent in the District of Virginia; and so "instructed the jury; to which opinion and in-"struction the defendant excepted."

The jury found a verdict in the following words: "We of the jury find that the said Alex-"ander Baine in the declaration mentioned, "did escape from the jail in the county of Bo-"tetourt, with the consent of the defendant, "the then marshal of the Virginia District, as "in the declaration is set forth; and therefore "we find for the plaintiff the debt in the dec-"laration mentioned and assess his damages to "one thousand dollars."

*Upon this verdict judgment was ren- [*79

dered for the plaintiff, and the defendant took his writ of error.

C. Lee, for the plaintiff in error.

By the law of Virginia it is necessary that the jury should state, in their verdict, that the escape was with the consent of the sheriff. The verdict in the present case states the consent of the marshal; but the jury found the fact in consequence of the instruction of the court.

1. The first opinion to which an exception was taken was that the marshal was liable for the negligence of the jailer.

The jailor was not the deputy nor the officer of the marshal, but the deputy of the sheriff of Botetourt county. He was not an officer of the United States, but an officer of the commonwealth of Virginia. He was not appointed by, nor under the control of, nor responsible to the marshal.

By the judiciary act of the United States, vol. 1, p. 66, § 28, the marshal is expressly made liable for his deputies, "and shall be "held answerable for the delivery, to his suc- "cessor, of all prisoners which may be in his "custody at the time of his removal, or when "the term for which he is appointed shall ex- "pire, and for that purpose may retain such "prisoners in his custody until his successor "shall be appointed and qualified as the law "directs."

On the 23d of September, 1789, vol. 1, p. 362, Congress resolved "that it be recommend- "ed to the legislatures of the several states to pass "laws making it expressly the duty of the "keepers of their jails to receive and safe keep "therein all prisoners committed under the au- "thority of the United States, until they shall "be discharged by due course of the laws "thereof, under the like penalties as in the case "of prisoners committed under the authority "of such states respectively; the United States "to pay for the use and keeping of such jails, "at the rate of 50 cents per month for each "prisoner that shall, under their authority, be [*80] "committed * thereto, during the time "such prisoners shall be therein confined; and "also to support such of said prisoners as shall "be committed for offenses."

In consequenee of this recommendation the legislature of Virginia passed "an act for the "safe keeping of prisoners committed, under "the authority of the United States into any of "the jails in this commonwealth" (P. P. new Rev. Code, vol. 1, p. 43), by which it was enacted "that it shall be the duty of the keeper "of the jail in every district, county or corpor- "ation within this commonwealth, to receive "into his custody any prisoner or prisoners, "who may be from time to time committed to "his charge, under the authority of the United "States, and to safe keep every such prisoner "or prisoners according to the warrant or pre- "cept of commitment, until he shall be dis- "charged by the due course of the laws of the "United States."

2. "And that the keeper of every jail afore- "said shall be subject to the same pains and "penalties for any neglect or failure of duty "herein, as he would be subject to, by the laws "of this commonwealth, for a like neglect or "failure in the case of a prisoner committed "under the authority of the said laws."

The keeper of the jail is directly liable to the party. It was not intended that he should have a double remedy, viz., against the keeper of the jail and the marshal. Nothing could be more unreasonable than to make the marshal liable for the conduct of a person not appointed by him, over whom he has no control, and against whom he has no remedy. When the marshal had delivered the prisoner to the keeper of the jail he had discharged his duty and was no longer liable. The prisoner was no longer in the custody of the marshal, but of the jailer.

2. The seeond opinion of the court, to which an exception was taken, was, that if the escape was after the defendant had ceased to be marshal, still he was liable unless he had assigned over Baine as a prisoner to his successor in manner provided by the law of Virginia.

The observations already made are an answer to this *opinion. The marshal was bound [*81 by the law of the United States to deliver to his successor only such prisoners as were in his custody. Baine was not in his custody, and therefore he was not bound to deliver him over; and if not bound to deliver him over, he could not be liable for his escape.

The opinion was objectionable also on another ground. By the law of Virginia, the delivery over of prisoners by indenture, and the reeord of the names of the prisoners delivered over, is not the only evidence which a sheriff may produce of the fact of the delivery. The statute is cumulative only. It describes a mode by which he may certainly exonerate himself, and the kind of evidence which would be conclusive, but does not deprive him of the right of proving the delivery over of the prisoners by other means. The act of Congress says nothing of the mode of delivery nor of the mode of proof.

The marshal was not bound to take out an escape warrant as required by the law of Virginia (1 P. P., 118), because the prisoner was in the custody of the jailer, and not of the marshal. Besides, the marshal must of necessity reside at a great distance from many of the jails, and it would be unreasonable to oblige him to superintend them all.

3. The third opinion objected to at the trial was, that in applying the Virginia law of sheriffs to the marshal, the whole district was to be considered as his county; and therefore if the plaintiff had an agent in any county it was sufficient to prevent his discharge without notice.

The words of the act of assembly relative to the residence of the creditor or his agent ought to be taken strictly. The laws of the state are to be taken as rules of decision where they apply. But in this case they were not applicable.

R. I. Taylor, contra.

If doubts exist as to the construction of a law, the argument *ab inconvenienti* has great weight. If the jailer is not liable to the marshal, the United States are not able to enforce their judgments. The jailer of a *county [*82 is the officer of the sheriff, who may or may not require security. A district jailer gives security only in the sum of $1,500. It is not very important whether the jailer is liable, as the remedy would generally be of little value. But if he is liable it does not follow that the marshal is not.

Under the resolution of Congress and the act of Virginia the jailer is only liable to the same

"pains and penalties," strictly and technically considered, as if, &c. That is, he is only liable criminally, and not civilly. He is liable to punishment for a voluntary escape, but not to a civil remedy.

It cannot reasonably be presumed that the legislature meant to confide the revenue, the debts of individuals and the execution of the criminal laws of the United States to the responsibility of a county jailer.

It is not unreasonable to charge the marshal, for he has by law all the power necessary for the safe keeping of his prisoners. (Laws of the United States, vol. 1, p. 65.) He may call out guards, or he may have an officer on purpose to keep his prisoners.

He is bound to deliver over all his prisoners to his successor, and if bound to deliver over, he is bound to safe keep them. If those who are confined in the county jails are not in his custody, there are none in his custody. Who is to produce them on *habeas corpus?* In case of epidemic disease, who is to remove them? Who is to bring them into court for trial? Who is to receive the money upon execution?

If the legislature of the United States meant thus to hazard the revenue, the criminal jurisprudence, and the property of individuals, they would not have left it to inference, but have been more explicit.

2. As to the second opinion. It was right if the first was right. There is no other mode by which a sheriff quitting his own office can relieve himself from responsibility. But there was no evidence in the record that the escape was after the defendant ceased to be marshal, and therefore the opinion was inapplicable to the case; *and if so could not injure the defendant. The bill of exceptions is always supposed to contain the whole evidence in the cause. (3 Dall., 38.) [*83

3. As to the third opinion. There was no evidence in the case that the prisoner was discharged because there was no agent of the creditor to pay his jail fees; and therefore this opinion also was inapplicable to the case, and could not hurt the plaintiff in error. But if the law as to sheriffs in their counties is to be applied to the marshal of the district, then the whole district must be considered as his county. A creditor would have to keep an agent in each county to receive notices, for it would be impossible for him to know in which county the marshal would imprison his debtor.

C. Lee, in reply.

It is unreasonable that the marshal should be responsible for all the jailers in the state, over whom he has no control.

The sheriff is bound to commit a prisoner to the jail of that county in which he is arrested; and so is the marshal. If the jail is bad, the justices of the county are responsible. If the prisoner escape through the negligence or by the consent of the jailer, the sheriff is liable, because the jailer is his deputy. In Virginia, if a sheriff commit a prisoner to the district jail, he is not liable, because the district jailer is not his deputy. A *habeas corpus* would be directed to the jailer and not the marshal. As to the risk of the revenue, the United States must suffer as others do; they have thought proper to trust it to such keepers, and if they suffer the remedy is in their own hands.

As to the second opinion. If there was no evidence to justify it, that is another ground of error. But it appeared in the bill of exceptions that the witness was uncertain whether it was before or after the defendant ceased to be marshal that he saw the prisoner at large. The opinion, therefore, was prejudicial to the defendant.

3. As to the third opinion. The law of Virginia (1 P. P., 306, § 52) declares it to be unreasonable that a *sheriff should be obliged to go out of his county to give notice to creditors at whose suit any person may be in his custody, or to pay money levied on execution, and enacts that where an execution shall be delivered to the sheriff of any other county than that in which the creditor shall reside, such creditor shall name an agent in the county where the execution is to be served, for the purpose of receiving notices and money; and if the creditor fail to appoint such agent, the sheriff is not bound to give notice previous to a discharge of such prisoner for want of security for his prison fees. [*84

The jailer was liable only in the same manner and to the same extent as he would have been if the prisoner had been committed under the state authority. If committed under the state authority he would have had a right to discharge the prisoner for want of security for his fees, without notice to the creditor. The court therefore erred in giving an opposite opinion.

February 21st. *Absent*—MARSHALL, *Ch. J.*, *and* TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

This is an action of debt brought against the former marshal of Virginia for an alleged wilful and negligent escape of a judgment debtor. At the trial of the cause in the Circuit Court of Virginia, several exceptions were taken by the plaintiff in error to the opinions of the district judge, who alone sat in the cause; and the validity of these exceptions is now to be considered by this court.

The first exception presents the question whether an escape of a judgment debtor, after a regular commitment, under process of the United States courts, to a state jail, be an escape for which the marshal of the United States for the district is responsible.

Congress, by a resolution passed the 23d September, 1789 (1 Laws U. S., 362), recommended to the several states to pass laws making it the the duty of the keepers of their jails to receive and safe keep prisoners committed under the authority of the United States, under like penalties *as in the case of prisoners commit- [*85
ted under the authority of such states respectively; and, by another resolution of 3d of March, 1791 (1 Laws U. S. 357), authorized the marshals, in the meantime, to hire temporary jails. In pursuance of the former recommendation, the legislature of Virginia, by the act of 12th November, 1789, ch. 41 (Revised Code, 43), made it the duty of the keepers of the jails within the state to receive and keep prisoners arrested under the process of the United States, and for any neglect or failure of duty, subjected them to like pains and penalties as in

cases of prisoners committed under process of the state.

The act of Congress of 24th September, 1789 (ch. 20, § 27 and 28), authorizes the marshals of the several districts of the United States to appoint deputies, and declares them responsible for the defaults and misfeasances in office of such deputies. But there is no provision in any act of Congress declaring the keepers of state jails *quoad* prisoners in custody under process of the United States to be deputies of the marshals, or making the latter liable for escapes committed by the negligence or malfeasances of the former. If, therefore, the marshals be so liable, it is an inference from the general powers and duties annexed to their office.

It is argued that the marshals are so liable, because, in intendment of law, prisoners committed to state jails are still deemed to be in their custody; and in support of this argnment is cited the provision in the act of Congress which makes the marshal, on the removal from or the expiration of his office, responsible for the delivery to his successor of all prisoners in his cnstody; and authorizes him, for that purpose, to retain snch prisoners in his custody nntil his successor is appointed. And this argnment is further supported by its analogy to the case of sheriffs, and by the extreme inconvenience, which, it is asserted, would arise from a contrary doctrine.

The argnment is not without weight; but, upon matnre consideration, we are of opinion that it cannot prevail. The act of Congress has limited the responsibility of the marshal to his **86*]** own acts and the acts of his deputies. *The keeper of a state jail is neither in fact nor in law the depnty of the marshal. He is not appointed by nor removable at the will of the marshal. When a prisoner is regularly committed to a state jail by the marshal, he is no longer in the custody of the marshal, nor controlable by him. The marshal has no authority to command or direct the keeper in respect to the nature of the imprisonment. The keeper becomes responsible for his own acts, and may expose himself by misconduct to the "pains and penalties" of the law. For certain purposes, and to certain intents, the state jail lawfully used by the United States may be deemed to be the jail of the United States, and that keeper to be keeper of the United States. But this would no more make the marshal liable for his acts than for the acts of any other officer of the United States whose appointment is altogether independent. And in these respects there is a manifest difference between the case of a marshal and a sheriff. The sheriff is, in law, the keeper of the connty jail, and the jailer is his deputy appointed and removable at his pleasure. He has the supervision and control of all the prisoners within the jail; and, therefore, is justly made responsible by law for all escapes occasioned by the negligence or wilful miscondnct of his underkeeper.

On the whole, as neither the act of Congress nor the doctrine of the common law, applicable to the case of principal and agent, affect the marshal with responsibility for the escape of a prisoner regularly committed to the cnstody of the keeper of a state jail, we are all of opinion that the decision of the Circuit Court upon this point was erroneous, and that the judgment must be reversed.

This decision renders it unnecessary to consider the other points raised in the bills of exception.

Judgment reversed.

Cited—3 Wood. & M. 235; 1 Low. 537.

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*POLK'S LESSEE *v.* WENDAL ET AL. [*87

Absent—LIVINGSTON, *J.*, TODD, *J.*, *and* STORY, *J.*

The act of N. Carolina, 1789, ch. 2, opening the land-office, did not prohibit a person from making several different entries, amounting in the whole to more than 5,000 acres, nor from purchasing the rights acquired by others by entries, nor from uniting several entries in one survey and patent; and such union of several entries is allowed by the act of 1784, ch. 19.

In a patent, the obliteration of the consideration does not make void the grant.

In cases depending on the statutes of a state, the settled construction of those statutes, by the state courts, is to be respected.

In Tennessee, the younger patent on the elder entry prevails over the elder patent on the younger entry.

A patent justifies a presumption that all the previous requisites of the law have been complied with.

A patent is void at law if the state had no title, or if the officer who issued the patent had no authority so to do.

In North Carolina the want of an entry nullifies a patent.

After the cession of land by North Carolina to the United States the former had no right to grant those lands to any other grantee who had not an incipient title before the cession. The question, whether such incipient title existed, is therefore open at law.

THIS case, as stated by the Chief Justice in delivering the opinion of the court, was as follows:

This is a writ of error to a judgment in ejectment rendered in the Circuit Conrt of the United States, for the Distriet of West Tennessee. On the trial the plaintiff below, who is also plaintiff in error, relied on a patent regularly issued from the state of North Carolina for 5,000 acres of land, dated the 17th day of April, 1800, which patent included the lands in controversy.

The defendant then offered in evidence a patent issned also from the state of North Carolina, and dated on the 28th of Angust, 1795, pnrporting to convey 25,060 acres of land to John Sevier, which patent also comprehended the lands in controversy. To the reading of this grant the plaintiff objected, because,

1. By the laws of the state of North Carolina no grant conld lawfully issue for as large a nnmber of acres as are included in that grant.

2. The amount of the consideration originally expressed in the said grant appears to have been torn out.

3. The said grant on its faee appears fraudulent, the number of acres mentioned being 25,060, the number of warrants forty, of 640 acres each, and yet the courses and distances, mentioned in its body, include more than 50,000 acres.

These objections were overruled, and the patent went to the jury. To this opinion of the court the counsel for the plaintiff excepted.

The counsel for the plaintiff then offered to prove, for the purpose of avoiding the said grant.

1. That the forty warrants of 640 acres each **88***] mentioned *in the said grant, purport, on their face, to have been issued by Landon Carter, entry-taker of Washington county, and that the land covered by the said grant is situated between the Cumberland Mountain and Tennessee River, and not within the said county of Washington.

2. That the consideration of ten pounds for every hundred acres was fraudulently inserted in the said grant, by procurement of said grantee, John Sevier.

3. That no entries were made in the office of the entry-taker of Washington or elsewhere, authorizing the issuing of such warrants.

4. That the pretended warrants are forgeries.

5. That at the time of the cession of the western part of the state of North Carolina to the United States, and at the time of the ratification thereof by Congress, on the day of 1790, the said pretended warrants did not exist, nor were any locations or entries in the offices of the entry-taker of Washington county, from which they appear to have issued, authorizing their issuance.

6. That no consideration for the said land was ever paid to the state of North Carolina or any of its officers.

And, to prove that since the execution of the said grant the consideration mentioned therein had been altered from 50 shillings to ten pounds, the counsel for the plaintiff offered to read as evidence a letter addressed by the said John Sevier, to James Glasgow, then Secretary of State for the state of North Carolina, in the words following, to wit.:

"Jonesborough, 11th November, 1795.

"Dear Sir—I am highly sensible of your "goodness and friendship in executing my "business at your office in the manner and form "which I took the liberty to request. Permit "me to solicit a completion of the small re- **89***] "mainder *of my business that remains "in the hands of Mr. Gordon.

"Should there be no impropriety, should "consider myself much obliged to have ten "pounds inserted in the room of fifty shillings.

"I have directed Mr. Gordon to furnish "unto you a plat of the amount of three 640 "acres which I consider myself indebted to "you, provided you would accept the same in "lieu of what I was indebted to you for fees, "&c., which I beg you will please to accept in "case you can conceive that the three warrants "will be adequate to the sum I am indebted to "you.

I am with sincere and great esteem,
Dear sir, your most obedient servant,
JOHN SEVIER."

"Hon. James Glassgow."

Indorsed thus,

"HON. MR. GLASSGOW,
Secretary of State."

"Mr. Gordon."

The counsel for the defendants objected to the reception of this testimony, and it was rejected by the court. To this opinion also an exception was taken.

A general verdict was rendered for the defendants, on which the court gave judgment.

This judgment has been brought up to this court by writ of error.

C. Lee, for the plaintiff in error.

Two questions arise in this cause:

1. Whether the fraud does not vacate the grant to Sevier?

2. Whether the evidence of that fraud should not have been admitted.

*1. The invalidity of the grant to [***90** Sevier appears upon its face. It is mutilated by the erasure of the consideration. And it has been fraudulently altered in a material part.

By the law of North Carolina, the survey must be annexed to the patent, and is a substantial part of it. From this survey it appears that under 40 warrants, for 640 acres each, amounting to 25,060 acres, there have been granted to him more than 50,000 acres.

These objections having been made at the trial below, ought to have excluded the patent from the consideration of the jury.

There is a difference between a public and a private grant. A patent must be issued according to the requisites of the law, or it will be void. It takes effect merely by the provisions of the law, and if not made pursuant to law, can convey no title. (3 Co., 77, *Fermor's* case; 10 Co., 110, *Legate's* case; 6 Co., 55, *Lord Chando's* case; 5 Co., *Barwick's* case: Co, Litt., 260.)

In the case of a sale of land by a sheriff for taxes, the proceedings must be regular and according to the law which authorizes the sale, or it will be void. So under the bankrupt laws, and the Lords' act in England. The same rule of law applies to a grant from a state; and the party may take advantage of it, in ejectment. (1 Harris & M'Henry's reports, 145, *The Lord Proprietary of Maryland* v. *Jennings et al.*) So, if a bond or release be offered in evidence, the other party may show it was obtained by fraud. And if any objection appear upon the face of the instrument, the court will take notice of it. (6 Cranch, 70, *O'Neale* v. *Thornton.*)

2. The court ought to have permitted the plaintiff to give evidence of the fraud and of the want of foundation for the patent. In ejectment the deeds are not declared upon, nor set forth in the proceedings, so that the opposite party has no opportunity to plead the fraud, or the erasure, &c. He can only produce these facts in evidence by way of objection so as to prevent such deeds from being read in evidence to the jury.

*If the entry-taker in Washington [***91** county had no authority to issue the warrants for these lands, they are void. The evidence of that fact ought therefore to have been admitted.

The evidence of collusion between Sevier and the Secretary of State, and of the other facts stated in the bill of exceptions, ought to have been received. For however slight the evidence might have been of some of the facts, yet it ought to have been left to the jury. (6 Cranch, 50, *Maryland Ins. Co.* v. *Woods.*)

The court below decided that no evidence could be given to invalidate the patent, except what regarded the entries.

Mr. Lee cited the following statutes of North

Carolina, from Iredell's revised code: P. 205, the act of 1777, ch. 1, § 3, 4; Id., p. 322, the act of 1783, ch. 2, § 2; Id., p. 345, the act of 1784, April session, by which the lands were ceded to the United States. And the acts of 1784, October session, p. 386, ch. 19, § 6; 1778, p. 252; 1786, ch. 20; 1789, ch. 3, p. 467; and 1791, ch. 21, § 5.

Jones, contra.

1. The first objection was to the admission in evidence of the patent to Sevier, for any purpose. There was nothing on the face of the patent to make it void. It was not mutilated. There were blanks in it, but no mutilation; and there is no evidence that it was mutilated.

There could be only three kinds of consideration; fifty shillings, ten pounds, or military service. It could not by law be either the first or the last. It must therefore have been ten pounds.

The act of the officer carries a presumption that the proper consideration was paid; and the statute shows what that consideration ought to have been.

2. The next objection is that the grant comprehends 50,000 acres instead of 25,060.

But the grant is only for the 25,060, although [**92***] the *survey may include more. The statute which prohibits grants for more than 5,000 acres does not vacate such grants. It is only directory to the officer; and such grants are recognized by the laws of North Carolina, 1784, ch. 19. The excess is no evidence of such fraud as will vacate the deed.

The defendants were not bound to show the correctness of their entries; nor anything else prior to the patent. The entries were merged in the patent.

As to the second bill of exceptions. It presents but one point. The only evidence offered and rejected was the letter of Sevier to Glassgow. For although it states that the plaintiff offered to prove other facts, yet it does not state that he offered evidence of those facts.

But if the bill of exception imports that such evidence was offered, yet the defendants were innocent purchasers. The contest is not between the original parties. They were not bound to look beyond the patent, and if the facts were proved which the plaintiff offered to prove, yet the patent is not thereby made void, but voidable by proper process. The king may avoid his grants where a subject could not (10 Co., 113, *Legate's* case); but it must be either by *quo warranto* or *scire facias*, or information in the nature of a *quo warranto;* which is a process in the nature of a proceeding *in rem*. There is no instance where it has been declared void when brought collaterally into question. And although a statute declares a grant void, yet it is not actually void, but voidable. (7 Bac. Ab., 64, B; 6 Cranch, 180, *Fletcher* v. *Peck*.)

In the case from Harris and M'Henry's reports, the state of Maryland sought to set aside the grant by an information, and it only shows that upon such a process the fraud upon the state may be given in evidence. In the present case no fraud or irregularity has been sufficiently alleged to set aside the deed.

1. It is said that the lands did not lie in Washington county. This is no objection, because the party had a right to remove his entry.

*2. The charge that the consideration of [**93** £10 was fraudulently inserted, is too vague and general. If the party had not paid the £10 he was still indebted to the state in that sum; and the deed is not for that cause void as to an innocent purchaser.

3. That there were no entries authorizing the warrants. This objection is equivocal, and involves questions of fact and law.

4. That the warrants were forgeries.

The patent cannot be declared void for any prior irregularity. In ejectment you must stop at the patent. And the prior patent gives the better title.

5. That at the time of the cession of the lands to the United States there were no entries authorizing the warrants.

This is in substance the same as the third objection. It is too general and vague, and involves fact and law.

6. That no consideration was paid. This, if true, does not avoid the patent; for if the money was not paid Sevier remains debtor for it to the state.

With regard to the letter to Glassgow, it is not material what alteration was made as to the consideration. No evidence of alteration was important unless it were such alteration as would vacate the deed. This letter contains no such evidence. It must have referred to some other patent; because the letter was dated in November, 1795, and refers to some instrument then incomplete; but the patent in this case was completed in the preceding August.

As to the issuing of the grant by the state of North Carolina after the cession of the territory to the United States, the act of cession provided for the issuing of such grants upon entries previously made. It does not appear that the entries in this case were not made before the cession. The plaintiff's grant was also issued by the state of North Carolina, five years after the defendant's.

C. Lee, in reply. [**94**

The practice of England, as to revoking patents, is no rule respecting the land laws of this country. The register of the land-office is only an officer of the law; can transfer nothing but according to his authority, and cannot grant contrary to law.

The patent is void on its face. It appears to have been obliterated. This fact, together with the letter to Glassgow, ought to have been left to the jury, as tending to prove a fraudulent alteration in the deed.

Unless the patent conveys all the land within the described bounds, it is vague and uncertain. It cannot be limited to the 25,060 acres. If it conveys anything, it conveys the whole 50,000 acres.

February 21st. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the court as follows:

The first exception is to the admission of the grant set up by the defendants in bar of the plaintiff's title. This objection alleges the grant to be absolutely void for three causes.

The first is,

That no grant could lawfully issue for the quantity of land expressed in this patent.

If this objection be well founded, it will be conclusive. Its correctness depends on the laws of the state of North Carolina.

The act of 1777, ch. 1, opens the land-office of the state, and directs an entry-taker to be appointed in each county, to receive entries made by the citizens of its vacant lands. The third section of this act contains a proviso that no person shall be entitled to claim a greater quantity of land than 640 acres, where the survey shall be bounded by vacant land, nor more than **95***] *1,000 acres between lines of land already surveyed for other persons.

The fourth section fixes the price of land thus to be entered at 50 shillings per hundred acres; after which follows a proviso that if any person shall claim more than 640 acres for himself, and 100 acres for his wife and each of his children, he shall pay for every hundred acres exceeding that quantity five pounds, and so in proportion. But this permission to take up more than the specified quantity of lands at five pounds for every hundred acres, does not extend to Washington county.

In June, 1781, ch. 7. the land-office was closed, and further entries for lands prohibited.

In April, 1783, ch. 2, the land-office was again opened, and the price of lands fixed at ten pounds for each hundred acres. The ninth section of this act authorizes any citizen to enter, with the entry-taker to be appointed by the assembly, "a claim for any lands, provided "such claim does not exceed 5,000 acres."

This act limits the amount for which an entry might be made. But the same person is not, in this act, forbidden to make different entries; and entries were transferable. No prohibition appears in the act which should prevent the assignee of several entries, or the person who has made several entries, from uniting them in one survey and patent. The court does not perceive, in reason or in the directions of the law respecting surveys, anything which should restrain a surveyor from including several entries in the same survey. The form of surveys, which is prescribed by law, if that rule should be considered as applicable to surveys made on several entries united, may be observed, and, in this case, is observed, notwithstanding the union of different entries.

In April, 1784, ch. 19, the legislature again took up this subject, and, after reciting that it had been found impracticable to survey most of the entries of lands made adjoining the large swamps in the eastern parts of the state agreeable to the manner directed by the acts then in force, without putting the makers **96***] thereof *to great and unnecessary expenses, empowered surveyors in the eastern parts of the state to survey for any person or persons, his or their entries of lands in or adjoining any of the great swamps, in one entire survey.

The third section enacts, "that where two "or more persons shall have entered or may "hereafter enter lands jointly, or where two "or more persons agree to have their entries "surveyed jointly in one or more surveys, the "surveyor is empowered and required to sur- "vey the same accordingly in one entire sur- "vey; and the persons so agreeing to have "their entries surveyed, or entering lands "jointly, shall hold the same as tenants in "common, and not as joint-tenants."

The fourth section secures the same fees to the surveyor and secretary as they would have been entitled to claim, had the entries been surveyed and granted separately.

As all laws on the same subject are to be taken together, it is argued that this act shows the sense of the legislature respecting the mode of surveying entries, and must be taken into view in expounding the various statutes on that subject. It evinces unequivocally the legislative opinion that, as the law stood previous to its passage, a joint survey of two entries belonging to the same person or to different persons, could not be made. The right to join different entries in the same survey, then, must depend on this act.

The first and second sections of this act relate exclusively to entries made in or adjoining to the great swamps in the eastern parts of the state.

The third section is applicable to the whole country, but provides only for the case of entries made by two or more persons. It is, therefore, contended that the court cannot extend the provision to the case of distinct entries belonging to the same person.

For this distinction it is impossible to conceive a reason. No motive can be imagined for allowing two or more persons to unite their entries in one survey, which does not apply with at least as much force for allowing a single *person to unite his entries adjoining [***97** each other in one survey. It appears to the court that the case comes completely within the spirit, and is not opposed by the letter of the law. The case provided for is, "where two or more per- "sons agree to have their entries surveyed "jointly," &c. Now, this agreement does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor that the assignee may survey the entries jointly or separately, at his election. The court is of opinion that, under a sound construction of this law, entries which might be joined in one survey, if remaining the property of two or more persons, may be so joined, though they become the property of a single person.

The second objection to the admission of the grant is, that the amount of the consideration originally expressed on its face appears to have been torn out.

The grant stands thus: "For and in consid- "eration of —— pounds," &c.

The court is unanimously and clearly of opinion that there is nothing in this objection. It is not suggested, nor is there any reason to believe, that the words were obliterated for fraudulent purposes, or for the purpose of avoiding the grant. They may have been taken out by some accident; and there is no difficulty in supplying the lost words. The consideration paid was ten pounds for each hundred acres; and there can be no doubt that the word "ten" is the word which is obliterated. Had the whole grant been lost, a copy might have been given in evidence; and it would be strange if the original should be excluded because a word which could not be mistaken, and which, indeed, is not essential to the validity of the grant, has become illegible.

The third exception is, that the grant, on its face, appears fraudulent, because it has issued for 25,060 acres of land, although the lines which circumscribe it, and which are recited in it, comprehend upwards of 50,000 acres.

Without inquiring into the effect of a grant **98***] conveying *50,000 acres of land under a sale of 25,000 acres, it will be sufficient to observe that, in this case, the surplus land is comprehended in prior entries, and is consequently not conveyed by this grant. This exception, therefore, is inapplicable to the case.

It is the opinion of this court that there was no error in permitting the grant under which the defendant claimed title to go to the jury.

The remaining exceptions were taken after the grant was before the jury, and are for causes not apparent on its face. They present one general question of great importance to land-holders in the state of Tennessee. It is this: Is it, in any, and, if in any, in what cases, allowable, in an ejectment, to impeach a grant from the state for causes anterior to its being issued?

In cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the state where that construction is settled, and can be ascertained. But it is not understood that the courts of Tennessee have decided any other point bearing on the subject than this, that under their statutes declaring an elder grant founded on a younger entry to be void, the priority of entries is examinable at law; and that a junior patent founded on a prior entry shall prevail in an ejectment against a senior patent founded on a junior entry. The question whether there are other cases in which a party may, at law, go beyond the grant for the purpose of avoiding it, remains undecided.

The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all the proceedings are completed by a patent issued by the authority of the state, a compliance with these rules is pre-supposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, **99***] be extremely *unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. But there are some things so essential to the validity of the contract, that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined. In general, a court of equity appears to be a tribunal better adapted to this object than a court of law. On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself; and, should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity, the specific points must be brought into view; the various circumstances connected with those points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation; and the decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant. In the general, then, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.

Having premised these general principles, the court will proceed to consider the exceptions to the opinion of the Circuit Court in this case, and the testimony rejected by that opinion.

The case does not present distinct exceptions to be considered separately, but a single exception to a single opinion, rejecting the whole testimony offered by the plaintiff. The plaintiff offered to prove that no entries were ever made authorizing the issuing of the warrants on which the grant to Sevier was founded, and that the warrants themselves were forgeries. He also offered *to prove that, at the time of [***100** the cession to Congress of the territory in which these lands lie, the warrants did not exist, nor were there any locations in the office from which they purport to have issued, to justify their issuing.

In the state of North Carolina itself, the want of an entry would seem to be a defect sufficient to render a grant null.

The act of 1777, which opens the land-office and directs the appointment of an officer in each county, denominated an entry-taker, to receive entries of all vacant lands in his county, directs the entry-taker, if the lands shall not be claimed by some other person within three months, to deliver to the party a copy of the entry with its proper number, and an order to the county surveyor to survey the same. This order is called a warrant.

The ninth section of the act then declares, "that every right, &c., by any person or persons set up or pretended to any of the before-mentioned lands, which shall not be obtained in manner by this act directed, or by purchase or inheritance from some person or persons becoming proprietors by virtue thereof, or which shall be obtained in fraud, evasion or elusion of the provisions and restrictions thereof, shall be deemed and are hereby declared utterly void."

The act of 1783, which again opens the land-office, appoints an entry-taker for the western district, and prescribes rules for making entries in his office, and for granting warrants similar to those which had been framed for the government of the entry-takers of the respective counties.

In the year 1789, North Carolina ceded to Congress the territory in which the lands lie for which Sevier's grant was made, reserving,

however, all existing rights under the state, which were to be perfected accordiug to the laws of North Carolina. This cession was accepted by Congress.

Sevier's snrvey is dated on the 26th day of May, 1795.

101*] *The lands for which the warrants were granted, by virtue of which the survey was made, lie within that district of conntry for which the land-office was opened by the act of 1777. Had the survey been made on the land originally claimed by these warrants, it must have been a case directly within the ninth section of the act; and the right is declared by that section to be utterly void. But the survey was made on different lands by virtue of an act which empowers the surveyor so to do in all cases of entries on lands previously appropriated. This clause in the law, however, does not authorize a snrvey where no entry has been made; and such snrvey would also come completely within the provision of the ninth section. In such case, there is no power in the agents of the state to make the grant; and a grant so obtained is declared to be void.

This subject is placed in a very strong point of view by considering it in connection with the cession made to the United States. After that cession, the state of North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of that state. But the right was reserved to perfect incipient titles. The fact that this title acrued before the cession does not appear on the face of the grant. It is, of course, open to examination. The survey was not made until May, 1795, many years posterior to the cession. It purports, however, to have been made by virtue of certain warrants founded on entries which may have been made before the cession. But if these warrants had no existence at the time of the cession, if there were no entries to justify them, what right could this grantee have had at the time of the cession? The court can perceive none; and if none existed, the grant is void for want of power in the state of North Carolina to make it.

If, as the plaintiff offered to prove, the entries were never made, and the warrants were forgeries, then no right accrued under the act of 1777; no purchase of the land was made from the state; and, independent of the act of cession to the United States, the grant is void by the express words of the law.

If entries were made in the county of Wash-

102*] ington, *but no commencement of right had taken place in the ceded territory previous to the cession, so as to bring the party within the reservation contained in the act of cession, then the grant must be void, there being no anthority in the grantor to make it. In rejecting testimony to these points, the Circnit Court erred; and their judgment must be reversed, and the cause remanded for a new trial.

Rev'g—2 Overt. 118.

Cited—1 Wheat. 486; 5 Wheat. 300; 11 Wheat. 382; 12 Wheat. 168; 2 Pet. 237; 6 Pet. 296, 728 *et seq.*; 15 Pet. 105; 4 How. 379; 14 How. 504; 18 How. 88; 20 How. 89; 1 Black, 375; 21 Wall. 675; 2 Otto, 425; 10 Otto, 52; 12 Otto, 53; 1 Cliff. 290, 439; 2 Cliff. 319; 1 Bald. 284.

THE SHIP RICHMOND
v.
THE UNITED STATES.

Absent—TODD, *J.*

The non-intercourse act of 28th of June, 1809, (vol. 10, p. 13), which requires a vessel bound to a permitted port to give bond in double the amount of vessel and cargo not to go to a prohibited port, is applicable to a vessel sailing in ballast.

If a merchant vessel of the United States be seized by the naval force of the United States, within the territorial jurisdiction of a foreign friendly power, for a violation of the laws of the United States, it is an offense against that power which must be adjusted between the two governments. This court can take no cognizance of it. The law does not connect that trespass, with the subsequent seizure by the civil authority, under the process of the District Court, so as to annul the proceedings of that court against the vessel.

APPEAL from the sentence of the Circuit Court for the District of Georgia affirming the sentence of the District Court, which condemned the ship Richmond for a violation of the non-intercourse act of 28th of June, 1809, (vol. 10, p. 13), by departing from Philadelphia, bound on a foreign voyage to a permitted port, without having given bond not to go to a prohibited port.

The case was argued by *Harper* for the appellants, and *Jones* and *Pinkney* for the United States.

February 22d. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The ship Richmond, an American registered vessel, sailed from Philadelphia in ballast in December, 1809, with a clearance for New York, but proceeded to Portsmouth in Great Britain, where she arrived in 1810. She made two voyages to Amelia Island in East Florida, during the second of which she was seized in St. Mary's River by gun-boat No. 62, January 14th, 1812, and libeled in the District Court of Georgia for violating the act passed the 28th of June, 1809, for amending the *non-intercourse [***103** law. The Richmond was condemned in both the District and Circuit Courts, and from their sentence the claimants have appealed to this court.

The claimants contend,

1. That the vessel was not liable to forfeiture.

2. That the seizure was made within the territory of Spain, and that all proceedings founded thereon are void.

When the Richmond sailed from Phiadelphia, commercial intercourse between the ports of Great Britain and those of the United States was permitted. But the act of the 28th of June, 1809 (vol. 10, p. 13), enacts, that "no ship or "vessel bound to a foreign port or place with "which commercial intercourse has been or "may be thus permitted, except, &c., shall be "allowed to depart unless the owner or owners, "consignee or factor of such ship or vessel "shall, with the master, have given bond, with "one or more sureties, to the United States, in "a sum double the value of the vessel and "cargo, that the vessel shall not proceed to any "port or place with which commercial inter-"course is not thus permitted, nor be directly "nor indirectly engaged during the voyage in

"any trade with such port or place." If a vessel shall depart without having given such boud, the vessel with her eargo are declared to be wholly forfeited.

It is contended that this act does not apply to vessels departing from the United States to a permitted port, in ballast.

The aet is eertainly not expressed with all the precision that could be wished. The case coutemplated by the legislature most probably was that of a vessel sailing with a cargo; but there is reason to believe that a vessel departiug in ballast also was within the meauing aud iutent of the law. The bond is provided to prevent a breach of the existing restrictive laws by a vessel clearing out or sailing for a permitted port, but actually proceeding for a prohibited port. This might be done by a vessel with or without a eargo; and the conditiou of the boud would be violated, in its letter as well as spirit, **104***] by *the vessel sailing without the cargo to a prohibited port. The eourt understands the law, then, direeting a bond to be given in double the value of the vessel and eargo, to apply to the eargo if there be a cargo, but to the vessel only if there be no cargo.

The seizure of an American vessel within the territorial jurisdiction of a foreign power is eertainly an offense against that power, which must be adjusted between the two governments. This eourt ean take no eognizance of it; and the majority of the eourt is of opinion that the law does uot connect that trespass, if it be one, with the subsequent seizure by the civil authority, uuder the proeess of the District Court so as to annul the proceedings of that eourt agaiust the vessel. One judge, who does not concur in this opiuion, considers the testimony as suffieient to prove that the Riehmond, when first seized by the gun-boat, was within the jurisdietional limits of the United States.

The sentence is affirmed with costs.

Cited—9 Wheat. 403.

ARNOLD AND OTHERS.
v.
THE UNITED STATES.

The double duties imposed by the act of July 1st, 1812, accrued upon goods which arrived within a collection district on that day.

To constitute an importation, so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry. Semb. That if the condition of a bond be to pay 1,700 dollars, or the duties which may be ascertained to be due on certain goods imported, it is not in the option of the obligee to discharge the bond by payment of the 1,700 dollars. That an obligor may, at law, recover more than the penalty of the bond.

Where the computation is to be made from an act done, the day on which the act is done, is to be included.

ERROR to the Circuit Court for the District of Rhode Island, in an action of debt, upon a bond in the penalty of 3,400 dollars, given July 2d, 1812, for duties at the custom-house. The cause was decided below upon demurrer to the pleas of the defendants, who were the principal and sureties in the bond.

It was an action of debt on a bond, dated July 2d, 1812, given to the United States for $3,400. The condition of the bond is as follows, viz: "The condition of this obligation "is such, that if the above bounden, S. G. "Arnold, &c., shall and do, on or before the "2d day of October next, well and truly pay "or cause to be paid unto the collector of the "customs for the District of Providence "*for the time being, the sum of $1,700, [***105** "or the amount of duties to be ascertained as "due, and arising on certain goods, wares and "merchandise entered by the above bounden "S. G. Arnold, as imported in the brig Dover, "R. Fenner, master, from Havanna, as per en-"try dated this day, then the above obligation "to be void, &c." The following indorsement is on the bond, viz.:

"Amount of duties ascertained as due $1,708 "and 38 cents.

THOMAS PECKHAM, Jun.,
Deputy-Collector."

The defendants pleaded that, as to $1,708 and 38 cents, part and pareel of said sum of $3,400 demanded by the plaintiffs, with interest thereon from the day whereou the same was payable, to the time of the plea, being 13 dollars and 38 cents, they owe the plaintiffs the same, being in the whole the sum of 1,721 dollars and 76 cents; and that as to the whole residue of the sum demanded, the defendants say, that therefore the plaintiffs, their said action, ought not to have and maintain, because they say, "that the brig Dover in the condi-"tion of the said bond mentioued, sailed from "Havauna on the 16th day of June, A.D. 1812, "bound to the said District of Providence, and "that she arrived within the United States on the "30th day of June, 1812, and within the said "District of Providence on the 1st day of "July, A. D. 1812, having on board the said "goods, &c., mentioned in the eoudition, which "said goods, &c., were imported into the "United States, on the said 30th day of June, "1812, and into the said District of Provi-"dence on the said 1st day of July, 1812, in the "brig Dover, &c.; that Providence is the sole "port of entry in the said District of Provi-"dence, and that ou the said 2d day of July, "1812, the said goods, &c., were duly entered "at the custom-house in the said District of "Providence, as imported in the said brig "Dover, &c.; the defendauts further aver, that "the bond aforesaid was made, exeeuted and "given by them to the plaintiffs as aforesaid, "for securing the duties due on the said goods "so imported as aforesaid, in conformity with, "and by virtue and in pursuance of, the act of "the Congress, &c., passed on the 10th day of "August, *1799, entitled 'an aet mak- [***106** "ing further provision for the payment of the "debts of the United States,' and also a cer-"tain other act of Congress, passed on the 7th "day of June, 1794, entitled, 'an aet laying "additional duties on goods, &c., imported "into the United States.' The defeudauts also "aver, that the duties due by the aets afore-"said, on the importation of said goods, &c., "in manner aforesaid, amouuted at the time "of the importation of the same as aforesaid, to "the aforesaid sum of 1,708 dollars and 38 "cents, and no more, and were then and there "ascertained by the said deputy-collector, to

"that sum and no more, according to the con-
"dition of said bond, and in pursuance of the
"provisions of said statutes. They also aver,
"that at the time of the entering of the said
"goods, &c., at the custom-house, as aforesaid,
"on the said 2d day of July, 1812, neither they,
"the defendants, nor the collector of the cus-
"toms for said District of Providence, had any
"knowledge of the act entitled, 'an act for im-
"posing additional duties upon all goods, &c.,
"imported from any foreign port or place, and
"for other purposes,' passed on the 1st day of
"July, 1812; nor was the said last mentioned
"act promulgated, published and made known
"at the District of Providence as aforesaid, at
"the time of making the said entry as afore-
"said; and this the defendants are ready to
"verify, &c."

To this plea, the plaintiffs demurred.

In the Circuit Court judgment was rendered for the plaintiffs, for 3,428 dollars and 90 cents.

Pitkin, on the part of the plaintiffs in error, contended,

1. That the act imposing double duties could not, on principles of law, or justice, be considered as in operation until the 2d day of July. The words of that act are: That "an additional "duty, &c., shall be levied and collected upon "all goods, &c., which shall from and after the "passing of this act, be imported into the "United States, &c."

The act was approved by the President on the 1st day of July, 1812. By the sound con-
107*] struction of the words *"from and after the passage of this act," it is contended that the first day of July must be excluded; that the meaning is the same as if the words used had been from and after the 1st day of July, in which case the first day of July would certainly be excluded, and the act would not be in force until after that day. "From and after the passing of this act," have also the same meaning as from and after the time of passing the act. The question would then occur, as it now does, when or at what time was the act passed? The answer is, on the 1st day of July; and, of course, unless there are fractions of a day, the duties could not be levied and collected until after that day. The act repealing the duty on salt, passed in 1807, declares, "that from and after "the 31st day of December next, so much of "any act as lays a duty on imported salt be, "and the same is hereby repealed, and from "and after the day last aforesaid salt shall be "imported, &c., duty free."

No one has ever pretended that salt could be imported duty free until the first day of January, because it could not be so imported until from and after the day preceding. The court must undoubtedly give such a construction to the act as that no citizen can by possibility be subjected to its operation before it had actually passed. In order to prevent this the court must either exclude the 1st day of July altogether, or they must admit fractions of a day and suffer an inquiry into the very moment of time on that day when the act received the signature of the President, and was lodged in the office of the Secretary of State.

If a vessel had arrived in the morning of the 1st day of July, and the act was not in fact approved by the President until the afternoon of that day, it cannot be pretended that the goods brought in such vessel were imported "from and after the passing of the act." It is well known that acts are not generally presented to the President for his approbation until about the middle of the day, and on the last day of the session, frequently not until nearly the last hour of the day. The difficulties, however, attending an inquiry of this nature, as well as the impropriety of calling on the President for information as to the moment when a law received his sanction, may perhaps be sufficient inducements for *the court [***108** to say, that when the rights and interests of the citizens are so materially involved, and when by the express words of the act it is not to take effect until from and after the passing of the same, they will as a general rule exclude the day on which it passed. The authorities which have a bearing on this question are various and contradictory. In the case of *Pugh and Wife* v. *Duke of Leeds* (Cowper, 714), these authorities are referred to and commented upon by Lord Mansfield with his usual ability and sound sense.

Much more subtlety than argument has been used to prove a difference in the meaning of words made use of in instruments to show the time when they should take effect. When the words have been "from the date," the court have sometimes said it should include the day, and where the words have been "from the day of the date," it should exclude the day. In some cases the courts have entirely rejected this distinction, and have said that they do or may mean the same thing. In the case of *Bellasis* v. *Hester* (1 Lord Raymond, 280), on a bill of exchange, payable 10 days after sight, the court—two judges against one—decided, that the day on which the bill was presented for payment was included. This opinion, however, was against the custom and practice of merchants. In the case of *Hatter* v. *Ash* (1 Lord Raymond, p. 85), the following distinction is made by counsel, and is admitted by one of the judges, and not contradicted by the others, "that the words "'from the date,' when used to pass on interest, "include the day, *aliter*, when used by way "of computation on matters of account." This distinction is in some measure recognized by Lord Mansfield in the above case of *Pugh and Leeds*, in Cowper. In this last case Lord Mansfield says that the words "from the date," or "from the day of the date," may be either inclusive or exclusive, according to the subject matter, and may be construed either way, to give effect to the transaction, or for the furtherance of justice between parties. In the case now before the court it is not necessary to include the day for the purpose of giving effect and validity to the law; and in case the day is included, manifest injustice may, and in all probability will, happen to the citizens of the United States. For, if there can be no fractions of a day, the act must in legal contemplation be considered as in force *from [***109** the first moment of the day on which it received the sanction of the President. It is understood that by the construction at the treasury the 1st day of July is excluded, and that the accounts of the collectors of the customs are all settled, excluding double duties, on goods which arrived on that day.

2. Even if the act went into operation on the 1st day of July, then was this case a complete importation before that time. The vessel and cargo arrived within the United States, and within the limits of the state of Rhode Island, on the 30th day of June, and the importation was then perfected. Importation does not imply a bringing into any particular port to which the vessel may be destined; a bringing within the jurisdictional limits of the United States, either on land or water, is an importation. Importing and bringing into the United States are used synonimously in various sections of the collection law, and the fair interpretation of both expressions is, that an importation is no more than voluntarily introdueing property within the jurisdiction of the United States generally, and does not require its actual arrival at the port of its destination. The moment a cargo so arrives within the United States, and before it reaches its port of destination, the right of the United States attaches to it. A manifest of the cargo must be delivered to their officers, and the cargo subjected in some degree to their control. The United States then have at least an inchoate right to duties, of which the owner cannot deprive them except by exportation without unlading; the right to the duties accrues on the first entry of the vessel into the waters of the United States, and not after her arrival at her port of destination; and no new right, on such arrival, accrues, except the seeondary right of ascertaining the amount of duties to be paid, and the extent of the security required for them, which could not be ascertained till after an actual entry at the custom-house. The coming in of the vessel to the waters of the United States, her proceeding to her destined port, her entry there, is one transaction, and is one act in relation to duties; and when she reaches her destined port and enters there, the right of the United States attaches as from the first moment of her coming within the jurisdictional limits of the United States, and the responsibilities of the owner cannot be increased or varied to his injury by subsequent acts of the government.

110*] *The 36th section of the law clearly discriminates between importation and entry. By the collection law, and all the forms of manifest, entry, &c., it is clearly evinced that importation precedes entry.

To constitute an importation there must be a voluntary bringing of goods into the United States; the vessel must be bound to the United States, with an intent there to unlade her cargo, or to enter the same for exportation without unlading.

Coming in by stress of weather or other necessity is not a legal importation.

By a construction given to the navigation acts of Great Britain, coming into a port, with an intent to unlade, although bulk be not broken, is an importation; but a mere coming within the limits of a port, without any intent to break bulk, or unlade, is not an importation, either to make the customs become due or to subject the ship or goods to forfeiture, or to oblige the master to report or make entry, &c. (Reeve's History of the law of shipping, 260.)

So, goods seized in a ship 20 miles below the Hope, but within the limits of the port of London, are considered as an importation. (Reeves, p. 261.)

It is believed, also, that under our non-importation law, arrival at any particular port of destination is not necessary to constitute an offense under that act, but that if the vessel is bound to the United States with an intent there to unlade her cargo, the forfeiture is incurred the moment the vessel voluntarily enters the limits of the United States. The words in the collection law and non-importation act are the same, viz.: "Imported into the United States," &c.

3. If, however, the importation was not so complete as that the duties accrued on the arrival of the vessel within the jurisdictional limits of the United States, it is contended that the importation was perfected, and the right of the United States to duties complete, on her arrival within the limits of any district of the customs of the United States.

*The vessel in the case before the [***111** court, as is confessed by the pleadings, arrived within the limits of the District of Providence, which is about 20 miles within the jurisdictional limits of the United States, on the 1st day of July; and if, in the fiscal sense of the term, this constituted an importation, and the law did not take effect until the 2d day of July, the goods so imported cannot be subject to the duties imposed by that act. We are aware of the decision of the court, in 1810, in the case of the *United States* v. *Vowell & M'Clean*, in 5 Cranch. The distinction there taken by the counsel for the defendants, between a district and a port of entry, is recognized by the court as correct. The court say, "the duties did not accrue, in "the fiscal sense of the term, until the vessel "arrived at the port of entry."

But with great deference we contend that the time of importation, even in the fiscal sense of the term, is not ascertained merely by the entry of the master, or of the owner or consignee, at the custom-house, but by the arrival of the vessel in the United States, or within the limits of some place in the United States designated by law. Whether this place be a port of entry, strictly so called, or a district, the master and owner have time given them by law within which, after such arrival, they are allowed to make their entries at the custom-house. Suppose the vessel, in this very case, had arrived at the port of Providence on the 30th day of June, at twelve o'clock, the master would be allowed until twelve o'clock the next day to make his first report to the collector, and he would not be obliged to exhibit a manifest of his cargo before 48 hours after his arrival, which would not be until the 2d day of July; and the owner or consignee is allowed 16 days, after the final report of the master, to make his entry for the purpose of paying or securing the duties. As this vessel would then have arrived before the law passed, she could not be subject to double duties, although she might not have entered at the custom-house until after the passage of the law. There is, therefore, a material distinction between importation and entry. When a vessel, bound to the United States with a cargo, has once arrived within certain known and specified limits—when she has once passed the line of demarcation fixed by law—then at least, if not before, must the goods in such vessel be considered as legally *and [***112** fiscally imported, and subject to all the provisions of law relative to the security of duties

upon them. The limits of a collection district are particularly designated by law. In every district there is one, and but one, port of entry, but in many of them there are several ports of delivery. These ports, however, whether of entry or delivery, have no limits fixed or designated by law.

When a vessel has arrived "within the limits "of any district of the United States" she is under the complete control of the government, and she cannot depart from such district, "unless to proceed to some more interior district," before a report or entry shall be made by the master, with the collector of some district, under the penalty of $400, and the custom-house officers and commanders of the revenue cutters are authorized to arrest and bring back any vessel attempting to depart from such district, &c. (Laws United States, vol. 4, § 29, p. 326.) The provisions of the next succeeding section, viz., section 30th, p. 327, are "that "within 24 hours after the arrival of any ship "or vessel, &c., at any port of the United "States, established by law, at which an officer "of the customs resides, the master is to make "a report of his arrival," and within 48 hours is to make a further report in writing, with a manifest of the cargo, &c. It is certain that the word "port" mentioned in this section must be applicable to a port of delivery, at which a surveyor of the customs resides, as well as to a port of entry, at which the collector of the district resides.

And, whether the master, according to this section, is obliged, within 48 hours after his arrival within the limits of a district, to make report and entry to the collector of such district, or within 48 hours after his arrival at some particular port in such district; still, after the arrival of a vessel within the limits of such district she cannot depart from the same, unless to an interior district, until the master has made a report, and exhibited a manifest of her cargo to the collector of such district. And after such manifest has been exhibited to the collector, she is not permitted to depart from such district, with the whole or any part of her cargo, either to a foreign port or to any other **113***] district, until bonds are *given for the due entry and delivery of the goods, which are distined for another district, or if the goods are destined for a foreign port, that they "shall "not be landed in the United States unless due "entry thereof shall have been first made, and "the duties thereupon paid or secured to be paid, according to law." (*Vide* 32, 33 and 34 sections, pages 331–2–3 and 4.) If the goods are intended for exportation, they must be so reported in the manifests, and then the vessel importing them may proceed "from the dis- "trict within which such ship or vessel shall "first arrive," &c., on giving bond, as above stated (sect. 32). If the goods or any part of them are destined to any other district, the vessel in which they were brought may proceed to such other district, on such conditions as are specified in the 34th section. This section declares, "that before any ship or vessel shall de- "part from the district in which she shall first "arrive, for another district (provided such de- "parture be not within 48 hours after her "arrival within such district) with goods, &c., "brought in such ship from a foreign port or "place, &c., the master, &c., shall obtain from "the collector of the district from which she "shall be about to depart, a copy of the report "and manifest made by such master," &c. Then the word district is used, and not port; and the proviso seems to show, pretty clearly, that within 48 hours after the arrival of a vessel within a district a report and manifest must be made to the collector of such district.

And when a vessel departs with goods from one district to any other district, the master is obliged within "twenty-four hours after the "arrival of such ship within any other district, "so to make report or entry, to or with the "collector of such other district," &c., &c. (See page 335, sect. 34.) The condition of the bonds, in both cases, show that the goods are considered as imported into the district, and not into particular ports and that the bonds are given to secure the payment of the duties upon them, in case they should be landed in any other port of the United States. With regard to importation, the words of the condition are: "Whereas, the following goods, &c., im- "ported into the district of" &c. In the case of the *United States* v. *Vowel & M'Clean*, the court say the vessel must arrive at the port of entry before the duties accrued. If by an arrival at a port of *entry is meant that [***114*** a vessel must actually go to a port of entry as established by law, before a right to the duties can attach or an entry can be made by the master or owner, the position is believed to be incorrect; as by the 19th section of the collection law, a vessel destined to a port of delivery, in many of the districts, may go directly to such a port of delivery, without even touching at a port of entry, and the master and owner may afterwards enter the vessel and cargo, and pay or secure the duties with the collector at the port of entry in such district, without taking the vessel or cargo to such port of entry.

The provisions of all the sections of the law from the 23d to the 35th inclusive, relate principally, if not solely, to the conduct of the master, or person having charge of the vessel, with a cargo bound to the United States; and that the object of all the provisions in these sections is to ascertain the amount and kind of goods which he has imported, is to prevent their being unladen without the assent of the government.

If the vessel be owned in whole or in part by a citizen of the United States, the master is to have a manifest of the cargo on board; a copy of this manifest must be delivered to an officer of the customs if within four leagues of the coast; a like copy must be delivered to an officer of the customs, after his arrival within the limits of any district, and a certificate of such officer is to be entered on the original manifest; the last copy is to be sent to the collector of the district in which such vessel has arrived, and the original manifest, certified by such officer, must be delivered to such collector by the master, or he must make oath that no such copy had been applied for, &c., (see 25th section, page 321–2); and the master is finally to deliver to the collector of the district under oath, a manifest containing the particulars of the cargo on board; and after this has been done by the master, the owners or consignees of goods thus imported are to come forward

and pay or secure the duties upon them; and for this purpose are to make a particular entry of such parts of the cargo as are owned by or consigned to them. The form of this entry is given in the 36th sec. of the law, and is headed, by the words, "Entry of merchaudise imported by," &c.

115*] *The eomplete control of the government over the vessel, from the mouent of her arrival within auy district, is shown by the 53d section of the law, page 345. This scction provides "that it shall be lawful for the collector of any "district in which any ship or vessel may ar- "rive, and immediately ou her first coming "within such district," &c., "to put on board "such ship or vessel, whilst remaining withiu "such district, or in going from one district to "another, one or more inspectors, to examine "the cargo, &c., and to perform such other "duties," &c., "for the better seeuring the col- "lection of the duties."

4. The boud was takeu under the former impost law as stated iu the plea, aud accordingly was an explicit contract for such duties as that law imposed and no other; and whatever claim the plaintiffs may have for double duties, no more than the single duties ought to be recovered on this bond.

If any duties are to be paid on account of the imported articles, beyond the tariff established by the former impost law, they are not recoverable in this action on the bond giveu under that law; but recourse must be had to some other process for the recovery of such further duties.

The sureties (and in this case two of the defendants are sureties) will not be made liable beyond the responsibility which they expected on entering into the obligation. They expeeted to be holden for uo more than the duties under the former impost law; and the proceedings on the part of government warranted that expectation. The time of giving the bond, the district where it is taken, and the penal sum, being rather less than the amount of double duties, as now demanded, evince conclusively that the bond, with its condition, was not for double duties, but for the single duties.

Every argument which can be urged for a demand of double duties, may be urged with equal force, and far more apparent equity, to sustain some other process, in which the sureties would not be subjected to the peculiar hardship of being compelled to pay double du-

116*] ties, for *which they could have no idea of being responsible when the bond was given.

This view of the case is according to the essential facts admitted by the pleadings. On the 2d of July, 1812, after the imported articles had been properly inspected, the amount of duties was ascertained and indorsed on the bond in the collector's office. The indorsement was expressed in these terms: "Amount of duties "ascertained as due, 1708 doll. 38 cents." Bond for securing the duties being required before granting a permit to land the articles from the importing vessel, a gross estimate of the amount of duties only could be made at the moment of taking the bond (see section 49, page 359–60), and that estimate was 1700 dollars, as mentioned in the conditiou.

When the articles had been duly inspected, after the permit to laud, and after return of such inspection (see page 361–2), but not before, the duties could be, and were, ascertained in the regular coursc at the collector's office. The precise amount of duties was then ascertained according to the former impost law, aud found to be 1708 dollars aud 38 cents, and was so indorsed on the bond, according to known provisions of law. Shall that indorsed amount be the measure of the demand on the boud? After the duties had been so aseertained and iudorsed on the 2d of July, if a deposit of goods (according to section 42, page 382–3) had been made for securing the amouut of the duties for which the bond had been given, what would have been the measure for determining the sufficieucy of such security? It was lawful for the collector, in lieu of sureties, to accept of a deposit of so much of the goods as should in his judgment be sufficient. And this deposit, from the nature of the case, was to be received only after the articles had been landed, and consequently after the amount of duties was regularly ascertained. The deposit, therefore, must have been for securing the specific sum of 1708 dolls. and 38 cents, and only that sum when due could, by law, be charged for duties to be paid from the proceeds of the deposited goods.

In the present case there is no question about the fairness of the proceedings at the custom-house. The *whole transaction [***117** was according to the regular course of business. Whatever was uncertain in the condition of the bond was reduced to certainty by the indorsement; and the full extent of the obligation was then settled by fair agreement of the proper agent on the part of the United states. That extent, of course, would be the measure of pledges to sureties. Such extent would measure the charge for duties on the part of the consignee, who might be principal iu a bond. And if the consignee were ordered by an owner, who made the shipments abroad, to sell promptly and pay over the proceeds of sales, the whole might be completed and all accounts between them closed at a place remote from the seat of government, such as New Orleaus, before any knowledge could there be had of the act for imposing double duties. All the official information and proceedings within the district had united to assure him of freedom from all duties or customs, on paying the amount required according to the former impost law.

In such a case, to exact double duties from a consignee who had entered the goods at the custom-house, would be manifest injustice. It would operate as fraud or extortion, or both. Is it for this court to believe the legislature capable of intending such wrong?

But where is the difference in principle between such a case and the case now before the court. New Orleans is not the only district where imported articles might be sold by a consignee, or by the owner himself, under such a full conviction of being liable to single duties only, and without a possibility of just compensatiou or redress, if the government may afterwards surprise him by exacting double duties. If a liability to double duties were kuown to an owner at the time of making entry, he might choose to have the articles entered for exportation accordiug to the terms allowed by the general law relative to the collection of duties on imposts.

But this privilege might be taken away by the construction under which the double duties are demanded in the present case.

The intent of the parties gives a rule for decision in cases of contract. At the date of this **118***] bond, was it mutually *intended to secure the payment of double duties? No such allegation is found in the pleadings; nor is such intention to be fairly inferred from the admitted facts. On the contrary, the intention fairly understood on each side, was to secure the payment of the single duties only as required under the former impost law. And this intention is apparent from the penal sum of the bond, with the gross estimate of duties as mentioned in the condition, and the ascertained amount of duties indorsed on the bond.

As the whole transaction at the collector's office is agreed to have been fair, the fact of that indorsement is decisive to prove, that with reference to the district where the goods were entered and delivered, no rule of duties on imposts had been made known, other than the former impost law. And the general principle of all law requires the rule to be prescribed or made known before it can be obligatory. To this principle Blackstone has reference in the first and fourth volumes of his commentaries. It is true, he has said, *Ignorantia juris quod quisque tenetur scire, neminem excusat.* And this he has stated as a maxim of the Roman as well as of the English law. But, according to him, the possibility of knowledge is essential to the obligation of knowing the law. To enforce any positive rule as a law, before the individual could be presumed to know it, would be alike inconsistent with public justice and civil right.

Indeed, this qualification relative to the opportunity and consequent presumption of knowledge is so essential that the statement might otherwise be questioned as deficient in accuracy. For the maxim, in terms as stated by Blackstone, is not found in the text of the Pandects indicated by his note of reference (4 Blackstone Com. p. 27), nor does that text warrant the position stated by Blackstone as a maxim, unless it be considered as applicable to the case of a law, which might be known by every one, and which, therefore, every one is holden to know, and this may be deemed the fair import of the Latin terms inwhich the position is stated. If so considered, and not otherwise, it agrees with the general doctrine of the Roman law, and is a principle of universal jurisprudence.

119*] *In relation to positive law, that principle implies the necessity of its being made known before it can impose any obligation. Positive law is a manifestation of the legislative will; and although there may be a legislative will, it does not become a law where it is not manifested.

There was no argument on the part of the United States.

February 23. *Absent*—TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

The United States brought an action of debt against the defendants on a bond given for the payment of duties on goods imported in the brig Dover into the port of Providence.

Upon the pleadings in the court below, judgment was given in favor of the United States, and the defendants have brought the present writ of error to reverse that judgment.

The material facts are, that the brig arrived within the limits of the United States on the 30th day of June, 1812, and within the collection district of Providenee on the 1st day of July, 1812. On the 2d day of July an entry was duly made at the custom-house, and the present bond was then executed.

The principal question which has been argued is, whether on these facts the goods are liable to the payment of the double duties imposed by the act of the first day of July, 1812, ch. 112. That act provides "that an additional duty of "100 per cent. upon the permanent duties now "imposed by law, &c., shall be levied and col-"lected upon all goods, wares and merchan-"dises which shall, from and after the passing "of this act, be imported into the United States "from any foreign port or place." It is contended that this statute did not take effect until the 2d day of July; nor, indeed, until it was formally promulgated and published. We cannot yield assent to this construction. The statute was to take effect *from its passage; and[***120** it is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included.

It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States, on the thirtieth day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States* v. *Vowell* (5 Cranch, 368).

Without, therefore, adverting to the consideration of the regularity or sufficiency of the pleadings, we are all of opinon that on the merits the judgment must be affirmed.

Judgment affirmed with six per cent. damages and costs.

Cited—12 Wheat. 453; 13 Pet. 494; 17 Wall. 198; 4 Otto, 560; 7 Otto, 384; 1 Abb. U. S. 423 (n); 5 Blatchf. 240; 2 Curt. 437; Deady. 126; 3 Cliff. 76.

THE ST. LAWRENCE, WEBB, MASTER.

(*M'Gregor and Penniman, Claimants.*)

Absent—TODD, *J.*

If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time. Eleven months after the declaration of war is too late.

APPEAL from the sentence of the Circuit Court for the District of New Hampshire, condemning the ship St. Lawrence and cargo. All the claims in this case, except those of

M'Gregor and Penniman for certain parts of the cargo, were settled at the last term, and with regard to these further proof was ordered.

No further proof having been produced, the case was submitted to the court without argument.

February 25th. *Absent*—TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

121*] *The only claims in this case now remaining for the consideration of the court, are those of Messrs. Penniman and M'Gregor. Further proof was directed, at the last term, to be made in respect to those claims; and no additional evidence having been produced, beyond that which was then disclosed to the court, the causes have been submitted for a final decision.

In respect to the claim of Mr. Penniman, the evidence is very strong that the goods were purchased some time before the war, by his agent in Great Britain, on his sole account. They were not, however, shipped for the United States until the latter part of May, 1813.

It is not the intention of the court to express any opinion as to the right of an American citizen, on the breaking out of hostilities, to withdraw his property, purchased before the war, from an enemy country. Admitting such right to exist, it is necessary that it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities. To admit a citizen to withdraw property from an enemy country a long time after the war, under the pretense of its having been purchased before the war, would lead to the most injurious consequences, and hold out strong temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent we are all satisfied that the right cannot exist. The present shipment was not made until more than eleven months had elapsed after war was declared; and we are all of opinion that it was then too late for the party to make the shipment, so as to exempt him from the penalty attached to an illegal traffic with the enemy. The consequence is, that the property of Mr. Penniman must be condemned.

And this decision is fatal, also, to the claim of Mr. M'Gregor. Independent, indeed, of this principle, there are many circumstances in the case unfavorable to the latter gentleman. In the first place, it is not pretended that the goods included in his claim were purchased before the war. In the next place, he was the projector of the present voyage, and became, as to one moiety, the charterer or purchaser of the ship.

122*] *Nearly all the cargo consisted of goods belonging (as it must now be deemed) exclusively to British merchants. He was, therefore, engaged in an illegal traffic of the most noxious nature; a traffic not only prohibited by the law of war, but by the municipal regulations of his adopted country. His whole property, therefore, embarked in such an enterprise, must alike be infected with the taint of forfeiture.

The judgment of the Circuit Court must, therefore, as to these claims, be affirmed with costs.

Aff'g—1 Gall. 467 in part. See 8 Cranch, 434.

DRUMMOND'S ADMINISTRATORS *v.* MAGRUDER & CO.'S TRUSTEES.

Absent—LIVINGSTON, *J.*, STORY, *J.*, *and* TODD, *J.*

If the execution of an important exhibit of the complainant's be not admitted by the defendant in his answer, who calls upon the complainant to make full proof thereof in the court below, this court will not presume that any other proof was made than appears in the transcript of the record.

A copy of a deed from a clerk of the court without the certificate of the presiding judge that the attestation of the clerk is in due form, cannot be received as evidence in a suit in equity.

If this court reverse a decree upon a technical objection to evidence (probably not made in the court below), it will not dismiss the bill absolutely, but remand the cause to the court below for further proceedings.

THIS was an appeal from the decree of the Circuit Court for the Virginia District, in a suit in chancery brought by the trustees for the creditors of W. B. Magruder & Co., against Drummond's administrators, to compel the latter to account for funds put into the hands of their intestate by W. B. Magruder & Co.

The defendants, in their answer, say they know no such firm or copartnership as Wm. B. Magruder & Co., they cannot admit it, and hope the complainants will be put to the proof of it. They have no knowledge of the deed of trust mentioned in the bill, and hope the complainants will be required to make ample proof thereof. That W. B. Magruder was largely in debt to their intestate, and they believed the funds put into his hands by Magruder were intended to be applied to that debt.

The only proof of the deed of trust appearing in the transcript of the record, was a copy certified by one Gibson, who calls himself clerk of Baltimore county, without any certificate from the presiding judge that *his attestation [***123** was in due form. It purported to be an assignment of personal estate only, and was not required by the laws of Maryland to be recorded.

P. B. Key, for appellants, contended,

1. That the complainants have not shown any title to call the defendants to account.

2. That on reversal this court must dismiss the bill.

They claim as favored creditors at the expense af Drummond, who is an equally meritorious creditor of Magruder. They have no equity to be let in to new proof to make a new case.

If the court below had dismissed the bill, relief could not have been given on a bill of review, unless new evidence, not known at the time of the first trial, should have been produced. This court cannot send the cause back for a new trial; or if they can, they will not in favor of these exclusively favored creditors.

R. I. Taylor, contra.

The cause is now placed on very different ground from that on which it appeared in the court below. There the question was, whether the defendants could set-off a debt due to their intestate from W. B. Magruder, against this claim in the right of W. B. Magruder & Co.

The only question now is, whether the court below erred in giving a decree in favor of the complainants without evidence of the execu-

tion of the original deed of assignment. The court below could not have decreed in favor of the complainants, unless they had been satisfied of the execution of the deed, or the proof of its execution had been waived by the other party. This court, therefore, will presume that the execution of the deed was so proved, or the proof waived. Exhibits may be proved *viva voce* at the trial. It was not necessary to reduce the testimony to writing. (Harrison Ch. Prac. 403, Laws of U. S., vol. 1, p. 68; vol. 6, p. 100.) If incompetent evidence was admitted in the
124*] court below *without objection, it is no cause for reversal of the decree.

P. B. Key, in reply.

The execution of the deed was put in issue by the answer, and it ought to appear upon the record that it was proved. If the complainants have failed to put the proof upon the record it is their own fault.

The answer puts in issue the right of the complainants to sue. A copy from the record, even if properly authenticated, would not have been sufficient, because it is not such a deed as the law requires to be recorded.

February 25th. *Absent*—TODD, *J.*

WASHINGTON, *J.*, delivered the opinion of the court as follows:

The appellees filed their bill on the equity side of the Circuit Court of Virginia, for the purpose of recovering a sum of money due from William Drummond to William B. Magruder & Co. To entitle themselves to sustain this suit, they allege in their bill that they are creditors and trustees of William B. Magruder & Co., by virtue of a deed of assignment annexed to the bill as part thereof. This exhibit purports to be an assignment to the complainants of all the partnership effects, debts and credits of William B. Magruder & Co., in trust for the payment of certain favored creditors of that company, amongst whom are the complainants.

The appellants filed their answer, denying any knowledge of such a copartnership as William B. Magruder & Co., and call upon the complainants to prove the same. They also deny any knowledge of the deed of trust mentioned in and annexed to the bill, and call upon the complainants to make full proof of it. To this answer there was a general replication; and the cause being heard upon these proceedings, the exhibits and examination of witnesses and the report of the master commissioner, a decree was rendered for the complainants for the sum reported to be due from the defendant to William B. Magruder & Co., from which decree the defendants appealed to this court.

125*] *The exhibit mentioned in and annexed to the bill, alleged to be an indenture of assignment from William B. Magruder & Co. to the complainants, appears to be a copy of a sealed instrument, certified to be a true copy from the records of Baltimore County Court, under the hand of William Gibson, who styles himself clerk of that court. The record contains no other evidence of the authenticity of this instrument; and the question is, whether the Circuit Court erred in decreeing upon this evidence in favor of the appellees.

The right of the appellees to bring this suit is, by their own showing, merely derivative; and, consequently, it was incumbent on them to prove by legal evidence that the deed of assignment from William B. Magruder & Co., under which they claimed this right to sue a debtor of that house, was duly executed. The answer put this matter directly in issue by denying any knowledge of the deed exhibited with the bill, and requiring full proof to be made of it. This court is not at liberty to presume that any other proof of this deed was given in the court below than what appears on the record. That proof consists in the certificate of a person who styles himself clerk of Baltimore County Court, that the paper to which his certificate is annexed is a copy of a deed taken from the records of the court of that county; but there is no such certificate as the act of Congress requires to satisfy the court that the attestation affixed to this copy is in due form. It follows that the instrument so certified cannot be noticed as a copy of a deed from William B. Magruder & Co.; and as it is the foundation of the complainants' right, the court erred in decreeing in favor of the complainants upon such defective evidence. But as this court cannot fail to perceive that the objection to the proof of this instrument is merely technical, and was probably not made at all in the Circuit Court, it would seem improper to dismiss the bill absolutely. The court is unanimous in reversing the decree; and a majority are of opinion that the cause ought to be remitted to the Circuit Court of Virginia for further proceedings to be had therein.

Decree reversed and remanded for further proceedings.

Cited—6 Wheat. 562; 2 Wood. & M. 4.

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*THE MARY, STAFFORD, MASTER. [*126

Absent—TODD, *J.*

The condemnation of a vessel as enemy's property, for want of a claim, cannot prejudice the claim for her cargo; but it is still competent for the claimant of the cargo to controvert the fact that the vessel was enemy's property, so far as that fact could prejudice his claim.

One claimant cannot be injured by the contumacy of another.

The holder of a bottomry bond cannot claim in a court of prize.

An American vessel sailing from England in Aug., 1812, in consequence of the repeal of the British orders in council, and compelled by dangers of the seas to put into Ireland, where she was necessarily detained until April, 1813, when she sailed again for the United States, under the protection of a British license, being captured on the voyage by an American privateer, was protected by the President's instructions of the 28th of Aug., 1812. The continuity of the voyage was not broken.

APPEAL from the sentence of the Circuit Court for the District of Rhode Island, condemning the cargo of the Mary as prize to the privateer Paul Jones.

This cause was argued at last term by *Stockton* and *Pinkney* for the claimants, and *J. Woodward* for the captors (ante, vol. 8, p. 388), when leave was given by this court for further proof, by affidavits, on the following points:

1. As to the citizenship of N. J. Visscher.

2. As to the names of the other heirs of General Fisher, who are interested in the prop-

erty; the place of their residence, and their national character.

3. As to the time when N. J. Visscher went to England; the object he had in view in going thither; how long he resided there; when the cargo was purchased; and when he returned to the United States.

4. As to the instructions which the Paul Jones had on board at the time of the capture of the Mary; and particularly whether the President's instruction of the 28th of August, 1812, had been delivered to the captain, or had come to his knowledge, at the time of the capture; or whether the Paul Jones had been in port after the 28th of August, 1812, and before the capture.

The captors also had leave to make further proof as to the same points.

The further proof now offered consisted of the affidavits of the claimant, N. J. Visscher, Jacob S. Pruyn, and David Gelston, collector of the customs for the port of New York. The affidavit of N. J. Visscher stated, in substance, that he, and sundry other persons (whose names and places of residence are mentioned, and who are all citizens and residents of the United **127***] States) are *the sole heirs at law and personal representatives of the late General Garret Fisher, who died in London intestate. That he, in behalf of himself, and as agent for the other heirs, went to England (having first obtained leave from the war department, he being a military officer in the service of the United States) in consequence of an agreement between him and the other heirs, dated June 19th, 1811, (which original agreement is annexed to the affidavit). He arrived in England on the 22d of August, 1811, and obtained letters of administration on the estate of General Fisher, collected the effects, converted them into cash, paid the debts, and was prepared to remit the balance to the United States long before the war was known in England; and was waiting for a favorable opportunity of investing the same in property that could be advantageously sent to the United States, the balance of exchange being then greatly against him, and not being able to invest the whole in United States' stock. That as soon as the revocation of the English orders in council took place, supposing that it would be followed by the repeal of the non-importation law of the United States, he gave orders for the purchase of British goods to nearly the whole amount of the balance remaining in his hands, which purchase, including the goods now in question, was made by Harmon Visger, his agent, before the war was known in England, who caused them to be sent to Bristol to be shipped, where they arrived in July and August; whence they were shipped early in August on board the American brig Mary. That the goods were the sole property of the claimant, for himself and the other heirs of General Fisher. That he left England as soon as his business was settled, and arrived in the United States on the 19th of October, 1812.

The affidavit of Mr. Pruyn confirms that of Mr. Visscher, as to the residence and citizenship of the claimant and the others interested in the cargo.

The affidavit of Mr. Gelston states the fact that a copy of the President's instruction of the 28th of August, 1812, was given to the commander of the Paul Jones before she sailed on the cruise in which she captured the Mary.

No further proof was offered on the part of the captors.

Stockton*, for the claimant, [*128**

After reading the further proof offered by the claimant, said he should rest the case, in the opening, upon the argument formerly made.

J. Woodward, for the captors,

Was directed by the court to show wherein this case differs from that of *The Thomas Gibbons*, decided at last term, upon the effect of the President's instruction of the 28th of August, 1812.

Woodward. The Thomas Gibbons was an American vessel and sailed so early as to be presumed to have sailed in consequence of the repeal of the orders in council. But we contend that the Mary, sailing from Ireland, under a British license, as late as April, 1813 (which license was obtained for the vessel and cargo by a British subject in his own name), and laden with British goods, must be taken to be a British vessel, and not as sailing in consequence of the repeal of the British orders in council, within the meaning of the instruction of the 28th of August. But the fact that the vessel has not been claimed is clear proof that she was British.

The voyage from Ireland in April, 1813, as far as respects those instructions, is a voyage *de novo*, whatever it may be considered to be upon more general principles of law.

The intent of these instructions was to protect American vessels and their cargoes, sailing from England under the impression that the repeal of the orders in council would have been followed by a repeal of our non-importation law, and a cessation of hostilities; but not to protect vessels sailing with a full knowledge that those consequences had not, and probably would not follow the repeal of the orders in council. At the time the Mary sailed all such expectations had ceased. The instructions are derogatory to the rights of war, and the party wishing to protect himself thereby must bring himself strictly within their meaning and intent. The vessel and cargo were safe at Waterford, and the political relation between the two countries was then well understood. There was *no necessity of her sailing from thence; [***129** she knew that the war was raging with increased violence.

The new license, although it refers to the old one, bears a very different character. The old one was innocent because it was not then the license of a belligerent, and did not give a belligerent character to what it protected; but the new had all the characters of a belligerent license, notwithstanding its connection with the old. When she sailed she knew, or might have know and taken warning by the act of Congress of the 2d of January, 1813, which extends the protection of the instructions only to vessels sailing before the 15th of September, 1812. The instructions merge in, or are controlled by, the provisions of that act. A vessel could not be protected by the instructions unless she sailed not only in consequence of the repeal of the orders in council, but before the 15th of September, 1812.

The necessity for a new license shows that it was a new voyage. She was obliged to take

new papers and a new clearanee. But if a voyage be legal in its eommencement, and before it be finished beeome illegal, and the party has an opportunity to put an end to it, he is bound to do so. The prosecution of the voyage, after a knowledge of its illegality, and after an opportunity given to abandon it, must be considered as placing the party *in delicto*.

If this property was purchased after knowledge of the war had reached England, it is liable to condemnation. The invoices are dated the 13th of August, and the war was know in Liverpool on the 18th of July. By the order for further proof, the claimant is ealled upon to prove the time when the cargo was purehased. No such proof is offered. The affidavit of Mr. Visseher, if it could be considered as proof, does not state the time, but merely states in general terms that the purehase was made before the war was known in England. This is not sueh proof as the order requires. The proof of the fact, if it exist, is in England; why has it not been obtained? It is the most material fact in the case. The voluntary affidavit of the party himself, who is so deeply interested in the eause, cannot be evidence. At the last term the court **130***] *wanted further evidenee of that faet. They have not obtained it, nor is it shown that it was out of the power of the elaimant to produee it. It was in his power. But it was not in our power to produce evidenee of the contrary. It is not probable that the witnesses would have eonsented to a voluntary examination on our part, and we had no means to eompel them to testify. We rely upon this defeet of evidence.

Emmett, on the same side.

The condemnation of the vessel is final and conelusive, there being no appeal. Part of the eargo is in the same eondition; 160 bundles of steel, worth about $1,000, are unelaimed, and of eourse no appeal was taken and they belong to the libelants. N. J. Visscher filed two elaims, and therefore had time to rectify the mistake if any were made.

It is elear, therefore, that there were articles on board which did not belong to N. J. Visscher, and that he intended to diselaim eertain parts of the cargo.

This ease is not within the reason of the decision in the case of *The Thomas Gibbons*. The intention of the instructions was to exempt the property from capture, not to give it an entire immunity. This eould be done only by the legislative power. The object of the instruetions was to suspend the prize act in this particular until the legislature could interfere. In the case of *The Thomas Gibbons*, this court, in delivering its opinion, has conneeted the instructions with the act of Congress of 2d January, 1813, and seems to hold out the idea that the time of sailing of a vessel must be limited to the 15th of September in order to be protected by the instruetions. The act of Congress had made that definite which the instructions had left undefined. If the instructions and the aet are not thus to be connected and eonstrued together; there is no time limited, and a vessel may at any period of the war bc proteeted by those instructions.

Does this vessel comc within those instructions? Is she a vessel owned by citizens of the United States? She has been condemned as enemy's property. From that sentence there has been no appeal. It is conclusive.

*But although that objeetion seems [**131** conclusive, yet there is a still stronger ground of condemnation. She did not sail from Waterford until nine months after war was declared. Here was ample time for eountermanding her voyage after knowing that the repeal of the orders in eouncil would not produce a cessation of hostilities. Can such a ease be proteeted by the instructions.

The further proof furnishes irresistible evidence of trading with the enemy. The order for further proof eall for cvidenee of the national charaeter of Visseher, and those interested with him in the elaim, and of the time when the goods were purchased, as well as with regard to the question whether the instructions were on board the privateer. It is clear, therefore, that the eourt were not then satisfied as to any of those points.

No further eompetent evidence has been produced as to the time of purehase. The court will not reeeive as proof the affidavit of the interested party himself, when it is elear that better evidenee must have been in his power. Why did he not produee the affidavit of his agent who made the purehases, or the bills of pareels, whieh he must have in his possession, by which to settle with the other heirs? These bills of pareels also would have shown whether other parts of the cargo, as well as the 160 bundles of steel, did not belong to Harman Visger.

But this was a clear case of trading. Visscher was only to collect and remit the proceeds of the estate. Instead of which he goes to trading with it for his own benefit, not that of the heirs. By undertaking to ship goods he took the risk on himself, and, if lost, he must account to the other heirs.

It is immaterial, however, whether the goods were purchased before or after knowedge of the war. (8. T. R. 556, the ease of *St. Philip* eited in *Potts* and *Bell*, from the MS. notes of Sir E. Simpson.)

LIVINGSTON, *J.* Was not this point settled in the ease of *The Rapid*?

Emmett. I think it was; but lest it should not *have been, I refer the court to the [**132** ease of *The Juffrow Louisa Margaretha* (1 Rob., 170, Amer. Ed.), cited in the case of *The Hoop* (1 Rob., 177); *The Eenigheid*, (1 Rob., 178), *The Fortuna*, (1 Rob., 181), Sir William Scott's judgment in *The Hoop*, where he does not allow an excuse either of convenience or necessity. A license from the government of the United States ought to have been obtained for the Mary, or the voyage abandoned. (1 Rob., 180, *The William*.)

A distinction is attempted to be taken between this ease and that of *The Rapid*. It is said this vessel was in motion.

If a vessel has been in motion so far that there is no opportunity of countermanding the voyage, this distinction might be relied upon. But here there was time for countermanding. Upon this point see again the case of *The Fortuna*. When was the Mary in motion? War was published in London on the 26th of July. This vessel did not begin to load till August, and did not sail from Bristol till three weeks after knowledge of the war. N. J. Visscher himself was present and might have countermanded the voyage,

which is a circumstance of great importance. (5 Rob., 142, Eng. Ed., *Juffrow Catharina.*)

STORY, *J.* The case of *The Rapid* differs from this. She went from this country to that of the enemy after knowledge of the war.

Emmett. As to the Rapid, the condemnation was owing to the presence of Harrison, who might have countermanded the voyage, but did not. Whether the party be in the country at the time of the breaking out of the war, or goes there afterward, is immaterial; in each case he is equally bound to countermand the voyage. The present case, therefore, is precisely that of *The Rapid.*

But N. J. Visscher was in England long after the Mary put into Waterford. He did not leave England till the 7th of September; the Mary arrived at Waterford in August. He knew that the vessel must remain there till the spring, and that she could not arrive in the United **133***] *States until nearly a year after the declaration of war. Why did he not apply to the United States for a license?

The sailing from Waterford was a new voyage. We are to consider the transaction, not in a commercial point of view, but as it is affected by public policy and national law. To every belligerent purpose it was a voyage *de novo.* It is not protected by the act of Congress of 2d January, 1813. That act requires that the vessel should have sailed before the 15th of September, 1812, and should have sailed in consequence of the repeal of the orders in council. The act has no prospective view. Visscher knew that it did not protect this vessel. He traded at his peril. (1 Rob., 181, *The Hoop.*)

But if, contrary to expectations, this property should be restored, we trust it will be with costs. There was no proof of property on board. She was found sailing with a British license dated long after the war was known. She had sailed long after the 15th of September, and did not appear by any documents on board to be within the President's instructions of the 28th of August, 1812. It is not usual to give costs after an order for further proof. If the papers withheld had been produced, it is probable a great deal more of the property would be found to belong, to Harman Visger.

Pinkney, in reply.

It is said that Mr Visscher had been trading, for his own benefit, upon the funds he received. There is no foundation for such an assertion. The letters of Harman Visger, and all the documents, show that the goods were purchased and shipped for the joint benefit of all the heirs. He did the best for the interest of all concerned, according to his judgment, and agreeably to the agreement of the parties, which contemplates and provides for the case of his beiug obliged to remit goods, and binds him to cause them to be insured.

Two questions arise in this case:

1. Was the Mary the property of an American citizen?

134*] *2. If so, was she, when captured, sailing in consequence of the repeal of the British orders in council?

1. Was the Mary the property of an American citizen?

All the documentary evidence shows that she was.

But it is contended that she was the property of one Smith, a Scotchman, and this assertion depends upon the evidence of the cook, who says he believed it because Smith ordered the men about. But it appears that this cook was shipped just as the vessel sailed.

It is said also that the ship, not having been claimed, was condemned, and no appeal has been prayed, which shows conclusively that she was British property.

The reason why she was not claimed appears in the evidence. She was hypothecated for more than she was worth. If lost by capture the owner is not personally liable, but if he should claim, and the vessel should be restored, he would be liable for the amount of the bottomry bond. Visscher, who held the bond, could not claim in his own name, for it has been decided that such a lien on the ship will not support a claim, and he could not use the name of the owner without his consent, which he would certainly not give to impose a liability on himself. It was his interest to make it a total loss. A sentence of condemnation founded upon the want of claim accounted for in such a manner, cannot surely be conclusive evidence that the ship was not *bona fide* owned by an American citizen.

2. Was she sailing in consequence of the repeal of the orders in council?

This voyage unquestionably had its inception in consequence of that repeal. We think this case falls precisely within the principles decided in that of *The Thomas Gibbons.* But it is said that the deviation to Waterford makes it a new voyage. That this was a continuation of the voyage at the common law, is admitted; but not in a court of prize. Why should there, in this respect, be a difference between the law merchant and the law of *nations? We [***135** contend that the law of nations, being more enlarged, is less rigid than the law merchant.

But as to prize law, the English courts of prize always connect voyages of this kind. Continuity is the favorite doctrine of a prize court. The British courts of prize, on the subject of contraband of war, seem to have been enamored of this doctrine of continuity; they condemn vessels returning with the proceeds of contraband; thereby making the homeward voyage the outward voyage, and the proceeds of contraband the contraband itself.

But it is said that this vessel was bound on an illegal voyage, and therefore cannot plead distress. She acted on the belief that the repeal of the orders in council would produce peace, as all others did, and if she was in error, *communis error facit jus.*

The President's instructions and the act of Congress go on the ground that this error was excusable.

This vessel is within the benefit of the maxim *actus Dei nemini facit injuriam.* She would certainly have been protected by that maxim if she had been all that time driven about the Atlantic by storms and contrary winds; and her case is still the same; she was still *in itinere.* It is said that the instructions were a substitute for a legislative act, and that the act of Congress has superseded the instructions. This we do not admit. They may both stand together—their objects are different.

But we are referred to the policy of the instructions, and it is said that this vessel was not within that policy. The adventure was under-

taken in the belief that the war would cease; the going to Waterford and the detention there were nccessary to the prosecution of the voyage.

But it is said there was *locus penitentiæ*. That Visscher knew how long the vessel would be detained there, and therefore ought to have abandoned the voyage. There is no evidence of that fact if it were material. But if he did know it, he kuew also that the voyage was innocent in its inception, and that its continuity could not be broken by this necessary deviation.

136*] *As to his obtaining a second British license, it was necessary; he could not leave Waterford without it. It was not a voluntary act. He acted under a *vis major*. The second license was only a renewal of the first; if he had authority to go at all, he might lawfully use the means. After his return to the United States, he did not apply for an American license becausc he was daily expecting the arrival of the Mary; besides, he knew that she was protected by the President's instructions.

The opposite argument is raised upon the supposition that she must not only commence her voyage under an impression that war had ceased, but must continue under the same impression during the whole voyage. Must she return, if, in the midst of the Atlantic, she is undeceived?

The voyage was commenced under a belief that war had ceased, and was continued under the impression that she would be protected by the instructions of the President. Although there was war between the United States and Great Britain, yet there was peace betweeu the United States and this adventure. This case, in principle, is exactly that of *The Thomas Gibbons*.

But we are accused of not having produced sufficient further proof of the proprietary interest in the cargo and the time of purchase. They say the only evidenee is the affidavit of N. J. Visscher—*testis in propria causa*. Such testimony is, and always must be, admitted in prize causes. N. J. Visscher is a man of fair character. But his testimony was matter of supererogation. Every document and paper showed before that the property was American.

But they say that as we undertook to furnish further proof we ought to have done so—that we were in possession of the bills of parcels and ought to have produced them. The fact is not so, nor can it, in the nature of commercial transactions, be so. We had the invoices, but not the bills of parcels; they were the vouchers of Harman Visger, who made the purchases; they remained in England and it could not be expected that we should send there for them. N. J. Visscher has produced his test affidavit, which is all that could be expected.

137*] *But there is an objection to the omission to claim 160 bundles of steel. By a comparison of the ship's papers with the claim it will be found that he meant to claim, and did claim, the whole of the cargo. The omission of this item was by mistake.

The rule that every trading with an enemy subjects to confiscation, will not, I trust, be sanctioned by this court.

All the esseutial parts of this transaction took place in peace, or in imagined peace. The rulc of trading with an enemy is not absolutely inexorable. See the case of *The Madonna del Gracie*, and the principles stated by Sir W. Scott in *The Hoop*. The danger of treasonable intercourse is the ground of the rule. But here was no such danger. Another ground of condemnation of goods is said to be their adherence to the enemy. But here, instead of adhering to the enemy, the goods were withdrawu by the earliest opportunity. It was certainly for the interest of the United States that the goods should be withdrawn from the power of the enemy. But it is said that it was contrary to his allegiance. Is it contrary to his allegiance to do that, the forbearance of which would be for the advantage of the enemy? Why should we give a new face of terror to the principles of war?

The case of *The Rapid* was essentially different. There was opportunity for treasonable intercourse. She sailed from this country after the war was declared. Let not the rule be made an iron rule. It has been carried far enough. There is not a shadow of authority for condemnation in a case like this, where a mere remittance of funds acquired before the war was intended to be made at the first knowledge of the war.

All the cases cited against us are to be found in the case of *The Hoop*, except one referred to in *Potts and Bell*. Not one of them includes the present case. 1. *The Ringende Jacob* was a clear case of mercantile trading in open war. 2. *The Lady Jane*. This case is relied upon because the cargo was the produce of goods sent to Spain before the war. But the commercial adventure was planned aud concocted during the war. 3. *The *Deergarden* [**138 *of Stockholm* was a case of trade with the enemy wholly originating during war. 4. *The Elizabeth of Ostend* was another clear case of trading during war. 5. *The Juffrouw Louisa Margaretha*. According to the statement of this case in Bosanquet and Puller (*Escott's* case), part of the goods were purchased long after the war had broken out, and the adventure was projected in the heat of the war. One part of the cargo was considered as infected by the other. *The St. Louis* or *El Allessandro*. In that case the goods were shipped in the midst of the war, and were bound to the port of au enemy. 7. In the case of *The Compte de Wohronzoff*, the goods were shipped long after the existence and knowledge of the war, and in the regular prosecution of trade. 8. So in *The Expedite von Rotterdam*, the exportation of goods was from the enemy's country in the midst of the war. 9. In the case of *The Bella Guidita*, the voyage was direct to an enemy country with provisions. 10. In *The Eenigheid*, the voyage was to, not from, the enemy's country, and was after the knowledge of the war. In that case there might be treasouable intercourse, but here there could be none. 11. *The Fortuna* was the case of a voyage to the enemy's country, which might have been countermaudcd after knowledge of the war. 12. In the case of *The Freeden*, the voyage was also to an enemy's port after notice of the war. 13. In *The William*, which is a case much relied on by the opposite counsel, it appears in 8 T. R., 560, that the sugars in question were received by the British merchant's agent from the enemy, after the war broke out, and were received in the course of a general trade, which is the feature that distinguishes

this case of *The Mary* from all that have been cited.

The claimants in those cases were general merchants in the regular prosecution of their trade; but ours is a single case of accidental remittance of funds, constituting no part of a general trade. To this long list of cases Sir John Nicholl, in *Potts and Bell* (8 T. R., 556), has added one more: *The St. Philip*, in 1747, where the lords refused evidence that the goods were bought before the war, being of opinion that the effects of British subjects taken trading with the enemy are good prize. This is certainly a hard case. It is very briefly stated; none of the particular circumstances being men-
139*] tioned. *It does not appear how long after the breaking out of the war the goods were shipped, which would be a very important consideration in the innocence or guilt of the transaction.

This court, it is presumed, will not push the law of war to its utmost extent, and certainly not further than it has been extended by the English courts.

As to costs. If the Mary was within the President's instructions, the captors are not entitled to costs and expenses.

STORY, *J.* When further proof has been ordered, are not costs and expenses to be allowed of course?

Pinkney, I think not.

February 25th. *Absent*—TODD., *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

Nanning J. Visscher, an American citizen, administrator of General Garret Fisher, deceased, went to Great Britain in the year 1811, for the purpose of collecting the estate of the said General Garret Fisher in that country, and remitting it to the United States for those who were entitled to it by law. Immediately after the repeal of the orders in council, the said Nanning J. Visscher invested a considerable portion of the funds of the said estate in British merchandise, and engaged the brig Mary, a vessel having an American register, to convey it to the United States. The Mary was engaged at Woolwich and came round to Bristol, where her cargo was procured. She began to take it on board on the 3d of August, 1812; and on the 15th of August, having completed her lading, she sailed from the port of Bristol for the United States, having on board a British license dated on the 8th of July, 1812. While prosecuting her voyage she encountered such severe weather, and received such damage, as to be under the necessity, in order to avoid the danger of foundering at sea, to put into the port of Waterford, in Ireland, for the purpose of being repaired. While lying in
140*] Waterford *and undergoing repairs, she was also detained by a general embargo, imposed on all American vessels in the ports of Great Britain. The Mary, being released, by the High Court of Admiralty, and her repairs being completed, her license was renewed on the 27th of March, 1813, and she sailed from Waterford for Newport, in Rhode Island, on the 7th of the following month. On the 22d day of April she was captured by the American privateer Paul Jones, Captain Taylor, and brought into Newport, Rhode Island, where the vessel and cargo were libeled as enemy property. No claim being put in for the vessel, she was condemned; but the cargo, which was claimed by Nanning J. Visscher, for himself and the other heirs of General Fisher, was restored. From this sentence the captors appealed. In the Circuit Court the sentence of the District Court was reversed and the cargo was condemned. From this sentence of condemnation an appeal was taken to this court, and the case was argued at the last term.

The President's instructions of the 28th of August, 1812, were then for the first time relied on, but it was not admitted on the part of the captors that these instructions were known to Captain Taylor. For the ascertainment of this important fact it was necessary to admit further proof.

It being uncertain how this fact would appear, the court also directed further proof on other points which were involved in some degree of doubt.

It is now proved incontestibly that the instructions of the 28th of August were on board the Paul Jones at the time of the capture. These additional instructions direct "the public and private armed vessels of the United "States not to intercept any vessels belonging "to citizens of the United States, coming from "British ports to the United States, laden with "British merchandise, in consequence of the "alleged repeal of the British orders in council."

The effect and operation of these instructions were settled in the case of *The Thomas Gibbons*. The only inquiry to be made in this case is, do they apply to the Mary?

*To sustain their application it must [***141** appear,

1. That the Mary belonged, at the time of capture, to a citizen of the United States.

2. That she was coming from a British port to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council.

1. Was the Mary the property of an American citizen?

She carried an American register, which represented her as the property of James B. Kennedy, a citizen of the United States.

She sailed from Charleston, in South Carolina, as an American vessel, commanded by Captain Stafford, a native American citizen, who continued to command her until her capture, and who always supposed her to be the property of Mr. Kennedy. Her first license, which was granted before intelligence of the declaration of war had reached England, was granted to her as an American vessel; and in the renewed license she was still considered as an American vessel.

In opposition to this testimony is the deposition of one of the mariners, who supposes one Smith, a British subject, to be a part owner of the Mary, because the captain so informed him, and because Smith ordered the people about as much as Mr. Kennedy or the captain.

So much of this deposition as refers to the information of the captain is not very probable; and, if true, must either discredit the captain's testimony, or be considered as a communication made for some particular purpose while the vessel was in a British port. That part of it which states Smith to have ordered

the people about as much as Mr. Kennedy, is not very intelligible, since Mr. Kennedy, the owner of the Mary, does not appear to have been on board the vessel, or at Bristol, or at Waterford.

142*] *Had a claim been put in for the Mary, this testimony, opposed to the proof furnished by the register and the deposition of the captain, would have been light indeed.

But no claim was filed for the Mary, and she was consequently, according to the course of the Court of Admiralty, condemned as enemy property.

This sentence is now relied on by the captors as establishing the fact. The argument has been pressed with great earnestness, and is certainly entitled to serious consideration.

The conclusive effect which the captors would give to this sentence is founded in part on reasoning which is technical, and in part on the operation which the fact itself ought to have on the human mind in producing a conviction that the claim was not filed because it could not be sustained.

A sentence of a court of admiralty is said not only to bind the subject matter on which it is pronounced, but to prove conclusively the facts which it asserts. This principle has been maintained in the courts of England, particularly as applying to cases of insurance, and has been adopted by this court in the case of *Croudson and others* v. *Leonard*. Its application to the case at bar will be considered.

The Mary was not condemned by the sentence of a foreign court of admiralty in a case prior to and distinct from that in which the cargo was libeled. She was comprehended in the same libel with the cargo.

The whole subject formed but one cause, and the whole came on together before the same judge. By the rules of the court the condemnation of the vessel was inevitable; not because in fact she was British property, but because the fact was charged and was not repelled by the owner, he having failed to appear and to put in his claim. The judge could not close his eyes on this circumstance; nor could he, in common justice, subject the cargo, which was claimed according to the course of the court, to the liabilities incurred by being

143*] *imported in a hostile bottom. In the same cause, a fact, not controverted by one party, who does not appear, and therefore as to him taken for confessed, ought not, on that implied admission, to be brought to bear upon another who does appear, does controvert, and does disprove it. The owners of the cargo had no control over the owner of the vessel. Visscher could not force Kennedy to file a claim; nor could Visscher file a claim for him.

The evidence that the vessel was American property could not be looked into so far as respected the rights of Kennedy, because he was in contumacy; but Visscher was not in contumacy. He was not culpaple for, and therefore ought not to suffer for, the contumacy of Kennedy. That contumacy, in reason and in justice, ought not to have prevented the District Court from looking into the testimony concerning proprietary interest in the vessel, so far as the rights of other claimants depended on that interest. Nor is the court informed of a legal principle which should have restrained the district judge from looking into this testimony. If we reason from analogy we find no principle adopted by the courts of law or equity which, in its application to courts of admiralty, would seem to subject one claimant to injury from the contumacy of another.

A judgment against one defendant for the want of a plea, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party.

No reason is perceived why a different rule should prevail in a court of admiralty, nor is the court informed of any case in which a different rule has been established.

If the District Court was not precluded by the non-claim of the owner of the vessel from examining the fact of ownership, so far as that fact could affect the cargo, it will not be contended that an appellate court may not likewise examine it.

This case is to be distinguished from those which *have been decided on policies [***144** of insurance, not only by the circumstance that the cause respecting the vessel and the cargo came on at the same time before the same court, but by other differences in reason and in law, which appear to be essential.

The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject matter is not examinable in them. With respect to itself no reason is perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of courts of common law and equity. They bind the subject-matter as between parties and privies.

The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted to in the Court of Admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from re-examining it. The judgment of a court of common law, or the decree of a court of equity, would,

145*] under such *circumstances, be re-examinable in a court of common law, or a court of equity; and no reasou is discerned why the sentence of a court of admiralty, under the same circumstances, should not be re-examinable in a court of admiralty.

This reasoning is uot at variance with the decision that the scnteuce of a foreign court of admiralty, condemning a vessel or cargo as enemy property, is conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral.

It is not at variance with that decision, because the question of prize is oue of which courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them.

In the case of *Croudson et al.* v. *Leonard*, two judges expressed their opinions. Those who were silent, but who concurred in the opinion of the court, undoubtedly acquiesced in the reasons assigned by those judges. On the conclusiveness of a foreign sentence, Judge Johnson said: "The doctrine appears to me to rest "on three very obvious considerations: the pro- "priety of leaving the cognizance of prize ques- "tions exclusively to courts of prize jurisdic- "tion; the very great inconvenienee, amount- "ing nearly to an impossibility, of fully in- "vestigating such cases in a court of common "law; and the impropriety of revising the de- "cisions of the maritime courts of other nations, "whose jurisdiction is co-ordinate throughout "the world."

These reasons undoubtedly support the opinion founded on them; but it will be readily perceived that they would not apply to the case before the court.

After stating the conclusiveness of the sentence of courts of exclusive jurisdiction, Judge Washington said: "This rule, when applied to "the sentences of courts of admiralty, whether "foreign or domestic, produces the doctrine "which I am now considering, upon the ground "that all the world are parties in an admiralty "cause. The proceedings are *in rem;* but any "person having an interest in the property "may interpose a claim, or may prosecute an **146***] "appeal from the sentence. *The in- "sured is emphatically a party, and in every "instanee has an opportunity to controvert the "alleged grounds of condemnation, by proving, "if he can, the neutrality of the property. The "master is his immediate agent, and he is also "bound to act for the benefit of all concerned; "so that in this respect he also represents the "insurer."

The very foundation of this opinion that the insured is bound by the sentcnce of condemnation is, that he was in law a party to the suit, and had a full opportunity to assert his rights. This decision cannot be applicable to one in which the person to be affected by the sentence of condemnation was not, and could not be, a party to it.

If the sentence condemning the Mary did not technically preclude the owners of the cargo from asserting in the court of admiralty her American character, the weight of the evidence on that point is to be fairly estimated.

In support of her American character, the documentary evidence is complete and unequivocal; and the corroborative testimony is calculated to strengthen a belief in the verity of the register. In support of her hostile character the omission of the owner to file his claim is chiefly relied on. The importance of this circumstance is not to be controverted. Its weight, however, is much diminished by the consideration that the case affords no reasonable ground for believing that the owner could have been restrained from making his claim by the apprehension of failing to support it. There is no testimony, and there is no reason to suspect that any testimony was attainable, which could have successfully opposed the register. This consideration gives plausibility to the argument that the worthlessness of the vessel, the bottomry bond with which she was charged, the expectation that the condemnation would relieve him from that debt, might be the motives for not resisting that condemnation. It is possible, too, that in point of fact he might not have actual notice of the proceedings. This is not to be presumed, and is not to benefit the owner; but it is possible, and may be taken into the *account in estimating the effect [***147** of this negligence on persons who are not culpable for it.

It has been said that the owners of the cargo, and that Nanning J. Visscher, who held the bottomry bond, ought to have filed a claim. But the interest under the bottomry bond could not have been asserted; nor had the owners of the cargo any right to the vessel. Had they known that they were to be, in any manner, affected by the character of the vessel, they might, and most probably would, have exerted themselves to have brought forward Kennedy as a claimant, or to have accounted for his silence; but in the District Court the President's instructions were unknown, and their effect unthought of. The owners of the cargo, therefore, neither troubled themselves about the vessel nor attempted to account for the claim to her not being filed. When afterwards in this court the bearing of those instructions was discovered, and further proof was directed, that direction did not extend to proof which might account for the failure of Kennedy to assert his title to the vessel. This may excuse the claimants for not producing testimony to that point.

Upou the best consideration we have been able to bestow upon the subject. the court is of opinion that the Mary, in this claim, must be deemed to have been the property of an American citizen.

2. Did she sail from a British port in consequence of the alleged repeal of the British orders in council?

That the voyage in its inception was produced by the opinion that the repeal of the British orders in council would terminate the differences between the two nations, is too clear for controversy. Had the Mary proceeded directly from Bristol to her port of destination in the United States, the counsel for the captors would not contend that it was not a voyage described by the instructions of the 28th of August. But the delay in the port of Waterford, it is said, has broken the continuity of the voyage, and in deciding on its character, the departure from Waterford, not the departure from Bristol, must be considered as its commencement.

148*] *It is not denied that, in a commercial sense, this is one continued voyage, to take its date at the departure of the Mary from Bristol. But it is urged that where the rights of war intervene, a different construction must take place.

The court does not accede to the correctness of this distinction.

The Mary was forced into Waterford by irresistible necessity, and was detained there by the operation of causes she could not control. Had her departure been from a neutral port, and she had been thus forced, during the voyage, into a hostile port, would it be alleged that she had incurred the liabilities of a vessel sailing from a port of the enemy? It is believed that this allegation could not be sustained, and that it would not be made. But as between the captors and the captured in this case, the voyage was, in its commencement, as innocent as if made from a friendly port. The detention at Waterford, then, can no more affect the character of the voyage in the one case than in the other.

But it is said that the owners of the cargo ought to have applied to the American government for a license to bring it into the United States.

So far as respects the captors, there could be no necessity for a license, since the vessel was already protected from them by the orders of the President under which they sailed; and for any other purpose a license was unnecessary, provided the importation, if the voyage had been immediate and direct from Bristol, could be justified.

If a cargo be innocently put on board in an enemy country, if at that time it be lawful to import it into the United States, the importation cannot be rendered unlawful by a detention occasioned, in the course of the voyage, either by the perils of the sea or the act of the enemy, unless this effect be produced by some positive act of the legislature.

There is no such act.

149*] *It has been contended that the act for the remission of fines, penalties and forfeitures in certain cases, passed on the 2d of January, 1813, controls the instructions given by the President on the 28th of August, 1812, and limits the operation of those instructions to the specific cases described by Congress; and as that act protects only those importations which were made previous to its passage, it has been argued that the President's instructions can go no further.

Independent of the war, all British merchandise was excluded from the ports of the United States by a system of policy supposed to have been founded on the British orders in council.

The Secretary of the Treasury had power to remit forfeitures incurred under these laws. When the orders in council were repealed, large shipments were made of British merchandise by American merchants, in the full confidence that the American restrictive system would fall with the orders which produced it. This opinion and the proceedings in consequence of it, were thought excusable both by the executive and legislative departments of government. The President instructed the cruisers of the United States not to molest vessels of this description, "but, on the contrary, to give aid and assistance "to the same; in order that such vessels and "their cargoes may be dealt with on their ar"rival, as may be decided by the competent "authorities."

These instructions act solely on the rights of war, and regulate the conduct of the public and private armed vessels of the United States.

The legislature passed an act on the 2d of January, 1813, taking away the discretion of the Secretary of the Treasury, and directing him absolutely to remit all penalties and forfeitures incurred by violating the non-intercourse laws, in all cases of importation made before the passage of the act, in American vessels, provided the goods were the property of citizens of the United States, and the vessels departed from any port of the United Kingdom of Great Britain and Ireland between the 23d day of June and the 15th of September then preceding.

*This act does not contemplate the [***150** conduct of captors, or the rights of war. Its sole object is to remit certain penalties already incurred by a violation of municipal law. The legislature does not appear to have had in view the instructions given by the President to the armed vessels of the United States, much less to have intended to control those instructions.

But, in effecting these different objects, the executive and the legislature were impelled by the same motive—the peculiar hardship of exposing the citizens of the United States in such a case to the penalties either of war or of municipal law. The one intended to protect from capture, the other from forfeiture, property which had been shipped in the reasonable confidence that peace and commercial intercourse between the two countries were the fruits of the repeal of the British orders in council. The President recognized the principle, but left the time within which it should operate to be decided by the armed vessels and by the courts, according to the circumstances of each case. The legislature prescribed certain limits within which it should operate. This court, in construing the less explicit instructions of the President, with respect to the departure of a vessel from a British port, has respected the more explicit language of the legislature on the same subject. But the instructions of the President relate only to the departure of the vessel. They do not extend to the time of its arrival. In this respect there is nothing to be explained. Consequently the act of Congress can furnish no aid in their construction. That the instructions were intended to protect from capture all vessels which had sailed in that confidence which was inspired by the repeal of the British orders in council, however the voyage might be protracted, is apparent from their language, and from the fact that they continued to be delivered to the armed vessels of the United States after the passage of the act of the 2d of January, 1813.

It is the unanimous opinion of the court that the Mary was, at the time of her capture, protected by the instructions under which the captor sailed.

This opinion renders all inquiry into the character of the cargo unnecessary.

*The counsel for the captors have [***151** claimed their costs and expenses, on the ground that there was probable cause of capture.

This claim is sustained by the court. Further

proof has been required, and the lateness of the period at which the Mary was found on the ocean justified a suspicion that her case was not one to which the instructions of the President extended.

The sentence of the Circuit Court condemning the cargo of the Mary is reversed, and the cause is remanded to that court with directions to dismiss the libel so far as respects the cargo, and to restore the same to the claimants, and to allow the captors their reasonable costs and expenses.

Rev'g in part—1 Gall. 620. See 8 Cranch, 388.
Cited—24 How. 205; 1 Wall. 52; 11 Wall. 325, 328; 23 Wall. 136; 1 Otto. 510; 6 Ben. 461; 2 Sprague. 214, 216; 5 Blatchf. 179; 1 Curt. 462; 2 Dill, 308; 1 Story, 553; Taney, 117; 1 Ware, 106; 2 Mason, 122; 7 Bank. Reg. 171; 12 Bank. Reg. 150; 3 Sumn. 605, 609; 1 Wood. & M. 178; 3 Wood. & M. 118; Newb. 291, 306.

DOE, LESSEE OF LEWIS AND WIFE, *v.* M'FARLAND AND OTHERS.

Absent—TODD, *J.*

It is not necessary that an executor of a will, made in Virginia, devising to the executor land in Kentucky, should take out letters testamentary in Kentucky, to enable him to maintain an ejectment for the land in Kentucky. If the plaintiff, in his declaration, claims the whole tract, a deed, showing that he has only an undivided interest in the tract, may be given in evidence.

ERROR to the Circuit Court for the District of Kentucky, in an action of ejectment.

The case was submitted to the court at last term, by *Wickliffe* for the plaintiffs in error, and *G. M. Bibb*, for the defendants, upon notes of an argument, and was argued at this term by *C. Lee* for the plaintiffs in error.

February 27th. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is a writ of error to a judgment rendered in the Circuit Court of the United States for the District of Kentucky, in an ejectment by the plaintiffs in error, against the defendants.

152* *At the trial of the cause, the plaintiffs produced and read in evidence a patent from the commonwealth of Virginia, granting certain lands therein described, lying in the county of Nelson, in the now state of Kentucky, to John May, John Banister, Kennon Jones, Thomas Shore and Christopher M'Conico. He then offered in evidence the last will and testament of John May, deceased, which contained this clause: "I give and devise my land to my "executors, hereinafter named, and to the sur- "vivors and survivor of such of them as may "act, and their heirs, for the purpose of sel- "ling as much thereof as will pay all my "debts."

This will was proved and admitted to record according to the laws of Virginia, while Kentucky was a part of that state, and is duly certified by the proper authority. The plaintiff, Ann Lewis (wife of the other plaintiff, Thomas Lewis), who was an executrix named in the will of the said John May, alone qualified as executrix, and took upon herself the burden of executing the said will; but she did not qualify, and did not obtain her letters testamentary until after Kentucky had become an independent state.

The counsel for the defendants objected to the admissibility of the will and certificate thereto subjoined, because the said Ann had only qualified and sued out letters testamentary in the state of Virginia, and not in the state of Kentucky, where the land lies. The court sustained the objection, and the will was not permitted to go in evidence to the jury. To this opinion an exception was taken. There was also a second exception taken on the same rejection of evidence, which depends entirely on the correctness of the first opinion, and therefore need not be particularly stated.

It has been decided in this court that letters testamentary give to the executor no authority to sue for the personal estate of the testator out of the jurisdiction of the power by which those letters are granted. But this decision has never been understood to extend to a suit for lands devised to an executor. In such case the executor sues as devisee. His right is derived from the will, and the letters testamentary do not give the title. The executors are trustees for the purposes of the will. *This [***153** will may be considered as requiring that the executors shall act to enable themselves to take under the devise to them; but when the condition is performed, those who have performed it take under the will. That the executrix took upon herself that character after the separation of Kentucky from Virginia is of no consequence. When she did take it upon herself, the condition on which the devise was made was performed, and she took as devisee under the will; and the act consummating her title had relation to the time of its commencement, which was before the separation of the two states. Were it even necessary, which is not admitted, to record this will in Kentucky, that objection was not made to the instrument, and therefore the court cannot suppose it to exist. The will was rejected because the executrix had not qualified in Kentucky, and this objection is not deemed a valid one.

An objection was also taken to a deed, which was offered in evidence, on the ground of an alleged variance between it, as proof, and the allegations in the declaration. The deed was not permitted to go in evidence to the jury; and to this opinion, also, an exception was taken.

The variance is not pointed out. If the objection to the deed is that it conveys only an undivided interest, while the declaration claims the whole tract, the objection ought not to have been sustained; but on the propriety of rejecting the deed it is not necessary to give an opinion since the judgment must be reversed on the first point.

Judgment reversed, and the cause remanded with directions to grant a new trial and to permit the will to be read in evidence.

Cited—9 Wheat. 571; 5 How. 273; 3 Mason, 518; 4 Mason, 32 (n); 1 Cliff. 134.

CLARK'S EXECUTORS
v.
VAN RIEMSDYK.

Absent—TODD, *J.*

The answer of one defendant in chancery is not evidence against his co-defendant—nor is his deposition, although he had been discharged under the act of assembly of Rhode Island (of 1757) from all debts and contracts prior to the date of the discharge, and although the debt in suit was a debt contracted prior to such discharge, the debt having been contracted in a foreign country.

An answer in chancery, although positive, and directly responsive to an allegation in the bill, may be outweighed by circumstances, especially if it be respecting a fact which, in the nature of things cannot be within the personal knowledge of the defendant. A denial by the defendant that his testator gave authority to A to draw a bill of exchange, is not such an answer to an averment of such authority as will deprive the complainant of his remedy, unless the defendant also deny the subsequent assent of his testator to the drawing of such bill. For a subsequent assent is equivalent to an original authority. Semb: that a discharge under the act of assembly of Rhode Island (of 1756) from all debts, duties, contracts and demands outstanding at the time of such discharge, upon surrender of all the debtor's property, will not protect him against a debt contracted in a foreign country.

THIS cause was this day argued by *Burgess* and *Stockton* for the appellants, and *Harper* for the appellee, in the absence of the reporter.

154*] *February 28th. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This is an appeal from a decree made in the Circuit Court of the United States for the District of Rhode Island.

The appellee filed his bill in that court, praying that the appellants and James Munro, Samuel Snow, and Benjamin Munro, late merchants trading under the firm of Munro, Snow & Munro, might be decreed to pay him the amount of a bill of exchange drawn in his favor at Batavia, by Benjamin Munro, at nine months sight, on Messrs. Daniel Crommelin & Sons, merchants, Amsterdam, for the sum of 21,488 guilders on account of advances made by the said Riemsdyk for the use of the defendants in the Circuit Court.

In the year 1805, John Innes Clark and Munro, Snow & Munro, being joint owners of the ship Patterson, in equal moieties, projected a voyage to Batavia, and appointed Benjamin Munro, one of the house of Munro, Snow & Munro, supercargo. The ship carried out some goods on account of the owners, and other goods on account of different persons, the whole to be invested in a return cargo, on the profits of which the ship-owners were to receive 45 per cent. instead of freight.

The bill charges that the supercargo was empowered verbally, in case of a deficiency of funds at Batavia, to load the ship with a return cargo, to take up money on the joint account of the owners, and, if necessary, to draw bills of exchange therefor on Messrs. Daniel Crommelin & Sons, of Amsterdam, or on the owners.

The Patterson returned in the Spring of 1806 with a cargo derived from the funds taken out in the outward voyage.

In March, 1806, the Patterson again sailed to Batavia on a voyage in all respects similar to the first. That part of the cargo which was furnished by the owners *consisted of [***155** wines and some other inconsiderable articles. Being unable to sell the wine in Batavia, the supercargo placed it for sale in the hands of Mr. Van Riemsdyk, the defendant in error. Rather than return without filling the vessel for the owners, he drew bills on them to the amount of $2,389.89; and also drew on Messrs. Crommelin & Sons, merchants of Amsterdam, the bill for which this suit was brought. The bill is drawn by Benjamin Munro in his own name, but it contains a direction to charge the same to John Innes Clark and Munro, Snow & Munro, merchants of Providence, Rhode Island, North America. Of all these proceedings the owners were regularly informed by letter from Benjamin Munro, their supercargo.

The ship returned safe in March, 1807, and the proceeds of the cargo purchased by these bills were received by the owners. The bills drawn on the owners were duly paid; but no provision was made for that drawn on Daniel Crommelin & Sons.

In May, 1807, the ship proceeded on a third voyage to Batavia, with Benjamin Munro again supercargo. The owners appear to have relied on the wine placed in the hands of Van Riemsdyk on the second voyage for producing the funds with which to procure their part of the return cargo. In June, 1807, Munro, Snow & Munro became insolvent; and according to the laws of Rhode Island, obtained a certificate discharging them from the claims of their creditors, so far as such discharge could be affected by the law of a state. They had previously transferred, for a valuable consideration, to John Innes Clark, all their interest in the ship, the return cargo and the accruing freight, the whole of which came into his possession on the return of the vessel. In December, 1807, the bill was presented to Messrs. Daniel Crommelin & Sons, and protested for non-acceptance; and in October, 1808, it was protested for non-payment. Neither Clark nor Munro, Snow & Munro had any funds in the hands of Messrs. Daniel Crommelin & Sons.

John Innes Clark departed this life in November, 1808, having first made his last will and testament, of which the plaintiffs in error are executors, who have *assets in their [***156** hands more than sufficient to satisfy the claim of Van Riemsdyk.

The defendants, Munro, Snow & Munro, in their answer, acknowledge all the material allegations of the bill, and expressly admit the authority of Benjamin Munro to draw the bill of exchange for which this suit was instituted. But they state their insolvency, and claim the benefit of the certificate of discharge granted them in pursuance of the laws of the state of Rhode Island.

Clark's executors deny that Benjamin Munro had any authority to take up money on credit for any purpose whatever, or to draw bills of exchange; and assert that both the complainant and Benjamin Munro knew that he had no such authority. They admit that if the money was taken up, it was for the joint use of the ship-owners, but not on their credit. It was, they say, on the sole credit of Benjamin Munro.

At the hearing, the bill was dismissed as to

Munro, Snow & Munro, and a decree was made against Clark's executors for the sum of $11,526.14, being the amount of the sum specified in the bill of exchange in the complainant's bill specified, together with ten per cent. damages for the non-payment thereof, and interest upon both these sums from the time when the said bill of exchange became due to the time of rendering the decree.

From this decree the executors of the said John Innes Clark prayed an appeal to this court.

In determining the extent of Clark's liability, the authority of Benjamin Munro to draw this bill becomes a question of material importance. If the answer of Munro, Snow & Munro, or their depositions taken in the cause, be admissible evidence against Clark's executors, this question is decided. But the admissibility of their answer, for this purpose, depends on the establishment of such a partnership as would authorize the draft of Munro as one of the partners; and the admissibility of their depositions depends on their being rendered disinterested witnesses by the certificate of discharge **157***] stated *in the proceedings. The court, being satisfied on neither of these points, will exclude both the answer and the depositions, and consider the cause independently of them.

The letter of Benjamin Munro, written at Batavia, on the 3d of November, 1806, the day on which the bill in favor of Van Riemsdyk was drawn, and addressed to John Innes Clark, Esquire, and to Messrs. Munro, Snow & Munro, contains these passages: "I have shipped "on board the Patterson, on your account and "risk, 505 pecols Jacatia coffee, agreeably to "invoice and bill of lading inclosed. I have "drawn on you for the amount of $2,389.89, "at ninety days sight, in favor of the several "officers, &c., on board the Patterson, being "the amount of money they had remaining "over their privileges, and which I have al-"lowed them 15 per cent. advance thereon, "and which drafts you will please to honor. "A statement thereof I annex. I have also "drawn on Messrs. Daniel Crommelin & Sons, "merchants, Amsterdam, at nine months sight, "in favor of the Honorable William V. H. "Van Riemsdyk, of this place, for the amount "of 21,488 guilders on account of the Patterson, "and which bills you will, no doubt, prepare "for timely, as I have written those gentlemen. "I leave all the Madeira wine in the hands of "the Honorable Mr. Riemsdyk, as it will not "sell at all. I transmit his receipt for the "same. I have receieved no advance on the "wine."

To this letter was annexed a statement of the cargo of the Patterson, containing this item: "For owners of Patterson, 505 pecols coffee."

There was, also, the following memorandum:

"Memorandum of bills payable by you at "ninety days sight, viz.:

"Captain James Shaw, 1st, 2d, 3d, ex-"change, $748.75, &c., amounting in the "whole to $2,389.89.

"Amount of bills drawn on Messrs. Daniel "Crommelin & Sons, merchants, Amsterdam, **158***] "payable by them *at nine months "sight, in favor of the Honorable Wm. V. H. "Van Riemsdyk, viz.:

"Four bills of exchange, 1st, 2d, 3d, 4th, "for the amount of 21,488 guilders, equal to "$8,595. I have allowed Mr. Riemsdyk on "the money, 20 per cent. advance."

It is impossible to read this letter and these memoranda without feeling a conviction that Benjamin Munro believed himself to be acting within the scope of his authority, and supposed that neither his bills on the owners, nor that on Crommelin & Sons, would be considered by them as an extraordinary or unexpected transaction. He makes no apology for what had been done; gives no description of his difficulties and embarrassments at being disappointed in Batavia by not receiving the funds on which he relied for their return cargo, and of his doubts whether the measure to which he had resorted in consequence of that disappointment, would be approved by them. His language is the language of an agent acting within his powers on a contingency which had been foreseen and provided for. Having stated the bills drawn on them, he adds, in the usual style of letters of notice, "which drafts "you will please to honor." After stating the drafts on Crommelin & Sons, he adds, "which bills you will no doubt prepare for "timely, as I have written those gentlemen." This is not the language of an agent conscious of having transcended his powers.

But it will be admitted that the opinion of the agent on the extent of his powers will not bind his principals. Let us, then, inquire, so far as the testimony will inform us, into the opinion entertained on this point by the principals themselves.

On the 1st of November, 1806, at Batavia, Benjamin Munro stated an account current between himself and the owners of the ship Patterson, according to which the executors of John Innes Clark admit the settlement to have been made on the arrival of the vessel. That account debits the owners with $9,090, the amount of invoice of 505 pecols of coffee shipped on board the Patterson, on their account and risk, and with the 15 per *cent. ad- [***159** vance on the bills drawn on them, and the 20 per cent. advance on the bills drawn on Crommelin & Sons, and credits them with the amount of those bills. The entry of the last-mentioned bills is thus expressed, "bills drawn on Messrs. "Daniel Crommelin & Sons, payable by you at "nine months sight."

This account charges the owners with the disbursements of the vessel, which exceed the funds in the hands of Munro, other than those produced by the bills of exchange, so that the whole return cargo was purchased by these bills. Not a sentence escapes either of the owners disapproving the conduct of Munro, or expressing surprise at it. With that full knowledge of the whole transaction which is given by the letter of Munro, by the statement annexed to it, and by the account; with full information that the whole cargo was purchased with bills drawn on them and on a house in Amsterdam, to be paid by them, they receive the cargo and dispose of it to a very considerable profit. Can they now be permitted, in a court of conscience, to question the authority by which the bills were drawn.

The circumstances which prove their acquiescence in this authority are not yet exhausted.

The Patterson sails on a third voyage to Batavia, and Benjamin Munro is again supercargo. His conduct in drawing bills on the second voyage is not censured. He is not informed that this is a power not confided to him; that he has mistaken the extent of his authority; that his principals are not bound by his drafts. He goes again to India in the full belief that his conduct had met with perfect approbation, and that no intention existed to throw upon him the bills he had drawn on Amsterdam for moneys with which he had purchased the second cargo. In this belief the proceeds of the wines, placed in the hands of Van Riemsdyk, are drawn out of his hands and invested in another return cargo for the owners of the Patterson.

Had there not been an entire acquiescence in the bill drawn by him on Crommelin & Sons, a full admission on the part of his principals that they were responsible for that bill, and that no attempt would be made to throw it on him, can it be believed that the proceeds of these wines **160***] *would have been invested in a return cargo for the owners of the ship? Had Van Riemsdyk suspected that the owners would disclaim the authority of their supercargo to draw bills, and would fail to place funds in Amsterdam to meet them, and would endeavor to turn him over to that supercargo for payment, is it credible that he would have permitted the proceeds of this wine to pass out of his hands without an attempt to secure himself?

These circumstances strengthen the conviction growing out of the whole conduct of the owners, that in drawing the bill for which this suit was instituted, Benjamin Munro acted within his authority.

This testimony is opposed by the answer of Clark's executors; and the rule that an answer must prevail unless contradicted by one witness as well as by circumstances, is said to be so inflexible that the strongest circumstances will not themselves be sufficient to outweigh an answer.

The general rule that either two witnesses or one witness with probable circumstances will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands, is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness.

The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a **161***] particular fact, or what he deemed an *infallible deduction from facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say that John Innes Clark never gave Benjamin Munro authority to take up money or to draw bills, when they assert that Riemsdyk, who was in Batavia, did not take this bill on the credit of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which cannot be within their own knowledge. In the first instance they speak from belief; in the last they swear to a deduction which they make from the admitted fact that Munro could show no written authority. These traits in the character of testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition. The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what in the nature of things they could not know, cannot give to their answer more effect than it would have been entitled to had they been more circumspect in their language.

But were the court to allow to this answer all the weight which is claimed for it by counsel, it would not avail his clients. It asserts that Munro drew bills without authority from his owners, but does not assert that his owners never confirmed his acts. It will not be denied that the acts of an agent, done without authority, may be so ratified and confirmed by his principals as to bind them in like manner as if an original authority had existed. The application of this principle to the case at bar is as little to be denied as the principle itself. The transactions which have been urged to show an original authority to draw the bill in question, will be recollected without being recapitulated. The court is of opinion that they amount to a full confirmation of those proceedings of their agent which had been communicated to his principals, and to an undertaking to perform the engagements he had made for them.

It is urged, on the part of the appellees, that this undertaking is not joint, but several, and binds each party to the extent of his interest, and no farther.

*The court does not so understand [***162** the transaction. The undertaking not being express, its extent must be determined by the character of their acts of confirmation, and by the character of the act confirmed.

The bill is to be charged, as expressed upon its face, to John Innes Clark, and to Munro, Snow & Munro.

In his letter of the 3d of November, 1806, addressed to his owners, Benjamin Munro, after mentioning the bills, says, "which bills you" (that is, John Innes Clark and Munro, Snow & Munro) "will no doubt prepare for timely."

In the account with his owners, rendered by Benjamin Munro, and dated the 1st of November, 1806, he charges them jointly with the coffee purchased by these bills, jointly with the premium advanced, and credits them jointly with the amount of the bills. This account is afterwards referred to by John Innes Clark himself as a settled account.

The court cannot understand the undertaking, proved by these papers and by the conduct of the parties, to be other than a joint undertaking of the owners to put themselves in the

place of Benjamin Munro, and to provide funds to take up the bill.

It is the unanimous opinion of the court that the liability of the owners of the ship Patterson for the bill drawn by Benjamin Munro in favor of Riemsdyk is precisely the same as if it had been drawn by themselves. They have made his act their act.

It is said that, even on this principle, the decree is for too large a sum, because the premium and the damages cannot be recovered in a court of chancery.

There is no evidence that the contract is not allowable by the laws of Batavia; nor did the owners, when informed of it, complain of its terms. This court cannot presume that it is illegal.

The damages form no part of the contract, and certainly cannot be decreed by a court of **163***] chancery, unless, *by the laws of the place where the bill was drawn, they become a part of the debt. Upon this point the court has no information; and for this reason the decree must be reversed.

It is also the opinion of the court that the dismissal of the bill of the complainants as to James Munro and Samuel Snow, the surviving partners of Munro, Snow & Munro, was irregular:[1] and that a decree ought to have been made against them also. For these causes the decree must be in part reversed, and the cause remanded to the Circuit Court with directions to reform the decree according to this opinion.

The decree of this court is as follows:

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Rhode Island, and was argued by counsel; which being considered, the court is of opinion that John Innes Clark in his life-time, and Munro, Snow & Munro, the owners of the ship Patterson, were jointly liable for the bill of exchange, in the complainant's bill mentioned, to the same extent as if the said bill had been drawn by them; and that the estate of the said John Innes Clark, in the hands of his executors, is, in equity, chargeable with the said debt, as far as the said John Innes Clark in his life-time was chargeable therewith. This court is therefore of opinion that there is no error in so much of the said decree of the Circuit Court for the District of Rhode Island as directs the respondents, the executors of the said John Innes Clark, deceased, to pay to the complainant the amount of the said bill with interest thereon from the time when the same became payable to the day on which the said decree was made, and the same as to so much thereof is affirmed. And this court is further of opinion that the defendants ought not to have been ordered to pay damages on the said bill without proof that, by the law of the place where the same was drawn, damages were made payable; in which case the persons bound to pay the said bill are liable in a court of equity, as well as in a court of law, to pay such damages. This court is also **164***] *of opinion that so much of the said decree as dismisses the bill of the complainants as to James Munro and Samuel Snow, the surviving partners of Munro, Snow & Munro, is irregular, and that a decree ought to have been made against them likewise. It is, therefore, the opinion of this court that so much of the said decree of the Circuit Court for the District of Rhode Island, made in this case, as directs the appellants to pay to the complainant in that court, damages at the rate of ten per centum on the amount thereof, with interest thereon; and so much of the said decree as dismisses the bill of the complainant to James Munro and Samuel Snow, the surviving partners of Munro, Snow & Munro, is erroneous and ought to be reversed, and the same is reversed accordingly. And this court doth further order and decree that the said cause be remanded to the said Circuit Court for the District of Rhode Island, with directions to receive proof of the law of Batavia respecting protested bills of exchange, to conform its decree to this opinion, and to make the same against the surviving partner or partners of the late commercial house of Munro, Snow & Munro as well as against the appellants; all which is ordered and decreed accordingly.

1.—It is probable that the court did not observe that the dismissal of the bill as to Munro, Snow & Munro, was with the assent of the complainant.

Cited—5 Pet. 111; 4 How. 218; 13 How. 171; 2 Wall. 430; 11 Wall. 233; 16 Wall. 30; 9 Otto, 206; 1 Cliff. 505; 2 Cliff. 51, 79, 146; 3 Cliff. 479; 4 Cliff. 459; 1 McAll. 302, 311, 449; 3 Sumn. 78; 2 Mason, 205; Hemp. 257; 5 Bank. Reg. 264; 1 Biss. 349; 1 Wood. & M. 358.

FINLEY *v.* WILLIAMS AND OTHERS.

Absent—TODD, *J.*

In Kentucky the courts of law will not look beyond the patent, but courts of equity will; and will give validity to the elder entry against an elder patent.

Between pre-emption rights, the prior improvement will hold the land against a prior certificate, entry, survey and patent.

It is not essential to the dignity of an entry upon a pre-emption warrant, that the entry should, in terms, call for the improvement, although it must in fact include the improvement.

An entry calling for "the Big Blue Lick," will not support a survey and patent for land at the Upper Blue Lick, the Lower Blue Lick being generally called "the Big Blue Lick," although there may be other calls in the entry which seem to designate the Upper Blue Lick as the place intended.

THIS was an appeal from the decree of the Circuit Court for the District of Kentucky, in a suit in chancery, brought by Finley to compel Williams and others, who had the elder patent, to convey certain lands to the complainant, which he claimed by virtue of a prior settlement.

The cause was argued by *Pope* for the appellants, and *Clay* for the appellees, on the 22d of February, 1813, in the absence of the reporter

*February 28th, 1815. *Absent*— [***165** TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

This cause depends on the land law of Virginia, which is also the land law of Kentucky, that state having formed a part of Virginia when the act was passed in which the titles of both plaintiff and defendant originated. Both parties claim the land in controversy by virtue

of improvements made previous to the first day of January, 1778, which improvements were recognized by the act generally termed "the previous title law," and gave the persons making them a pre-emption of one thousand acres of land, to include the improvement, on paying therefor the price at which the state sold its vacant lands, "provided they respectively "demand and prove their right to such pre-"emption before the commissioners for the "county to be appointed by virtue of this act, within eight months."

In the year 1781 an act passed which, after reciting that by the discontinuance of the commissioners in the District of Kentucky, many good people of the commonwealth were prevented from proving their rights of settlement and pre-emption in due time, owing to their being engaged in the public service of this country, enacts that the county courts, in which such lands may lie, be empowered and required to hear and determine such disputes, and that the register of the land-office be empowered and directed to grant titles on the determinations of such courts, in the same manner as if the commissioners had determined the same.

It appears that in the year 1773, John Finley, the plaintiff in the cause, marked and improved the land in controversy. He entered into the continental service in the year 1776, and continued therein throughout the war. His claim was not made before the commissioners, but was made to the court of the county in which the lands lie, by which court his claim was allowed, and the following certificate was granted: "At a court held for the county of "Fayette, March 12th, 1782, application and "satisfactory proof being made, this court "doth certify that John Finley is entitled to **166***] "the *pre-emption of 1,000 acres of "land, situate on the main branch of Licking "Creek, to include an improvement made in "the year 1773 by said Finley, and to be "bounded by a survey made, at the time, for "him, which includes the Upper Blue Lick, "by virtue of such marking out and improv-"ing, and his being in public service when the "commissioners sat in the district, and thereby "prevented applying for the same."

A pre-emption warrant was obtained, and on the 14th day of November, in the year 1783, an entry was made with the proper surveyor in the following words: "John Finley enters "1,000 acres of land on a pre-emption warrant, "No. 2526, on Licking, to include the Upper "Blue Lick, and bounded on three sides by "the line of an old survey made in the year "1773, beginning," &c. This entry was surveyed, and a patent issued thereon.

William Lynn, under whom the defendants claim, made an improvement on the same ground in the year 1775, and laid his claim before the commissioners, who allowed the same, and granted a certificate therefor, dated the 20th day of November, in the year 1779, in the following words: "William Lynn this day "claimed a pre-emption of one thousand acres "of land at the state price, lying on the south "side of Licking Creek, known by the name "of the Big Blue Lick, to include the said "lick, lying in a short bent of the said creek, "by improving the same in the year 1775, &c." On the 22d of June, 1780, Lynn, having obtained a pre-emption warrant, entered the same with the proper surveyor, in these words: "William Lynn, James Barbour and John "Williams enter 1,000 acres of land upon a "pre-emption warrant, beginning a quarter of a "mile below the Big Blue Lick on Licking, on "the south side thereof, running on both sides "of the said creek, and cast and south for "quantity." This entry was so surveyed as to include the lands in dispute, and a patent was obtained thereon of an earlier date than that of Finley. Upon this patent an ejectment was brought, and judgment obtained by Lynn, Barbour & Williams. Finley has brought this suit to compel a conveyance of that part of the land held by Lynn and others, which is included in his patent. On a hearing, *it was [***167** the opinion of the Circuit Court that Lynn and others held the better title; in conformity with which a decree was made. From that decree Finley has appealed to this court.

The peculiar state of titles to land in Kentucky, a senior patent being in many cases issued on a junior title, and it being a rule in their courts of law not to look beyond the patent, have settled the principle that courts of equity will sustain a bill brought for the purpose of establishing the prior title by entry, and of obtaining a conveyance from the person holding under a senior patent issued on a junior entry. The courts of the United States have conformed to this practice, and adopted the the principle.

It is also settled in Kentucky that between pre-emption rights the prior improvement will hold the land, although the certificate of the commissioners, the entry, the survey and the patent, be all posterior in point of time to those obtained by the person who has made an improvement of a later date.

It follows from these established principles, that Finley must prevail, unless he has lost the right acquired in consequence of his improvement.

The Circuit Judge was of opinion that this right was lost by the form of his entry with the surveyor. Not having in that entry called, in terms, for his improvement, that judge was of opinion that although his entry does in fact comprehend his improvement, yet he has surrendered the preference which his pre-emption warrant gave him, and sunk his claim to the level of a common treasury warrant. This court can perceive no reason for that opinion. The law requires that the entry shall in fact include the improvement, but does not make it essential to the dignity of the entry that the improvement shall in terms be called for. The certificate expressly states that the land granted is to include the improvement; and the entry, which is made with remarkable precision, conforms exactly to the certificate in the description of the land intended to be taken.

*But it is contended by the defendant [***168** that, whatever may be the opinion of the court on this point, Finley's title as to a pre-emption must yield to that of Lynn, in consequence of his having omitted to assert his claim before the court of commissioners. The legislature could not, it is said, after permitting the time for making this claim to expire, revive it to the prejudice of any other person who had acquired title to the land. It is added that the decisions

in Kentucky have been adverse to titles to pre-emptions depending on certificates granted by the county courts, in cases where they come into competition with titles gained before the grant of such certificates.

This court would not willingly depart from the state decisions, if they have settled the principle the one way or the other; and would, therefore, have deferred the determination of this cause until more certain information could be obtained, had it rested solely on the validity of the plaintiff's title as founded on a pre-emption. But, on an inspection of the record, the entry of the defendants is deemed so radically defective as necessarily to yield to the title of the plaintiff, should his warrant even be reduced to the grade of a treasury warrant.

The law requires that the holder of a land warrant "shall direct the location thereof so "specially and precisely as that others may be "enabled with certainty to locate other war-"rants on the adjacent residuum."

Such has been the difficulty of making special locations that much of the precision which the law would seem to require has been dispensed with; but a reasonable and practicable certainty has always been deemed necessary; and wherever the material and principal call of a location has been calculated, instead of informing, to misguide subsequent locators, the location itself has been brought into hazard, and it has often been determined that the survey was made on other land than that which the entry covered.

In examining these questions, the courts of Kentucky have universally and properly determined that all subordinate calls in an entry **169***] must yield to a principal *call to which they may be repugnant. If a great and prominate object, immovable and durable in itself, and of general notoriety, be called for in a location, that object must fix and locate the entry, although other minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator really intended to take other land.

In the entry of Lynn and others there is such a principal call. The Big Blue Lick is perhaps an object of as universal notoriety as any in Kentucky. But there are two Blue Licks on the same creek, and both of them are large licks. In such a case the locator would certainly be at liberty, and it would be his duty to designate the lick he intended to take; for if his entry would apply to the one as well as to the other, it would be justly chargeable with a vagueness which would leave subsequent locators unable to locate with certainty the adjacent residuum. This entry has, in its terms, designated the lick intended to be included. It is "the Big Blue Lick." The entry does not call for a Big Blue Lick, but for the Big Blue Lick, thereby excluding any other lick than that which was emphatically denominated the Big Blue Lick.

We are then to ask which of these licks a man in Kentucky, holding a warrant which he intended to locate, would suppose was the Big Blue Lick.

Upon this subject the testimony is not doubtful. It is in full proof that at the time the entry of the defendants was made, and for some years before, the Lower Blue Licks were generally called the Big Blue Licks; and that where the defendants have surveyed was known by the name of the Upper Blue Licks. They were sometimes, though rarely, distinguished from each other as the Upper Big Blue Licks and the Lower Big Blue Licks; sometimes as the Upper and the Lower Blue Licks; but the term the Big Blue Licks, when used without the word "upper" or "lower," was universally understood to designate the Lower Blue Licks.

The company which made this location in 1775, had not discovered the Lower Blue Licks, and therefore denominated the spring which they did discover, "the *Big Blue [***170** Lick;" but the name originated and expired with themselves. It was never adopted by the people of the country. It is probable that Lynn did contemplate the Upper Blue Licks when he made his entry; but between conflicting entries a mistake of this kind is fatal to the person who commits it. In the case of *Taylor* and *Hughes* it was impossible not to perceive that Taylor intended one creek when he named another; but subsequent locators could judge of his intention only from the words of his entry.

But it is contended that there are other explanatory calls in the entry which cure the defect which has been stated, and designate, with sufficient certainty, that the Upper Blue Lick was intended to be included in the entry.

The entry is said to require a lick on the south side of Licking, and the spring which issues at the Upper Blue Lick is on the south side. The words are, "beginning one-quarter "of a mile below the Big Blue Lick on Lick-"ing, on the south side thereof." The locator intends to describe his beginning; and these words are to be construed with reference to that intention. Do the words "on Licking" describe the place of beginning, or the location of the Big Blue Lick? The latter was unnecessary, because there was no Big Blue Lick except on Licking; and because, were the fact otherwise, the lick would be ascertained by calling for a beginning a quarter of a mile below it on Licking. But the beginning might be a quarter of a mile below the lick, and yet not on the creek. The beginning would be, in some degree, uncertain, unless it be fixed by those words. The entry is understood as if it were expressed thus: "Beginning on Licking, on the south side thereof, a quarter of a mile below the Big Blue Lick." If reference be had to the certificate granted by the commissioners, that places the land, not the lick, on the south side of the creek.

A cabin and a marked tree in a country full of cabins and marked trees, cannot control a call made for an object of such general notoriety as the Big Blue Lick. A subsequent locator would look for them only at the Big Blue Lick.

*It is the opinion of this court that the [***171** decree of the Circuit Court be reversed and annulled, and that the defendants be decreed to convey to the plaintiff so much of the land comprehended within this grant as appears by the survey made in this cause to lie within the bounds of the grant made to the complainant.[1]

Cited—13 Wall. 86.

1.—The opinion of the Circuit Court, consisting of Judges TODD and INNES, was as follows:
The claims of the parties in this suit commenced

173*] *M'IVER'S LESSEE
v.
WALKER AND ANOTHER.

Absent—LIVINGSTON, *J.*, STORY, *J.*, *and* TODD, *J.*

If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian.

Course and distance must yield to a call for natural objects.

All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey.

If a patent refer to a plat annexed, and if in that plat a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey nor the patent calls for that water-course. *Quære.* Whether parol evidence can be given that the surveyor intended to express the courses according to the true, and not according to the magnetic meridian.

ERROR to the Circuit Court for the District of East Tennessee, in an action of ejectment brought by the plaintiff in error against the defendants.

The case is thus stated by the Chief Justice in delivering the opinion of the court:

On the trial the plaintiff produced two patents for 5,000 acres each, from the state of North Carolina, granting to Stockley Donalson, from whom the plaintiff derived his title, two several tracts of land lying on Crow Creek, the one, No. 12, beginning at a box elder standing on a ridge corner to No. 11, &c., "as by the plat "hereunto annexed will appear." The plat and certificate of survey were annexed to the grant.

The plaintiff proved that there were eleven other grants of the same date for 5,000 acres each, issued from the state of North Carolina, designated as a chain of surveys joining each other from No. 1 to No. 11, inclusive, each calling for land on Crow Creek, as a general call, and the courses and distances of which, as described in the grants, are the same with the grants produced to the jury. It was also proved that the beginning of the first grant was marked and intended as the beginning corner of No. 1, but no other tree was marked, nor was any survey ever made, but the plat was made out at Raleigh, and does not express on its face that the lines were run by the true meridian. It was also proved that the beginning corner of No. 1 stood on the north-west side of Crow Creek, and the line running thence down the creek, and called for in the plat and patent, is south 40 degrees west. It further appeared that Crow Creek runs through a valley of good land, which is on an average about three miles wide, between mountains unfit for cultivation, and which extends from the beginning of the survey No. 1 in the said chain of the surveys, until it reaches below survey No. 13, in nearly a straight line, the course of which is nearly south thirty-five degrees *west by the [*174 needle, and south forty degrees west by the true meridian. That in the face of the plats annexed to the grants, the creek is represented as running through and across each grant. The lines in the certificate of survey do not expressly call for crossing the creek; but each certificate and grant calls generally for land lying on Crow Creek. If the lines of the tracts herein before mentioned—No. 12 and 13—in the said chain of surveys be run according to the course of the needle and the distances called for, they will not include Crow Creek or any part of it, and will not include the land in possession of the defendants. If they be run according to the

as pre-emption rights, yet by their subsequent acts in making their entries with the surveyor, they have reduced them to the footing of treasury warrant claims, by omitting in their entries to call for their respective improvements, the foundation and essence of pre-emption rights. (Hughes's Rep., 194, Bryan & Owings v. Wallace.) These circumstances render it unnecessary for the court to express an opinion as to the description of persons contemplated to be relieved by the act of the Virginia legislature which passed in May, 1781.

The defendants derive their title under an entry made the 22d of June, 1780, in the words following, to wit: "William Lynn, James Barbour and John "Williams enter 1000 acres upon a pre-emption war- "rant, beginning one-quarter of a mile below the "Big Blue Lick, on Licking, on the south side "thereof, running up both sides of the said creek, "and east and south for quantity," which, being of elder date than that of the complainants, the defendants holding the elder grant for the lands in controversy, I shall therefore consider the validity of their entry first, and test thereby their right to the land in dispute, which, if it be defective and cannot be supported, must yield to the complainant, whose entry, in that case, is deemed good and valid for so much as it can legally cover.

The important call in the entry of the defendants is "the Big Blue Lick on Licking, on the south side "thereof."

The validity of this entry rests on the following points: Was the lick, described in the connected plat filed in this suit by the name of the Blue Lick, on the 22d day of June, 1780, and prior to that time generally known and called by the name of "the Big Blue Lick?" Does it lie on the south side of Licking? Is it a big lick? If the lick was not notoriously known by the name the "Big Blue Lick" prior to June, 1780, is the identity thereof so described as to put a subsequent locator on his guard?

By the testimony taken in this cause the lick in controversy was discovered by the complainant and his fellow-adventurers in the year 1773, and was by them called the Upper Blue Lick, in contradistinction to another and larger lick which had then been discovered by some of the company lower down Licking.

In the year 1775 another company of adventurers, consisting of five persons, of whom William Lynn was one, discovered the lick, and by them it was called the "Big Blue Lick," and from the entry made with the surveyor by Lynn, it was so known to him, and called by that name on the 22d day of June, 1780.

From the year 1777 to the present day the lick has been generally, and perhaps universally, with the above exception by Lynn, designated by the name of the Upper Blue Lick. The weight of testimony preponderates, as to the name of the lick, in favor of the complainant. Therefore, as to the notoriety of the lick by the name of "the Big Blue Lick," the entry of the defendants is defective.

Although it often happens that notoriety of an object called for in an entry cannot be satisfactorily proved, yet the identity thereof may be so described *that it may be found by reason- [*172 able inquiry and searching therefor, and when found, known by the description. In that case, identity is equal to notoriety.

I will now inquire how far the identity of the lick called for in the entry of the defendants can be supported.

All the witnesses in the cause speak of the lick in question as being a blue lick, and it is so admitted by the parties who, in their admission, represent the salt water issuing from the spring to be of a bluish color. There is no testimony which proves

true meridian, or so as to include Crow Creek, they will include the lands in possession of the defendants. Whereupon the counsel for the plaintiff moved the court to instruct the jury,

1. That the lines of the said lands ought to be run according to the true meridian and not according to the needle.

2. That the lines ought to be run as to include Crow Creek and the lands in possession of the defendants.

The court overruled both these motions and instructed the jury that the said grant must be run according to the course of the needle and the distances called for in the said grants, and that the same could not be legally run so as to include Crow Creek, and that the said grants did not include the lands in possession of the defendants. To this opinion an exception was taken by the plaintiff's counsel. A verdict and judgment were rendered for the defendants, and that judgment is now before this court on a writ of error.

The Chief Justice, in stating the case, omitted the fact that testimony was offered by the plaintiff at the trial to prove "that the surveyor "who made the plats and certificates of survey "annexed to the grants, had regard to the true "meridian, and not to the course of the needle, "in making the said certificates of survey, and "inteuded the courses of the survey so to be "run;" which testimony was rejected by the court below as inadmissible; but the court ad-

175*] mitted evidence "that *the general "practice of making surveys by surveyors has "been to run to the courses of the needle."

Swann, for the plaintiff in error.

The court below ought not to have rejected the testimony to prove the intention of the surveyor to run the lines of these grants by the true meridian. It corroborates the plat annexed to the grant. The rule of construction as to grants from the state, especially in Virginia, North Carolina and Tennessee, differs from the rule as to other deeds. Course and distance may be controlled by parol evidence of the actual manner in which the survey was made, and of the actual marks and bounds made upon the land at the time of the survey. The courts have not stopped at a natural object called for, if parol evidence be given that according to the actual survey the line extended beyond that object. The marks control the course and distance of the patent. (1 Hen. and Mun., 77, *Baker* v. *Glasscock;* Taylor's N. Carolina Rep., 116; Hayward's Rep., 238, 378; MS. Rep., *Blount's Lessee* v. *Masters;* 3 Call., 239, *Herbert* v. *Wise.*)

If the witness had testified that a survey had been actually made and that it included the creek, it would have been admissible testimony. But the plat was intended to be a substitute for an actual survey. It was a part of the patent, annexed to it and referred to by it. It was as much a part of the patent as if it had been inserted in it. It shows that the land ought to be laid off so as to include the creek, as plainly as if the patent had expressed it in words. The course, south 40 degrees west, is ambiguous—it may mean a maguetic or a meridional course. The question is, what was the intention of the surveyor? How shall it be ascertained? The most direct mode of ascertaining it is to prove his declarations at the time. It is true that by proving what was the general practice of surveyors you may infer his intention; but that is a secondary mode of proof, and less certain than that proof of his declarations at the time he made the particular survey in question. This is not bringing parol evidence to contradict or to control the plat, but to corroborate and confirm it.

If a grant is capable of two constructions, the court *must adopt that which is most [***176** beneficial to the grantee. (1 Taylor's Rep., 163.)

the existence of any Blue Lick ou Licking, except the Upper and Lower Blue Licks. The testimony establishes two salt springs on the south side of Licking; that the one lowest down is less than the upper spring; that there is another salt spring on the north side of Licking, at the place called the Lower Blue Licks, which is larger than that on the south side of the stream; and that there is no salt spring on the north side of Licking opposite the upper lick. The witnesses also, when speaking of the lower salt springs, describe them generally as one entire object, "the Lower Blue Lick," or Licks; and William Brooks describes both the Upper and Lower Blue Licks as big licks, and that the upper spring discharges most water.

The courts in this country have always endeavored to sustain an entry, if by reasonable construction it be possible. For this purpose they will reject an absurd or superfluous call; they will supply a word; they will consider a call not proved as expunged; and although there are more allegations than are proved, yet if enough is proved to render the entry sufficiently certain, the court will support it.

These observations are made to show that the courts will go great lengths to support defective entries in imperfect and uninportant calls, and are not applicable to the entry now under consideration, which, in itself, is considered as possessing sufficient identity to put a subsequent locator upon inquiry, and when found, to know the place by the description contained in the entry. The Upper aud Lower Blue Licks had received appropriate names as early as the year 1777. The Lower Blue Licks, although there were at that place two salt springs, one on the north and the other on the south side of Licking, had received an appropriate name conveying the idea of unity This was not the situation of the Upper Blue Lick, which, although it had also an appropriate name by which it was most generally known at the time the entry of the defendants was made, yet it lies altogether on the south side of Licking.

The testimony taken in this cause supports every call in the entry of the defendants. All the witnesses concur that the place designated in the connected plat as a blue lick is entitled to that appellation. Brooks says that both the licks, *i. e.*, the Upper and Lower Blue Licks, are big licks; and in answer to a request to express his opinion which of the two was the largest, said he would recommend an examination; and the upper lick is on the south side of Licking. These facts apply to the description given in the defendants' entry, and will not apply to the Lower Blue Licks. Therefore, as no entire blue lick is proved to exist on the south side of Licking, except that designated in the connected plat, the entry of the defendants is sustained, and the court is of opinion that no doubt could exist in the mind of a subsequent locator, upon viewing the Upper and Lower Blue Licks, and comparing the situation and other circumstances attending the Upper Blue Lick, with the entry, but that it was the place described and would defeat any idea of ambiguity, if it had occurred.

On examining the connected plat I find that the defendants have commenced their survey on Licking, about one hundred poles below the lick, whereas, by the entry, they ought to have begun only eighty, that being the precise distance called for as the point of beginning of their survey; to rectify which a new survey was ordered, upon the return of which the defendants were decreed to convey to the complainants so much of the land was in the defendants' original survey, and was now left out by the new survey, as interfered with the complainant's survey, and that the complainant's bill be dismissed as to all the residue.

Jones, contra.

The general practice of the country is to survey by the compass, and all the courses expressed in surveys refer to the magnetic meridian. A certificate of survey, therefore, is always supposed to express maguetic courses unless the contrary is expressed on its face. No parol proof can be admitted to contradict what is so strougly implied. It would be a dangerous practice—it would be a difficult thing for a common surveyor to ascertaiu the true meridian, and thcre is no law of North Carolina which compels him to do it. The testimony offered was not to prove any act of the surveyor, but his intentions.

There is no natural boundary called for in the patent. The general expression that the land is on Crow Creek cannot control the course and distance. The expression in the patent, "as by the plat hereunto annexed will appear," refers only to the course and distances, and not to the actual location of the land. The figure of a creek dclineated on the plat, without any reference to it in the certificate of survey, cannot coutrol the bouudaries actually described. Not a word is said about the lines including or crossing Crow Creek; and in order to include the creek you must deviate from the straight line called for.

C. Lee, in reply.

The intent of a grant must be effectuated, if by any means, consistent with the rules of law, it can be done. The intent of this grant cannot be effectuated by the mode of survey of the court below. The plat annexed to the grant shows the intent to be to make the survey conform to the nature of the ground so as to include the creek and the valley, and exclude the mountains. The law of North Caroliua requires the plat to be auuexed to thc deed, which is thereby, aud by the reference to it in the body of the deed, made a part thereof; and contains a plain declaration that the grantec shall have the valley through which the creek **177*]** runs. *On what ground could the testimony of the intention of the surveyor have been rejected by the court, when they admitted testimony to show the general practice to be to survey by the magnetic meridian? That general practice was only a fact from which the jury might infer, in the absence of positive testimony, what the intent of the surveyor was. It was a grade of evidence inferior to positive testimony of the intentiou. It was only *prima facie*, not conclusive, evidence of his meaning. Therc was no law of North Carolina which required the surveyor to go by the magnctic aud not by the true meridian. He was at full liberty to adopt the true meridian if he pleased. We say he did so, and the plat itself is evidence of the fact, for it could not otherwise be consistent with itself. You must run the liues according to the true meridian to include the creek.

MARSHALL, *Ch. J.*

Does not a difficulty arise in consequence of the grant having beeu made without actual survey?

C. Lee. That is a matter between the state and the grantee. After a graut, no stranger can take advantage of such a defect. The state may waive the objection if it chooses to do so.

Swann. It has becn settled, I believe, in North Carolina, that when a grant has actually been made no enquiry shall be made by the state as to the survey, &c.

In Hayward's Rep., 358, the judge says, "when a grant has issued we can look no "further back; all previous proceedings must "be considered as regular."

March 1st. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

"It is undoubtedly the praetice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be *bounded by the courses and distances [***178** of the patent, according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequeutly if marked trees and marked corners be found conformably to the calls of the pateut, or if watcr-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.

The reason of the rule is, that it is the intention of the grant to convey thc land actually surveyed, and mistakes iu courses or distances arc more probable and more frequent than in marked trees, mountains, rivers or other na-

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NOTE.—Where reference is made in a deed to a recorded plat, evidence in an action of ejectment, to show that the recorded plat thus referred to differed from the original plat, is inadmissible. Until an action to reform the deed was brought, and the deed reformed for mistake, in equity, the deseription given in the deed by reference to the recorded plat is conclusive upon the parties. Jones v. Johnston, 18 How. 150.

Where both parties claimed under deeds which referred to a recorded plat, as a means of describing the premises, it is immaterial whether the plat is recorded precisely as required by the statute. If the description in the deed was made sufficiently certain, by reference to the plat, to locate and identify the lots intended to be conveyed, the title of such lots passed by the deed to the grantees whether the plat conformed to the statute or not. Noonan v. Lee, 2 Black. 499.

Where, in an action of ejectment, parol evidence was given by plaintiff that two of the calls in his deed were not applicable to a lot of which he was in possession, unless another lot, of which defendant was in possession, was also included, defendant may give parol evidence of the acts and declarations of plaintiff, to show that defendant's lot was not included in the description contained in plaintiff's deed. Atkinson v. Cummins, 9 How. 479; Pancoast v. Barry, 1 Cranch, C. C. 176.

Extraneous evidence is competent to show the existence and locality of objects called for, but not to explain or construe the words of an entry. Meredith v. Pickett, 9 Wheat. 573.

Where deed conveyed property to D "as trustee," without saying for whom, parol evidence is admissible to show what was the trust, to prevent D's claiming adversely to the beneficiaries. Railroad Co. v. Durant, 5 Otto. 576.

Where no ambiguity exists in the patent as to the person described as patentee, parol evidence is in-

tural objects capable of being clearly designated and accurately described. Had the survey in this case been actually made, and the lines had called to cross Crow Creek, the courses and distances might have been precisely what they are; it might have been impracticable to find corner or other marked trees, and yet the land must have been so surveyed as to include Crow Creek. The call in the lines of the patent to cross Crow Creek would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause.

That the lands should not be described as lying on both sides of Crow Creek, nor the lines call for crossing that creek, are such extraordinary omissions as to create considerable doubt with the court in deciding whether there is any other description given in the patent of sufficient strength to control the call for course and distance.

The majority of the court is of opinion that there is such a description. The patent closes its description of the land granted by a reference to the plat which is annexed.

The laws of the state require this annexa-
179*] tion. In *this plat, thus annexed to the patent, and thus referred to as describing the land granted, Crow Creek is laid down as passing through the tract. Every person having knowledge of the grant would also have knowledge of the plat, and would, by that plat, be instructed that the lands lay on both sides of the creek. There would be nothing to lead to a different conclusion, but a difference of about five degrees in the course, should he run out the whole chain of surveys in order to find the beginning of No. 12; and he would know that such an error in the course would be corrected by such a great natural object as a creek laid down by the surveyor in the middle of his plat. This would prove, notwithstanding the error in the course, that the lands on both sides of Crow Creek were intended to be included in the survey, and intended to be granted by the patent.

It is the opinion of the majority of this court that there is error in the opinion of the Circuit Court for the District of East Tennessee in this, that the said court instructed the jury that the grant, under which the plaintiff claimed, could not be legally run so as to include Crow Creek, instead of directing the jury that the said grant must be so run as to include Crow Creek, and to conform as near as may be to the plat annexed to the said grant; wherefore it is considered by this court that the said judgment be reversed and annulled and the cause be remanded to the said Circuit Court, that a new trial may be had according to law.

The Chief Justice added that he did not think the question about the true meridian had much to do with the case. The court decided it upon the plat. If it had not been for the plat they should have said that the land ought to be surveyed by the magnetic meridian.

DUVALL, *J.*

My opinion is that there is no safe rule but to follow the needle, making allowance for variation according to practical observations.

S. C. 4 Wheat. 444.

Cited—5 Wheat. 372; 3 How. 193, 672; 2 Black. 504; 2 Curt. 574; 2 Story, 291.

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*OWENS *v.* HANNEY. [*180

Absent — LIVINGSTON, *J.*, STORY, *J.*, *and* TODD, *J.*

It is not necessary that the transcript of the record should contain the names of the jurors. Semb: that if it appear by the record that the plaintiff below was a subject of Great Britain, and a war break out between Great Britain and the United States, after rendition of the judgment below, and before affirmance on the writ of error, the plaintiff in error cannot take advantage of the fact that the original plaintiff is an alien enemy, but the judgment may be affirmed.

ERROR to the Circuit Court for the District of Georgia, in an action of *assumpsit*, upon a special promise to pay interest upon the amount of a decree in chancery, in consideration of forbearance.

The plaintiff below is stated in the declaration to be an alien and British subject, and the defendant a citizen of Georgia.

A demurrer to the declaration having been overruled, the defendant pleaded *non assumpsit*, upon which issue the verdict and judgment were against him in May, 1811, and he brought his writ of error.

In the transcript of the record which came up, a blank is left for the names of the jurors, but in other respects the record appears to be perfect. The verdict and judgment are fully stated.

War was declared by the United States against Great Britain on the 18th of June, 1812, and continued at the time of the argument in this court.

Harper, for the plaintiff in error, contended,

1. That as it appeared upon the record that

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admissible to show that the father was intended as patentee, and not the son to whom the patent was issued and who is described as patentee, in action of forelosure of a mortgage given by the son. Babcock v. Pettibone, 12 Blatchf. 354.

In order to ascertain the meaning of ambiguous words in a deed, the acts and admissions of the parties subsequently to the execution of the deed, are legitimate evidence to show what they then admitted to be the meaning of the terms used in the deed. Goodyear v. Cary, 4 Blatchf. 271.

In determining what lands are embraced in an ancient deed, the description in which is ambiguous, all the circumstances attending the making the grant are admissible, to give the court the same advantages for construing the deed which was possessed by the parties themselves. The quantity of land specified, the boundaries named, and the survey as made, are all to be considered. The practical interpretation which parties interested have by their conduct given to the instrument, is always admitted as one of the best tests of the intention of the instrument. Cavazos v. Trevino, 6 Wall. 773; Stone v. Clark, 1 Met. 378.

In chancery, a mistake in a deed may be shown by parol testimony. A mistake in reducing instruments to writing is a head of equity jurisdiction, and parol evidence is competent to prove the mistake. Abbee v. Goodwin, 7 Conn. 377; Inskoe v. Proctor, 6 Monroe, 316; Ross v. Wilson, 7 Smedes, & M. 753; Wesley v. Thomas, 6 Harr. & J. 24, 435; Randall v. Phillips, 3 Mas. 378. In such case the mistake must be alleged. Morris v. Morris, 2 Bibb. 211; Westbrook v. Harbeson, 2 McCord, 115; Dwight v. Pomeroy, 17 Mass. 303; Lemaster v. Burkhart, 2 Bibb. 28; Fenwick v. Ratliff, 6 Monroe, 154; Fishback v. Woodford, 1 J. J. Marsh. 87; Thomas v. McCormick, 9 Dana 108.

the plaintiff was an alien enemy, and the defendant had had no opportunity to plead that fact, this court ought not to affirm the judgment; and,

2. That the omission of the names of the jurors was fatal inasmuch as it did not appear from the record that it was the verdict of a legal jury.

March 1st. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, stated the opinion of the court to be that the omission of the names of the jurors was not material. Nothing was said upon the first point.

Judgment affirmed with costs.

181*] *THE UNITED STATES

v.

THE CARGO OF THE SHIP FANNY, JENNINGS, MASTER.

Absent—TODD, *J.*

Under the non-intercourse act of 1809 a vessel from Great Britain had a right to lay off the coast of the United States, to receive instructions from her owners in New York; and, if necessary, to drop anchor, and in case of a storm to make a harbor; and if prevented by a mutiny of her crew from putting out to sea again, might wait in the waters of the United States for orders.

APPEAL from the sentence of the Circuit Court for the District of Connecticut, restoring the property to the claimants.

The American ship Fanny was laden at Greenock, in Scotland, with a cargo of British goods, the property of citizens of the United States, and sailed from thence on the 4th day of July, 1812, after the repeal of the orders in council, and before the war between Great Britain and the United States was known in Greenock. The orders to the captain were to proceed to New York; but unless he was perfectly sure of being allowed an entrance for ship and cargo at New York, he was not to go into the waters of the United States, but to send up a pilot boat with his letters so that the consignees might fix upon a port of discharge. The master had no knowledge of the war until his arrival on the coast, when he received it off Montaug Point, from a pilot boat, who also informed that several British frigates were off Sandy Hook, capturing American vessels. Whereopon he dispatched the pilot boat with letters for his owners by the way of New London. Soon afterwards it became calm, and the ship drifting too near the shore he dropped anchor. In the course of the night it came on to blow a gale, and finding it impossible to lay there he attempted to get under weigh and stand off, but before he could get up the anchor and make sail he drifted so far in that he could not fetch Montaug Point, and the pilot informing him that there was good anchorage ground in Fort-pond-bay, and that it would not be safe to keep out, he proceeded with the ship to that bay, intending to stand out as soon as the storm abated. Having there cast anchor and rode out the gale, his crew refused to get under weigh to go out of the waters of the United States, alleging that they understood he had a British license, and was going to put his ship *under the [*182 protection of British ships of war, and they were afraid of being impressed. He then determined to come out into the sound and there wait for orders, without going into any port. He did so, but was boarded about half way from Fort-Pond-bay to the race, Fisher's Island bearing north, and seized by a revenue cutter, who carried him into New London, where the cargo was libeled for having been shipped in Great Britain with the knowledge of the master, with intent to be imported into the United States, contrary to the provisions of the non-intercourse act of 28th June, 1809, (vol. 10, p. 13). In the District Court the cargo was condemned, but was restored by the Circuit Court. From this sentence the United States appealed.

The cause was argued by *Jones* for the United States, and *Daggett* for the claimants, in the absence of the reporter.

March 1st. *Absent*—TODD, *J.*

JOHNSON, *J.*, delivered the opinion of the court as follows:

This case bears every feature of fairness. The voyage was undertaken upon the repeal of the orders in council. The vessel was laden in the short space of four days, and sailed without a knowledge of the war. Her destination was alternative—to New York, if she could enter; if not, to a British port. Upon arriving off Montaug, she receives notice of the war, and of the danger of capture in prosecuting her voyage to New York. A pilot boat is then dispatched to New London by the captain with notice to his owners of his situatiou, and a request for instructions.

To call off for instructions was fair and justifiable; and to obtain them it was necessary that he should await the return of the pilot boat. Thus circumstanced, a calm obliges him to drop anchor to prevent his drifting on shore, and a storm forces him into a bay for shelter. Whilst there his crew mutiny, and prevent his leaving the bay in order to lie off and await the return of his messenger; and whilst plying in the waters between *Montaug and New [*183 London, he is seized by the revenue cutter and forced into the latter port. We are of opinion that there was nothing either in action or intention which subjected this vessel to municipal forfeiture. A condemnation is claimed on no other ground; and the decree of the Circuit Court must, therefore, be affirmed.

The claims of the several parcels of merchandise seized in the Fanny rest on the same circumstances, and must likewise be restored.

Cited—Blatchf. Pr. 85.

THE FRANCES, BOYER, MASTER.

(*Dunham & Randolph's claim.*)

Absent—TODD, *J.*

If a British merchant purchase, with his own funds, two cargoes of goods in consequence of, but not in exact conformity with, the orders of an American house, and ship them to America, giving the American house an option within 24 hours after receipt of his letter to take or reject both cargoes—and if they give notice within the time that they

will take one cargo, but will consider as to the other; this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume the property and make them accountable for that which came to their hands. The right of property in the cargo not accepted does not, *in transitu*, vest in the American house, but remains in the British subject and is liable to condemnation, he being an enemy.

IN this case further proof was ordered at the last term. (See Ante, vol. 8. p. 354.)

Pinkney, for the claimants.

The property vested in Dunham & Randolph by the shipment. It was made in consequence of, although not strictly in conformity with, their orders; and delivery to the master of the vessel was tantamount to a delivery to themselves. The invoices and bills of lading all stated the goods to be shipped on their account and risk.

But if the property did not pass by the shipment, there is no reason why it should not pass *in transitu*, so that it be before capture. It is true that it cannot vest *in transitu* so as to defeat a vested belligerent right. But if the transfer take place, according to the original terms of the contract, before a belligerent right has accrued, it is not within the principle nor the spirit of the rule. If the further proof shows that the property had absolutely vested in Dunham & Randolph before the capture, it must be restored.

The further proof shows that the invoice, stating the shipment to be made for their ac-
184*] count and risk, was *sent to them; and that D. & R. wrote a letter before the capture of the Frances accepting the goods by the Fanny, and saying that they would consider as to those by the Frances.

The question then is, whether the whole of both cargoes did not thereby vest, *eo instanti*, in Dunham & Randolph.

The documentary evidence is clear and positive; it behooves the captors to show how it is qualified.

The condition upon which the property was to vest in the claimants was performed before the capture. They agreed to take the goods by the Fanny, and were instantly bound to take both shipments. They could not afterwards refuse that by the Frances. Their letter agreeing to take the goods by the Fanny was dated the 22d of August. The Frances was not captured until the 28th.

Emmett, on the same side.

The surplus of goods beyond the order, were chiefly if not entirely in the Fanny and accepted by D. & R., so that there can be no question on the ground that the goods by the Frances were not ordered.

Dunham & Randolph's letter of 19th of September explains the cause of their partial acceptance.

Dexter, contra.

This court has decided that this was a condition precedent, and that the transfer could not take place until the condition was performed.

The first question is, whether, if the goods were accepted by Dunham & Randolph, either in fact or in law, the property could pass *in transitu*. The general principle is, that it could not. The question always is, in whom was the right of property at the time of shipment? The simplicity and celerity with which the trial of captures must be conducted require that the question should be limited to the time of shipment. For the *same reason prize courts [*
185 have rejected equitable liens. If it were not so, further proof would be required in every case. (6 Rob., 329, note, *Twen Venner Monk.*) This rule is reasonable. Possession is evidence of ownership. Change of title *in transitu* is only an exception to the general rule. The exception should be confined to the cases in which it has been held necessary, as where possession could not be delivered, &c. The papers on board are always sufficient for the captors. In a prize court the documentary evidence is all important. This point is settled in the case of the claim of Jones & M'Gee in *The Venus* at this term.

As to the further proof produced in this cause, it is of very little importance. Dunham & Randolph did not comply with the condition upon which the property was to vest in them. They agreed to take a part only, and therefore were not entitled to any. It is immaterial whether this bound them to take the whole or not. It did not bind Thompson. He had a right to refuse to let them have any part, as they had not accepted the whole, or he might insist upon their taking the whole. It was at his option to call upon them to account, as his factors, for the whole. If Thompson had such a right, the captors have such a right, for by the capture they succeeded *jure belli* to all the rights of Thompson.

The time was past when they accepted the goods by the Fanny; they were in the custody of the law under the seizure of the revenue officers. Dunham & Randolph could only accept them conditionally; *i. e.*, if they should be restored; but if they should be condemned they could not receive them.

It is not credible that they should have received them absolutely at the time they were under seizure. They did not *bona fide* accept them. It is not to be believed that they would take upon themselves the risk of their condemnation. It was probably done as a cover for the benefit of Thompson. The goods not being according to order, they were not bound to accept them. Thompson made a new proposal to them. They did not accept it, but offered new terms on their part, to which Thompson did not assent; so that there was no agreement. The property never passed.

Emmett, in reply. [*
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There are two questions in this cause:

1. The first is a question of fact; did Dunham & Randolph accept the goods?

2. The second is a question of law; can such an acceptance change the title *in transitu?*

1. Dunham & Randolph, relying on the justice of the United States, and that they would protect goods the property of citizens of the United States, shipped on the faith of the declarations of their agents respecting the effect of the repeal of the orders in council, did *bona fide* accept them. This appears from their letter of the 19th of September. They had no motive to make the goods appear American rather than British—for in each case they would be equally liable to condemnation. They relied entirely upon the justice of the government.

The acceptance of the goods by the Fanny was absolute. The language used in regard to those by the Frances was intended to deceive the enemy, in case of British capture.

Thompson had no right to annex the condition to the acceptance. The goods were ordered by Dunham & Randolph. Thompson had agreed to execute the order, and was bound so to do. In shipping the goods he was executing an order, not making a bargain. Dunham & Randolph had a right to take to their own account the goods ordered, and receive the residue as a consignment to sell for the account of Thompson. If the question were now open, I should say that these goods never belonged to the shipper. They were purchased by the agent of Dunham & Randolph by their order and for their account.

2. In point of law, what was the effect of the acceptance? The acceptance was good for both cargoes or it was good for neither. Thompson either had or had not a right to annex the condition. If he had not, then the goods were the property of Dunham & Randolph *ab initio*. If he had a right to annex the condition, they **187***] *had no right to reject it. They were bound to take all or none—if they took part they were bound to take the residue. Their reservation of a right to consider as to the goods by the Frances, was void. The only remaining question is, whether belligerent property can change *in transitu*.

Belligerent rights, in derogation of the common law, are to be construed strictly. They are not to be extended further than the state of war requires. (5 Rob., 161, *Vrow Anna Catharina*. The rules of war are not to be changed for the convenience of captors. It is true that the captors are to judge by the ship's papers; but here the ship's papers all showed the truth of the case; and nothing but a single letter cast any doubt upon it.

The rule extends no further than that a neutral title shall not originate during the voyage.

If the title originated anterior to the war; if the shipment was made before the war, and not in contemplation of war; and if the condition upon which the title was to change was annexed before the war, such a contract could not be in violation of the belligerent rights.

Thompson had not an option to hold Dunham & Randolph to the acceptance or not as he pleased. If they did an act which bound them, he was bound also.

The acceptance must be considered absolute, and the condition not in derogation of belligerent rights.

March 2d. *Absent*—TODD, *J.*

JOHNSON, *J.*, delivered the opinion of the court as follows:

This claim is interposed to obtain restitution of three bales and nineteen boxes of goods captured in the Frances. As early as the 23d of July, 1811, these claimants, anticipating a repeal of the orders in council, give an order to Alexander Thompson, of Glasgow, to ship them a variety of articles. In July, 1812, upon the repeal of the orders in council, Thompson ships the articles ordered; and, originally intending **188***] to ship to *the claimants a consignment on his own account, intermingles with the goods ordered a variety of others not contained in the order of the claimants. These goods are shipped by two vessels, the Fanny and the Frances; and, by a letter dated the 11th of July, 1812, Thompson advises the claimants of these shipments; and, after descanting on the merits of the articles, and declaring his reason for blending other goods with those shipped to their order, and his subsequent determination to make them an offer of the additional goods, he continues in these words: "I leave it with "yourselves to take the whole of the two ship-"ments, or none at all, just as you please. If "you do not wish them, I will thank you to "hand the invoices and letters over to Messrs. "Falconer, Jackson & Co. I think twenty-"four hours will allow you ample opportunity "for you to make up your minds on this point; "and if you do not hand them over within that "time, I will of course consider that you take "the whole. You will see, I think, the rea "sonableness of your taking the whole or none "of the shipment."

The Fanny reached the waters of the United States in safety; and, being seized by a revenue cutter, was carried into New London, where she has been finally restored. The Frances was captured on the 28th of August, by the privateer Yankee, and carried into Rhode Island. On the 22d of August, after the arrival of the Fanny, the claimants write to Falconer, Jackson & Co., and accept of the shipment by the Fanny; but with regard to that by the Frances they write in the following words: "His letter also speaks of another ship-"ment of thirty-one packages per Frances, "which, on arrival, we shall then hand in our "determination." On the first of September following they again write to Falconer, Jackson & Co., intimating their acceptance of the shipment by the Frances.

On this state of facts it is contended that the claimants are entitled to restitution—that they either had an original interest in the goods shipped, or had acquired one before the capture.

In the ordinary course of mercantile transactions, a delivery to a ship-master is a delivery to the consignee. *But it is evident that [***189** this delivery may be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is, that in the latter case he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit or with his own funds, is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it. There was, therefore, nothing inconsistent with the relative rights of the parties in Thompson's imposing upon the consignees the condition of taking all or none of the two shipments; and the consequence was, that the delivery was not absolute, but qualified; and, until the condition performed the goods remained the property of the shipper; and had they suffered shipwreck the loss would have been his.

But it is contended that the condition was performed, and that this case forms an exception from the rule that, as to the exercise of

belligerent rights, there shall be no transfer *in transitu*.

The acceptance of the cargo by the Fanny was on the 22d, the capture of the Frances on the 28th of August. It is contended that the acceptance of the Fanny's cargo was conclusive as to both shipments; and that, although partial in terms, it must, in law, have effect as to the whole, since such was the condition imposed by the shipper; and that it was, in fact, the intention of the claimants that such should be the effect of the acceptance; but the reservation was intended only as a *ruse de guerre* to guard against the effects of hostile capture.

There is certainly nothing illegal in resorting to devices to elude hostile capture; and where it can be clearly shown that property is really neutral or friendly, its being covered under **190***] hostile habiliments for the purpose *of evasion, will not necessarily subject it to condemnation. But the evidence must be less equivocal than that relied on in this case. The property was already captured and libeled and as liable to American capture when the claimants' letter of the 19th of September was written. To receive such evidence, under such circumstances, to so critical a point, would be to surrender every belligerent right to fraud and imposition. The letter of the 22d of August must, therefore, be taken on its plain import, and such effect given to it as its words imply.

This letter contains an express exclusion of the goods under consideration; but it is contended that, as Thompson's letter left them no latitude, but obliged them either to choose or refuse the whole, their acceptance of part cast on them the property in the whole.

But we are of opinion that such was not the effect of this act of the claimants. The consequence of such a doctrine would be, that where a property is to be acquired upon a condition performed, the condition may be rejected, and yet the property acquired. It certainly put it in the power of the shippers either to cast the whole property upon the claimants or resume the property and make the consignee accountable for that which had come to his hands. Falconer, Jackson & Co., upon the arrival of the Frances, had she not been captured, would have had an undoubted right to demand the shipment made by her, on the ground of the claimants' not having accepted it within the time limited; and it would have been in vain for the claimants to have contested their right, whilst they held the letter of the 22d of August and Thompson's instructions on the subject of the acceptance. If, then, it rested with Thompson or his agent to retain the property in this shipment, or cast it upon the claimants, the consequence is, that the legal interest still remained in the shippers.

This conclusion on the state of interest in the parties, renders it unnecessary to consider the argument urged to except this case from the rule relative to changes of property *in transitu;* and we hope it will be, at all times, recollected that the reasoning in this case is not founded on the implied admission of the distinction taken by the claimants' counsel on this subject.

Aff'g—1 Gall. 445 in part; see 8 Cranch, 354.
Cited—1 Woods, 65.

*THIRTY HOGSHEADS OF SUGAR,

(*Adrian B. Bentzon, claimant,*) [***191**

v.

BOYLE AND OTHERS,

Being the officers and crew of the privateer Comet.

Absent—TODD, *J.*

The produce of an enemy's colony is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence.

An island in the temporary occupation of the enemy is to be considered as an enemy's colony.

In deciding a question of the law of nations, this court will respect the decisions of foreign courts.

APPEAL from the sentence of the Circuit Court for the District of Maryland, condemning 30 hogsheads of sugar, the property of the claimant, a Danish subject, it being the produce of his plantation in Santa Cruz, and shipped after the capture of that island by the British, to a house in London, for account and risk of the claimant, who was a Danish officer and the second in authority in the government of the island before its capture; and who, shortly after the capture, withdrew, and has since resided in the United States and in Denmark. By the articles of capitulation the inhabitants were permitted to retain their property, but could only ship the produce of the island to Great Britain. This sugar was captured in July, 1812, after the declaration of war by the United States against Great Britain, and libeled as British property.

Harper, for the appellant, made two questions:

1. Is this case within the rule of the British prize courts, that the produce of a plantation in an enemy's country shall be considered, while such produce remains the property of the owner of the soil, as the property of an enemy, whatever may be the general national character of the owner?

2. If it be within that rule, is the rule to be considered in this country as a rule of national law?

1. Sir William Scott, in laying down the rule in the case of *The Phœnix* (5 Rob., 26, 20), refers to the case of *Juffrow Catharina* in 1783, and the reason of the rule seems to be that the proprietor of the soil incorporates *him- [***192** self with the permanent interests of the country. The rule is modern, and several exceptions have been made to it. In the case of *The Phœnix* the claim was made by persons of Germany for property taken on a voyage from Surinam to Holland, and described as the produce of their estates in Surinam, which was then a colony of Holland, with which Great Britain was at war, Germany being neutral. Sir William Scott admits that if the estates had been purchased while Surinam was in the possession of the British, the case would not have been within the general rule. So in the case of *The Diana* (5 Rob., 60, Eng. Ed.), those who settled in Demarara while it was under British protection were held not to be within the rule; and the case of *The Vrow Anna Catharina* (5 Rob., 161, Eng. Ed.) is another modification of

the rule. These cases were excepted because the proprietors had not incorporated themselves with the permanent interests of the nation.

In the present case Mr. Bentzon never incorporated himself with the interests of the British nation, either permanently or temporarily. The character was forced upon him against his will; he always disclaimed it. He was by birth, and always continued, a Danish subject. He did not voluntarily purchase a plantation in the country of the enemy. When he purchased his estate Santa Cruz was neutral. The occupation of the island by the British was temporary; it was neither permanent in fact nor in law. Peace has restored the island to Denmark. Mr. Bentzon could not, by means of his estate in Santa Cruz, incorporate himself permanently with the interests of Great Britain.

2. But if the case comes within the British rule, are we to adopt that rule and extend it to a neutral nation which has never itself adopted it?

It is but the ordinary case of a neutral carrying on his lawful trade with our enemy; and has nothing in it contrary to the law of nations.

The rule contended for is a mere arbitrary rule, calculated to extend the field of rapine and to increase the maritime power of Great Britain. We have no interest in aiding those views.

193*] *What is the law of nations? Not a rule adopted by one nation only, but the law of nature, of reason, and of justice, applied to the intercourse of nations, and admitted by all such as are civilized. What is there in the code of any other nation to support this rule? It is to be found only in the maritime code of Great Britain, which is not more binding upon us than that of any other maritime power. It can have no force with us, but in cases where the rule of reciprocity or of retaliation will justify its use.

But Denmark has never used nor acknowledged the rule; and, therefore, we cannot justly enforce it against her. But if this court should adopt the rule, we trust it will be with the strictest limitation.

Pinkney, contra.

By the capture of Santa Cruz by the British, it immediately became the colony of an enemy. It is not necessary that the occupation should be perpetual; for the time it was indefinite, and during the occupation it was as much the colony of an enemy as any of his other possessions.

If, then, Santa Cruz was an enemy's colony, its produce, while it remained the property of the owner of the soil, was the property of an enemy. Sir W. Scott, in the case of *The Phœnix* (5 Rob., 21, Eng. Ed.), says that the rule has been so repeatedly decided both in that and the Superior Court that it is no longer open to discussion. No question can be made upon the point of law at this day.

The opposite argument goes to show that if the property in the soil be acquired before the capture of the island the owner would not be considered an enemy, although the island should remain permanently a British colony.

The case of *The Phœnix* contains no exception to the general rule; it is, however, said that the case of *The Diana* shows an exception; but that was a mere question of domicile. The rule now under consideration was not discussed.

*It is said that the party, in order to [*194 acquire the hostile character as to the produce of his estate, must incorporate himself with the interests of the enemy while the soil is in possession of the enemy. But the rule is not so. There is no difference whether he acquire the estate before or after it come into the possession of the enemy; if he continues to hold the estate, he becomes immediately incorporated with the nation *jure belli*.

But it is asked, is Great Britain to legislate for other nations? We say no. But this court will pay great respect to the English decisions on this subject; especially as the rule has been acquiesced in by all the nations of Europe. Not one of them has remonstrated—not even Denmark. It has, therefore, the positive authority of England, and the negative authority of all the residue of Europe. The rule is not harder than that of domicile, to which it is analogous.

Harper, in reply.

It is said that the rule is general, because all the nations of Europe have acquiesced in the English decisions. Several reasons may be given for this appearance of acquiescence. It is a recent rule. No authority can be produced for it earlier than 1783, just at the close of the American war. Peace having immediately taken place, removed the cause of complaint. And as to the late war with France, no case of the kind appears to have arisen. The edicts of France, &c., had a different bearing. It is said that the rule is analogous to that of domicile. But the rule of domicile rests upon a different principle—the principle of allegiance and the safety of the state. A man found in the enemy's country at the breaking out of the war receives the protection of that country, and is bound to do nothing to its injury; and if he do not remove in a reasonable time is to be considered as having incorporated himself with the interests of that country. The rule of domicile is rather a rule of municipal than of national law; and the principal ground of the rule is the necessity of preventing treasonable intercourse with the enemy. It becomes a part of national law only when it applied to neutrals. It has no analogy to the rule now in question, which *was adopted merely to prevent the [*195 interference of neutral with belligerent rights.

March 4th. *Absent*—Todd, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The island of Santa Cruz, belonging to the kingdom of Denmark, was subdued, during the late war, by the arms of His Britannic Majesty. Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land therein, withdrew from the island on its surrender and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzon. On her passage she was captured by the American privateer, the Comet, and brought into Baltimore, where the vessel and cargo were libeled as enemy property. A claim for these sugars was put in by Bentzon; but they were condemned with the rest of the

cargo; and the sentence was affirmed in the Circuit Court. The claimant then appealed to this court.

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?

196*] *In arguing this question, the counsel for the claimants has made two points.

1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty.

2. That the rule has not been rightly laid down in those courts, and consequently will not be adopted in this.

1. Does the rule laid down in the British courts of admiralty embrace this case?

It appears to the court that the case of *The Phœnix* is precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it; but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir William Scott lays down the general rule thus: "Certainly "nothing can be more decided and fixed as "the principle of this court and of the Su- "preme Court, upon very solemn arguments, "than that the possession of the soil does im- "press upon the owner the character of the "country, as far as the produce of that planta- "tion is concerned, in its transportation to any "other country, whatever the local residence of "the owner may be. This has been so repeat- "edly decided, both in this and the Superior "Court, that it is no longer open to discussion. "No question can be made on the point of law "at this day."

Afterwards, in the case of *The Vrow Anna Catharina*, Sir William Scott lays down the rule, and states its reason. "It cannot be doubted," he says, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the

197*] parties. The *produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

This rule laid down with so much precision does not, it is contended, embrace Mr. Bentzon's claim, because he has not "incorporated "himself with the permanent interests of the "nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction does not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though as a Dane he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz he was no enemy; he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British courts. The next inquiry is, how far will that rule be adopted in this country?

*The law of nations is the great [**198** source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, their prize law was our

prize law. When we separated it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in *The Phœnix* is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783, **199***] is quoted in the margin *as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion, to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this court is of opinion that there was no error, and the sentences is affirmed with costs.

Cited—2 Wall. 158; 13 Wall. 393; 16 Wall. 434; 20 Wall. 397; Blatchf. Pr. 75, 76.

EVANS *v.* JORDAN AND MOREHEAD.

Absent—TODD, *J.*

The act of January, 1808, for the relief of Oliver Evans, does not authorize those who erected his machinery between the expiration of his old patent and the issuing of the new one to use it after the issuing of the latter.

THIS was a case certified from the Circuit Court for the District of Virginia, in which the judges were divided in opinion upon the question whether, after the expiration of the original patent granted to Oliver Evans, a general right to use his discovery was not so vested in the public as to require and justify such a construction of the act passed in January, 1808, entitled "an act for the relief of Oliver Evans," as to exempt from either single or treble damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent and previous to the passage of the said act. The act (vol. 9, p. 20) authorizes the Secretary of State to issue letters patent to Oliver Evans in the manner and form prescribed by the general patent law, granting to *him for the term of 14 years the [***200** exclusive right of making, using, and vending for use, the machinery in question, "provided, "that no person who may have heretofore paid "the said Oliver Evans for license to use his "said improvements shall be obliged to renew "the said license, or be subject to damages for "not renewing the same; and provided also, "that no person who shall have used the said "improvements, or have erected the same for "use, before the issuing of the said patent, "shall be liable to damages therefor."

Harper, for the plaintiff.

The former patent of the plaintiff having expired, Congress, in consideration of the particular circumstances of his case, authorized a new patent to issue for another term of 14 years. Between the expiration of the old and the issuing of the new patent, the defendants had erected and used, and continued to use, the plaintiff's machinery in the manufacture of flour, contending that they were protected by the proviso of the act of January 21st, 1808.

We contend that the proviso does not authorize them to continue the use of the machinery after the issuing of the new patent, but merely protects them from damages for having used and for having erected for use the machinery in question, prior to the issuing of the new patent.

The second patent was intended to place Evans in the situation in which he would have been if the first patent had continued in force, except as to his right to damages for acts done in the intermediate time between the first and second patent. If the defendants chose to continue to use the machinery after the new patent, they were bound to pay for the right to use it.

E. I. Lee and *P. B. Key*, contra.

If the construction contended for on the other side be correct, the proviso was wholly useless, because the defendants needed no such protection. Evans could have no claim against them for acts done after his patent had expired, and before the issuing of the new patent. The defendants had a full and perfect right to erect and use the machinery. A law to oblige them now to abandon *their property or to [***201** pay what Mr. Evans may choose to exact, is in the nature of an *ex post facto* law; and although it may not be absolutely unconstitutional, yet is so far within the spirit of the constitution that this court will not give such a construction to the proviso, if it can possibly be avoided. The proviso says that no person who shall have erected the machinery for use shall be liable to damages therefor. The defendants had erected the machinery for use, and are consequently not liable therefor. What can the proviso mean, unless to give those who are in the situation of the defendants the right to use their own machines lawfully erected? The inventions had become public property; every one had a right to use them. Congress did not mean to take away that vested right from those who had availed themselves of it. To deprive a person of the use of his property is equiva-

lent to depriving him of the property itself. Congress could not mean to do this. This court will give the act such an equitable construction as will give effect to the proviso.

Harper, in reply.

The words of the proviso are clear and explicit, and admit not of construction. The legislature may have supposed that the new patent, which was intended to be a continuation of the old one, might have subjected those who had already erected the machinery to damages, and intended to guard against them. It is not certain that under the law under which the patent issued, this would not have been the effect; but it is sufficient if the legislature supposed it would have been. We are not bound to show the motives of the legislature; if their words are clear and explicit, there is no room for construction. The acts which are protected by the proviso are acts done before the issuing the patent; the opposite counsel contend that the legislature, when they said "before," meant after.

The proviso is too plain to bear an argument.

March 4th. *Absent*—TODD, *J.*

WASHINGTON, *J.*, delivered the opinion of the court as follows:

202*] *The question certified to this court by the Circuit Court for the District of Virginia, and upon which the opinion of this court is required, is whether, after the expiration of the original patent granted to Oliver Evans, a general right to use his discovery was not so vested in the public as to require and justify such a construction of the act passed in January, 1808, entitled, "An act for the relief of Oliver Evans," as to exempt from either treble or single damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent and previous to the passage of the said act.

The act, upon the construction of which the judges of the Circuit Court were opposed in opinion, directs a patent to be granted, in the form prescribed by law, to Oliver Evans for 14 years, for the full and exclusive right of making, constructing, using, and vending to be used, his invention, discovery and improvements in the art of manufacturing flour and meal, and in the several machines which he has discovered, invented, improved, and applied to that purpose.

The proviso upon which the question arises is in the following words: "Provided, that no person who may have heretofore paid the said Oliver Evans for license to use the said improvements, shall be obliged to renew said license, or be subject to damages for not renewing the same; and, provided also, that no person who shall have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages therefor."

The language of this last proviso is so precise, and so entirely free from all ambiguity, that it is difficult for any course of reasoning to shed light upon its meaning. It protects against any claim for damages which Evans might make, those who may have used his improvements, or who may have erected them for use, prior to the issuing of his patent under this law. The protection is limited to acts done prior to another act thereafter to be performed, to wit, the issuing of the patent. To extend it by construction to acts which might be done subsequent to the issuing of the patent, would be to make, not to interpret the law.

*The injustice of denying to the de- [***203**
fendants the use of machinery which they had erected after the expiration of Evans's first patent and prior to the passage of this law, has been strongly urged as a reason why the words of this proviso should be so construed as to have a prospective operation. But it should be recollected that the right of the plaintiff to recover damages for using his improvement after the issuing of his patent under this law, although it had been erected prior thereto, arises, not under this law, but under the general law of the 21st of February, 1793.[1] The provisions in this law profess to protect against the operation of the general law, three classes of persons—those who had paid Evans for a license prior to the passage of the law; those who may have used his improvements; and those who may have erected them for use before the issuing of the patent.

The legislature might have proceeded still further, by providing a shield for persons standing in the situation of these defendants. It is believed that the reasonableness of such a provision could have been questioned by no one. But the legislature have not thought proper to extend the protection of these provisos beyond the issuing of the patent under that law, and this court would transgress the limits of judicial power by an attempt to supply, by construction, this supposed omission of the legislature. The argument, founded upon the hardship of this and similar cases, would be entitled to great weight, if the words of this proviso were obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language.

The argument of the defendants' counsel, that unless the construction they contend for be adopted the proviso is senseless and inoperative, is susceptible of the same answer.

*Whether the proviso was intro- [***204**
duced from abundant caution or from an opinion really entertained by the legislature that those who might have erected these improvements or might have used them prior to the issuing of the patent, would be liable to damages for having done so, it is impossible for this court to say. It is not difficult, however, to imagine a state of things which might have afforded some ground for such an opinion.

Although this court has been informed, and the judge who delivers this opinion knows, that the former patent given to Evans had been adjudged to be void by the Circuit Court of Pennsylvania, prior to the passage of this law, yet that fact is not recited in the law, nor does it appear that it was within the view of the legislature; and if that patent right had expired

1.—The 5th sec. of the act of 21st of February, 1793, which is the only section of that act which gives damages for violation of the patent right, is repealed by the 4th sec. of the act of the 17th of April, 1800, vol. 5, p. 90, the 3d sec. of which act gives treble damages, for the violation of any patent granted pursuant to that act, or the act of 1793.

by its own limitation, the legislature might well make it a condition of the new grant that the patentee should not disturb those who had violated the former patent. This idea was certainly in the mind of the legislature which passed the act of the 21st of February, 1793, which, after repealing the act of the 10th of April, 1790, preserves the rights of patentees under the repealed law only in relation to violations committed after the passage of the repealing law.

If the decision above mentioned was made known to the legislature, it is not impossible but that a doubt might have existed whether the patent was thereby rendered void *ab initio*, or from the time of rendering the judgment; and if the latter, then the proviso would afford a protection against all preceding violations. But whatever might be the inducements with the legislature to limit the proviso under consideration, as we find it, this court cannot introduce a different proviso totally at variance with it in language and intention.

It is the unanimous opinion of this court that the act passed in January, 1808, entitled "an act for the relief of Oliver Evans," ought not to be so construed as to exempt from either treble or single damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent, and previous to the passage of the said act. Which opinion is ordered to be certified to the Circuit Court for the District of Virginia.

Aff'g—1 Brock. 248.
Cited—14 How. 560, 562; 3 Story, 135; 3 Blatchf. 495.

205*] *CARGO OF THE SHIP HAZARD
v.
CAMPBELL AND OTHERS.

Absent—TODD, *J.*

Neutral cover of British property. Time for further proof refused.

APPEAL from the sentence of the Circuit Court for the District of Georgia, affirming that of the Circuit Court which condemned the cargo of the Russian ship Hazard, as British property.

The Hazard was captured in December, 1813, about 6 miles from the land of Amelia Island, by a boat from the United States Flotilla, and carried into St. Mary's, in Georgia. The boarding officer, after examining the ship's papers, returned them to the captain, and asked the captain's permission to stay on board that night, which was granted; and at the request of the captain the boarding officer assisted in piloting the ship over the bar of the St. Mary's River, and brought her to anchor, after which he asked again for the ship's papers and then declared his intention to take the ship to St. Mary's. The captain in his protest states that the ship anchored nearer to the Spanish shore and harbor than to any other. The cargo was claimed in behalf of Luning, Gogel & Co., of Gottenburg.

Charlton and *P. B. Key*, for the appellants, contended,

1. That inasmuch as Russia and the United States had both adopted the principles of the armed neutrality, the principle that free ships should make free goods was, as between those two nations, to be considered as part of the law of nations, and that the cargo was protected by the Russian flag.

2. That the capture was made within the territorial jurisdiction of Spain, and therefore void.

3. That the boarding officer practiced a *ruse de guerre* not justifiable towards a neutral. Fraud in war may be *practiced to- [*206 wards an enemy, but not towards a friend. (Duponceau's Bynkershoek, 15.) There ought to have been a *vis major* on the part of the Americans. They ought not to have decoyed the vessel out of neutral waters in order to capture her.

4. That the testimony was not sufficient to counteract the documentary evidence as to the interest of the claimants. And,

5. That as the original German instructions from Luning, Gogel & Co. were taken away by the captors, and not produced on the trial, the claimants ought to be allowed time for further proof.

Jones and *Pinkney*, contra, insisted,

1. That there was no foundation for the idea that there can be a law of nations in force between Russia and the United States which is not equally in force between the United States and all other nations. The United States do not contend that by the law of nations free ships make free goods.

2. That there is no foundation in fact for the allegation that the ship was captured within the jurisdiction of Spain; and if there was, Spain has not complained.

3. The artifice used (if any was used) was perfectly justifiable. A neutral vessel must submit at all events. The deceit produced no effect of which the claimants can complain.

4. That the evidence of fraud in the use of the names of Luning, Gogel & Co. to cover this property was too manifest to require argument. And,

5. That in a case so clearly fraudulent as this, further proof ought not to be allowed. It is alleged that the German instructions have been fraudulently withheld by the captors; their contents have been stated in substance by the supercargo; and if they were here they could not alter the state of the case.

*March 6th. *Absent*—TODD, *J.* [*207

LIVINGSTON, *J.*, delivered the opinion of the court as follows:

The ship Hazard and cargo were libeled as prize of war in the District Court of Georgia, where the latter was condemned, and the ship restored to the master with an allowance for freight. This sentence being affirmed by the Circuit Court, an appeal as to the cargo was taken to this court.

The cargo was claimed in behalf of Messrs. Luning, Gogel & Co., subjects of Sweden, and residing at Gottenburg. It is impossible to look at the proofs in this cause without being at once convinced that this house never had any interest in it. The papers found on board leave not the smallest doubt as to the hostile character of the property, which is also abundantly proved by

the witnesses who were examined in the District Court. The shipment was made by Mr. Worrall, a British merchant at Liverpool, and an English supercargo put on board by the name of Diggles, under whom Mr. Dalmer, who filed the claim, was to act as assistant supercargo. Between Mr. Worrall and Mr. Lowden, who makes some figure in this transaction, there is proved to exist such an intimate connection as to render the one chargeable for the declarations and acts of the other, so far as they regard this shipment. Mr. Lowden, in a letter to his correspondent at Charleston, which was on board of the Hazard, says: "There is "likely to be a great deal of business done be- "twixt this and Amelia Island. The vessel "that this goes by has about £9,000 worth on "board. The parties interested are my par- "ticular friends." And a little further on: "It may perhaps be satisfactory to know that "we have full and unlimited authority from a "respectable house in Gottenburg, to make use "of their name upon any occasion whatever; "so that in case of capture or detention the "necessary proof could easily be produced of "the neutrality of the property." Mr. Worrall writes to Mr. Smith, of Charleston, that the "Russian vessel Hazard, bound to Amelia "Island, was laden by him in conjunction with "some other friends." There was, also, a memorandum on board for the government of **208***] the supercargo, signed by Lowden, *containing, among others, this instruction: "Should "you be boarded at sea by men of war or pri- "vateers, you must uniformly declare the prop- "erty to belong to Luning, Gogel & Co., of "Gottenburg, as it is represented to be by the "documents accompanying the cargo. Men of "war are apt to board under false colors, and "if you don't stick to the text you may be de- "ceived." It may be asked here, why was the supercargo thus cautioned to be on his guard, unless he was in the secret, as he doubtless was, that the documents were colorable, and the property in fact British?

Mr. Dalmer, in the claim interposed by him for the cargo, does not swear to its neutrality, but only that the gentlemen at Gottenburg are owners thereof, as far as he is informed; and it is deserving of attention that Mr. Diggles, the supercargo, not only does not unite with the assistant supercargo in filing this claim, but, on being brought before the commissioners, refuses to be sworn or examined as a witness in the cause. On his examination, sometime afterwards, before the district judge, he states that "he is not acquainted with the owners of the "cargo or any part of it, and cannot swear that "Luning, Gogel & Co. are the owners; that he "received his instructions from Mr. Worrall as "agent of that house."

There was a short letter of instructions on board, to Diggles & Dalmer, dated 8th October, 1813, and proved to be signed by Luning, Gogel & Co., but the body of which must, no doubt, have been written by Mr. Worrall, or under his direction.

Now, although the invoice be made out in the name and for the account and risk of Luning, Gogel & Co., and a letter of instructions signed by them was found on board, it would be giving more weight to these formal documents than they are entitled to, should we say that they have satisfied us, notwithstanding the mass of evidence which this cause presents to the contrary, that the property was other than British through every stage of this transaction. Indeed, the advocates of the appellant, despairing to convince the court of its neutrality, rely principally on an irregularity in the capture, and on a suppression by the captors of a letter of instructions *from Luning, Gogel & [***209** Co., which, it is said, came to their hands.

The capture, it is alleged, was made within the limits and jurisdiction of Spain. Of this there is no sufficient evidence, which renders it unnecessary to say what influence that fact, if established, might have on the ultimate decision of the court. The suppression of the paper in question is also very imperfectly made out; and if it had been brought into court and formed part of the evidence in the cause, it could not possibly do the appellant any good; for a paper merely signed by Luning, Gogel & Co., and converted into a letter of instructions by Mr. Worrall, in Liverpool, to suit his own purposes, as must have been the case here, could have but little effect in removing any one of the numerous doubts which the circumstances of this case are so well calculated to excite.

A motion has also been made for an order for further proof. If the court entertained any difficulty as to the reality of this transaction, or believed that Messrs. Luning, Gogel & Co. could prove that they were, in fact, the owners of this property, perhaps it might listen to the application, late as it is; but believing, as it does, that the evidence, as it now stands, is not susceptible of any satisfactory explanation, and that the captors have made out a clear title to the whole cargo shipped by Mr. Worrall, it cannot, in justice to them, make any such order.

* *The sentence of the Circuit Court is therefore unanimously affirmed with costs.*

SHIP SOCIETE, MARTINSON, MASTER

Absent—TODD, *J.*

If a neutral vessel be captured on her outward voyage from England to Amelia Island carrying a hostile cargo, which is condemned, and if, by the charter-party, the outward cargo is to be carried free of freight, but the homeward cargo is to pay at a certain rate to be ascertained by the nature of the cargo, yet the court will decree freight *pro rata itineris* of the outward cargo, to be assessed upon the principles of a *quantum meruit*. This court will not allow a new claim to be interposed here, but will remand the cause to the Circuit Court, where it may be presented.

APPEAL from the sentence of the Circuit Court for the District of Georgia, affirming the decree of the District Court, which allowed freight *pro rata itineris*, to the Swedish ship Societe, captured on her outward voyage from *England to Amelia Island, with a Brit- [***210** ish cargo on board, which was condemned as prize of war.

By the charter-party, the outward cargo to Amelia Island was to be carried freight free, and the homeward cargo was to pay at the rate of threepence halfpenny a pound for cotton, and in the same proportion for other goods.

Pinkney and *Jones*, for the ship-owner,

Contended, that the freight ought to have been given according to the charter-party, and not to be ascertained by assessors, as ordered in the court below.

Swann stated that he wished to interpose a claim to the cargo of the ship Societe, in behalf of the officers and crews of the United States brigs Rattlesnake and Enterprize, as having been concerned in her capture; and was not certain whether this court would now receive the claim, or whether it should be presented to the court below.

The court said that it must be laid before the Circuit Court.

March 6th. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

William Little, a naturalized citizen of the United States, entered into a charter-party with Magnus Martinson, master of the Swedish ship called the Societe, at London, on the 10th day of November, 1813, whereby the said Martinson let, and the said Little took the said ship to freight for the voyage and on the terms mentioned in the charter-party.

It was agreed, among other things, that the vessel should take on board a cargo, prepared for her in the Thames, and deliver it at Amelia Island, freight free. At Amelia Island she was to take on board such return cargo as might be tendered to her. If she could not be loaded there, she was to proceed to such port in the **211*]** *United States as the agent of Little should direct, and there receive her cargo. There were other provisional stipulations, and it was agreed that the freight on the return cargo should be a sum specified in the charter-party, which exceeded what would have been paid as freight on the return cargo alone had it been totally unconnected with the outward voyage.

On her voyage to Amelia Island the Societe was captured by an armed vessel of the United States, and brought into the District of Georgia, where the cargo was libeled and condemned as enemy property.

A claim for freight was interposed by the master of the Societe, and the District Judge appointed commissioners to ascertain the value of the freight on the voyage to Amelia Island, and decreed freight conformably to their report.

The claimant of the cargo and the master of the ship both appealed to the Circuit Court, where the sentence of the District Judge was, in all things, affirmed. From that sentence an appeal was prayed to this court.

The cases already decided in this court on the questions of domicile and trading with the enemy having completely settled this case, so far as respected the claim to the cargo, that part of the sentence is affirmed without opposition.

On the part of the master, it is contended that his right to freight ought to be measured by his charter-party, not by any estimated value of the freight on the voyage to Amelia Island.

Had the charter-party contained any stipulation for freight to Amelia Island, that stipulation would unquestionably have governed the court. But the outward cargo was to be delivered freight free. So far, then, as the case is controlled by the express stipulations of the charter-party, the vessel is entitled to the whole freight on a return cargo never taken on board, or to nothing.

The court knows of no case of capture where the *neutral vessel has been allowed [***212** freight for a cargo not taken with her. There is no lien on one cargo for freight which may accrue on another. The court can perceive no principle on which a cargo to be delivered freight free can be burdened with the freight agreed to be paid on a cargo to be afterwards taken on board. In this case, too, no sum in gross is to be paid for freight, but a sum depending on the quantity and quality of the return cargo. As between the captor and neutral owner, the court cannot consider this as one entire voyage, but as distinct outward and inward voyages.

If the claim to freight on the return voyage, not commenced at the time of capture, cannot be sustained, the court perceives no other rule which could have been adopted than that which the District Court did adopt. Freight has been allowed on the whole voyage to Amelia Island as on a *quantum meruit*.

The captors not having appealed, no question can arise on the propriety of having allowed the ship any freight whatever. The court, however, will say that it is satisfied with the allowance which is made, and which is certainly an equitable one.

The sentence is affirmed with costs.

The officers of the Rattlesnake and Enterprize, armed vessels of the United States, offered a petition to this court to be permitted to claim for themselves and their crew a share of the prize in the case of the Societe; alleging that they are entitled equally with the officers and crew of the gun-boat by whom the said cargo was libeled; which petition was rejected, and the claim was not received, it being the opinion of this court that the claim of the petitioners must be made in the Circuit Court, to which the cause is remanded.

THE UNITED STATES
v.
GILES AND OTHERS.

Absent—TODD, *J.*

If a marshal before the date of his official bond, receive, upon an execution, money due to the United States, with orders from the comptroller to pay it into the bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor upon the bond, although the money remain in the marshal's hands after the execution of the bond.

Quære. Whether the sureties in a marshal's bond conditioned for the faithful execution of his duty, "during his continuance in the said office," are liable for money received by him, after his removal from office, upon an execution which remained in his hands at the time of such removal.

The comptroller of the treasury has a right to direct the marshal to whom he shall pay money received upon execution, and a payment according to such directions is good, and it seems he may avail himself of it upon the trial without having submitted it as a claim to the accounting officers of the treasury.

No debtor of the United States can, at the trial

set off a claim for a debt due to him by the United States, unless such claim shall have been submitted to the accounting officers of the treasury and by them rejected, except in the cases provided for by the statute.

THIS was a case certified from the Circuit Court for the District of New York, in **213*** which the opinions of the *judges of that court were opposed upon ten questions of law arising out of a special verdict.

It was an action of debt brought by the United States against Giles, late marshal of the District of New York, and his sureties, upon his official bond, dated the 9th of January, 1801, the condition of which was as follows: "Whereas, the above bound Aquila Giles hath been appointed the marshal, in and for the New York district in pursuance of the act, entitled "an act to establish the judicial courts of the United States." Now, therefore, the condition of the preceding obligation is such, that if the said Aquila Giles shall, by himself and by his deputies, faithfully execute all lawful precepts directed to the marshal of the said district under the authority of the United States, and true returns make, and in all things well and truly and without malice or partiality, perform the duties of the office of marshal, in and for the said District of New York, during his continuance in the said office, and take only his lawful fees, then the preceding obligation to be void, or else to remain in full force and virtue."

The defendants pleaded performance. The replication set forth six breaches of the condition of the bond.

1. That the United States having, in May, 1799, recovered judgment in the District Court against one John Lamb for the sum of $127,-952.99, debt, and $20 damages, a writ of *fieri facias* was thereupon issued and delivered to the defendant, Giles, then being marshal, upon which he returned in August, 1799, that he had taken goods and chattels to the value of $50, which remained unsold for want of buyers, whereupon a writ of *venditioni exponas* and *fieri facias* was issued and delivered to the said defendant, Giles, on the 9th of January, 1800, by virtue whereof he sold the said goods and chattels for $50, which sum he received; and also, by virtue of the said writ, sold lands of Lamb to the amount of $60,000, which sum he received and continued to hold until the 1st of February, 1801, when he converted the same to his own use, contrary to the tenor and effect of the condition of his said bond.

*2. That by virtue of the said writ [***214** the defendant, Giles, on the 17th of September, 1800, sold other lands of Lamb for $60,000, which he received on the 20th day of January, 1801, and on that day converted the same to his own use, contrary to the tenor and effect of the condition of the bond.

3. That on the 17th of December, 1800, the comptroller of the treasury of the United States directed the defendant, Giles, to pay into the office of discount and deposit of the bank of the United States, at New York, to the credit of the account of the Treasurer of the United States, all such sums of money as should be made from the property of Lamb, by virtue of the aforesaid writ. That the defendant, Giles, afterwards, on the 23d of December, 1800, by virtue of that writ sold other lands of Lamb, to the amount of $60,000, which he received on the 15th of January, 1801, but has not paid the same, nor any part thereof, into the said office of discount and deposit in the manner directed, contrary to the tenor and effect of the condition of his said bond.

4. That on the 1st of February, 1801, the defendant, Giles, being marshal as aforesaid, had in his hands as marshal, 14 bonds, the property of the United States (particularly described), and on that day converted the same to his own use, contrary to the tenor and effect of the condition of his bond aforesaid.

5. That the defendant, Giles, having, in September, 1800, made the sum of $309.87, by virtue of a *fieri facias* in behalf of the United States, against one Richard Capes, and having

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NOTE.—Sureties on bond to bank, conditioned for faithful performance of the duties of the office of cashier, continue liable for his defaults, after resolutions of the directors to suspend him from office, and that the president receive from him the property and take measures to have the duties of cashier otherwise discharged, until the resolutions are communicated to the cashier and are carried into effect. McGill v. Bk. of U. S., 12 Wheat. 511; affirming S. C. 1 Paine, 661.

Sureties of a public officer for the faithful discharge of his duties, are not liable for previous wrongful appropriations, or previous defaults, of their principal, unless the bond be retrospective in its terms. Farrar v. U. S., 5 Pet. 373; U. S. v. Boyd, 15 Pet. 187; U. S. v. Linn, 2 McLean, 501.

The sureties of a collector of customs are responsible for moneys handed over to him by his predecessor in office, and for those transmitted to him by another collector to enable him to pay expenses, which he is required to disburse officially. Broome v. U. S., 15 How. 143.

Where an officer appointed by commission to hold until the end of the next session of the Senate and no longer, was, during such session, re-appointed to hold during the President's pleasure: *Held*, that the second commission and acceptance under it of the office, were a superseding and surrender of the first commission; and the liability of his sureties in the bond conditioned for the discharge of his duties according to law, given under the first appointment, did not extend beyond it; and such sureties were not liable for moneys received by the officer under a law, extending his powers, subsequently enacted. U. S. v. Kilpatrick, 9 Wheat. 720; U. S. v. Ellis, 4 Sawyer, 590; U. S. v. Eckford, 1 How. 250.

Sureties on an official bond, not discharged by laches of the United States, or its officers. U. S. v. Kilpatrick, 9 Wheat. 720; U. S. v. Vanzandt, 11 Wheat. 184; Dox v. P. M. Gen. of U. S., 1 Pet. 318.

Taking collateral security without suspending the original cause of action does not discharge a surety. U. S. v. Nicoll, 12 Wheat. 505.

Duties imposed upon an officer additional to those which pertained to the office when the bond was given, and the performance of such additional duties by the officer, the character of the office not being changed or the responsibility of the officer for the original duties not being increased, will not discharge the sureties in the bond for liability for the principal's default in the original duties. Gaussen v. U. S., 7 Otto, 584; U. S. v. Bell, Gilp. 41.

Sureties of a bank cashier whose term of office is annual, not liable for defaults occurring after expiration of his year, and his re-election, and lapse of time sufficient for his putting in a new bond. Harris v. Babbitt, 4 Dill. 185; Dedham Bk. v. Chickering, 3 Pick. 335.

Sureties, who have voluntarily united in a bond, cannot defend an action for their principal's default, on the ground that his appointment was unauthorized. U. S. v. Potter, 25 Int. Rev. Rec. 138; U. S. v. Maurice, 2 Brock. Marsh. 96.

A surety, who signed a bond, with blanks unfilled

received the same, eonverted it to his own use on the 1st of February, 1801, eontrary to the tenor and effeet of the eondition of his bond.

6. That the defendant, Giles, having so received all the several sums of money before mentioned, retained the same in his hands until the 27th of Mareh, 1801, when he was duly removed and dismissed from his offiee of marshal, and ceased to be marshal of the New York distriet, and has retained the said several sums of money in his hands ever since. That on the 2d of June, 1804, he was duly notified according **215*** to law, by the comptroller *of the treasury of the United States, to render to the auditor of the treasury of the United States on or before the 10th of October, then next, all his accounts and vouehers for the expenditure of all moneys received by him as marshal of the New York distriet, but he has never rendered the same; eontrary to the tenor and effect of the condition of his bond aforesaid.

The defendants rejoined,

1. To the first breaeh, that the defendant, Giles, reeeived the sum of $50, and sold the lands of Lamb for $30,000 and no more. That by the orders of the eomptroller of the treasury of the United States, he reeeived on the 10th of December, 1800, from the purchasers, $11,000, and no more, in eash, in part of the said sum of $30,000, and took from them, by the like orders of the said comptroller, their respeetive bonds and mortgages, 30 in number, for $19,000, being the residue of the said sum of $30,000. That on that day the United States were justly indebted to the said Giles in the sum of $20,000, for money paid by him at their request for their use, and for fees justly due by them to him as marshal, and for services performed by him for them at their request, when he retained in his hands the said sums of $50, and $11,000, as it was lawful for him to do, in part payment and satisfaetion of the sum of $20,000 so due to him from the United States, and then and there delivered to the United States the said several bonds and mortgages in full payment and satisfaetion of the said residue of the said sum of $30,000. Without that, that he converted to his own use the said sums of $50 and $60,000, in the replieation, in assigning the first breaeh mentioned, or any part thereof in manner and form, &c., any otherwise than by retaining the said sums of $50 and $11,000 as aforesaid.

2. To the seeond breaeh they say, that on the 17th day of December, 1800, the defendant, Giles, by virtue of the said writ, sold other lands of the said Lamb for the sum of $29,383 and 30 eents, and no more, and that by order of the comptroller he received from the purehasers only the sum of $10,000, and took their bonds and mortgages, 30 in number, for the payment *of the balance, being $19,383 [***216** and 30 eents. That the United States were on that day justly indebted to him in the sum of $20,000 for moneys expended, &c., and for fees, and serviees, &e., wherefore he retained in his hands $8,950, part of the $10,000, in part payment and satisfaetion of the said sum of $20,000; and paid to the United States the sum of $1,050, the residue of the said sum of $10,000, and delivered to the United States the 30 bonds and mortgages aforesaid in full payment and satisfaction of the aforesaid sum of $29,383 and 30 eents; without that, that the said Giles converted to his own use, &e., otherwise than by retaining the said sum of $8,950 as aforesaid, &e.

3. To the third breaeh they say, that the said Giles did not receive $39,000, pareel of the said $60,000, but that he received in all the sum of $21,000 only from the buyers of the lands of the said John Lamb; and that the United States were on the said 15th of January, 1801, justly indebted to the said Giles in the sum of $22,000, wherefore he did not pay the said sum of $21,000 or any part thereof into the office of diseount and deposit of the bank of the United States, &e., but then and there retained the same in his own hands, as it was lawful for him to do, &e.

4. To the fourth breaeh they say, that the said Giles, on the 1st of February, 1801, delivered the said bonds to the attorney for the United States; without that, that he converted them to his own use, &c.

5. To the fifth breach they say, that on the 8th of January, 1801, the United States were justly indebted to Giles, in the sum of $22,000, wherefore he retained the said sum of $309 and 87 cents, in part payment and satisfaction of

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as to additional names and dates and amounts, cannot defend an action on the bond, on the ground that his principal fraudulently filled up the blanks with a larger sum than agreed on between the two, and that he inserted worthless sureties who executed the bond. Butler v. U. S., 21 Wall. 272.

The bond of an officer covers not merely duties imposed by existing law, but duties belonging to and naturally connected with his office or business, imposed by subsequent law; but such new duties must have some relation to or connection with such office or business, and not be disconnected from or foreign to both. U. S. v. Singer, 15 Wall. 111.

The sureties of a county treasurer are not discharged by the negligence of the board of supervisors in the auditing of his accounts, which results in the failure to discover an error therein. supervisors of Monroe v. Otis, 62 N. Y. 88.

Sureties on bond given by employee, conditioned that he will faithfully account to his employer for moneys and property of the latter coming to his hands, are not discharged from subsequent liability by the employer's omitting to notify them of a default of their principal known to the employer and continuance of the employment after such default, there being no evidence of fraud or dishonesty of employee; otherwise, where the default is of such nature as to show want of integrity in the employee, and this is known to the employer. A. & P. Tel. Co. v. Barnes, 64 N. Y. 385.

Sureties for debts of an agent to become due not discharged by failure of the principal to disclose previous failures of the agent to account. Howe Co. v. Farrington, 16 Hun. 591; McKechnie v. Ward, 58 N. Y. 541.

Sureties on bond of village collector to village treasurer not liable for failure of collector to pay over state, county and town taxes, levied upon those portions of the town included in the corporate limits and collected by him. Ward v. Stahl, 81 N. Y. 406.

Sureties on a bond, given by an agent, are not bound, when a new and different agency is subsequently formed. Boston H. Man. v. Messinger, 2 Pick. 223.

Sureties of public officer are not liable for moneys placed by the government in his hands after the legal termination of his office. U. S. v. Nicoll, 12 Wheat. 505; nor liable after the resignation of such officer. U. S. v. Wright, 1 McLean, 509.

the said sum of $22,000; without that, that he otherwise converted the same to his own use, &c.

6. To the sixth breach they aver, that Giles did render his accounts to the auditor on the 10th of October, 1804, as he was required to do.

To these rejoinders there were general sur-**217*** rejoinders *and issues, except as to the rejoinder to the third breach; upon which the plaintiffs took issue as to $39,000, and demurred as to the retainer of the $21,000, upon which demurrer the court gave judgment for the United States.

The jury found a special verdict which stated in substance, as follows:

1. As to the first breach, they find that the defendant, Giles, was authorized by the officers of the treasury department of the United States, in executing the aforesaid writ of *fieri facias* to sell the lands of the said John Lamb, on the following terms, viz.: One-fourth of the purchase money to be paid in cash, one-fourth with interest in 2 years, one-fourth with interest in 3 years, and the residue with interest in 4 years from the day of sale, to be secured by bonds and mortgages; and was directed by the comptroller of the treasury, on the 17th of December, 1800, to pay over all moneys he might receive therefor into the office of discount and deposit of the bank of the United States, in the city of New York, to the credit and account of the treasurer of the United States. That the sales were commenced on the 26th of November, and continued from time to time to the 23d of December, 1800. That Giles received from the purchasers before the 9th day of January, 1801 (the date of the bond), $3,713.98, and no more, which sum, together with the sum of $50, which he had before received for the sales of the goods and chattels of the said John Lamb, he never had, nor any part thereof, before the said District Court, to render to the United States, and never paid the same, nor any part thereof, into the said office of discount and deposit, and that he has never been required by any rule or order of the said District Court to bring the said moneys into the court, nor to pay them over in any manner whatever. That between August, 1800, and May, 1801, he arrested one Elias Hicks by virtue of a writ of *ca. sa.* in favor of the United States, for $80,000, and by an indorsement thereon was directed to levy, by virtue thereof, $33,156 and 38 cents, besides marshal's fees and poundage. That he kept the said Hicks in custody, in execution, until he was discharged by order of the Secretary of the Treasury of the United States, pursuant to the act of **218*** *Congress, entitled "an act providing "for the relief of persons imprisoned for debts "due to the United States." That the poundage fees for the service of that writ, if any such fees were due to the defendant, Giles, thereon, have not been paid to him, and that they amounted to the sum of $419.57.

That the United States also became indebted to the defendant, Giles, in the further sum of $8,133.96, for his own fees and services in taking the second census or enumeration of the inhabitants of the United States in the said district; and for moneys paid by him as marshal as aforesaid to his assistants in taking the said census, pursuant to the act of Congress in such case provided, which several sums, so due from the United States to the said Giles, amount to the sum of $8,553.53, and that he has retained the said sums of $50 and $3,713.98, from the times when they were received by him, and still retains them, claiming to hold and retain the same towards the payment and satisfaction of an equal sum due to him from the United States as aforesaid. But whether upon the whole matter aforesaid, the said Giles did in law convert the said several sums of $50 and $3,713.98 to his own use, contrary to the tenor and effect of the condition of his said bond, the jurors aforesaid are ignorant, &c., and if the said Giles did so convert, &c., they assess the damages at $3,763.98, and if, &c.

2. As to the second breach, they find that the said Giles, having received such instructions as aforesaid from the comptroller of the treasury, and having sold the lands as afore said, afterwards, and after the 9th of January, 1801 (the date of the bond), and at different times before the commencement of this suit, received of certain other purchasers of the said lands, several other sums of money, viz., before the 27th of March, 1801 (when he was removed from office), the sum of $1,683.52; and after that day the sum of $17,191.58, which two sums amount to $18,875.10, which was all the money he received from the said purchasers after the 9th of January, 1801; and that the poundage, and charges due to and paid by the said Giles upon the execution and the said sales, and *legally chargeable against [***219** the proceeds of the said sales amounted to the sum of $1,332.85, which being deducted from the said sum of $18,875.10, left the net sum of $17,542.25 in the hands of the said Giles, of the money so received by him after the 9th day of January, 1801. That on the 13th of April, 1803, he paid part of the same—viz., $6,238.35 —to Edward Livingston, who was then the United States attorney for the New York district, which payment was so made with the assent and approbation of the comptroller of the treasury of the United States, and agreeably to the usage and practice in that district; that the said Giles never had the said sum of $6,238.35, nor any part thereof, before the District Court to render to the United States, and has never paid the same to the United States in any other manner than by the said payment to the said Edward Livingston (if such payment was a payment to the United States), and never paid the same, nor any part thereof, into the office of discount and deposit, &c.

That as to another part of the said sum of $17,542.25, to wit: as to the sum of $4,479.68, the said Giles never had the same, nor any part thereof, before the District Court to render to the United States, nor paid the same into the said office of deposit, &c., but has ever since held and retained the same, claiming to hold and retain the same towards payment and satisfaction of an equal sum so due to him by the United States as aforesaid.

That as to the residue of the said sum of $17,542.25, to wit: as to the sum of $6,824.25, the said Giles never had the same, nor any

part thereof, before the District Court to render to the United States, nor paid the same to the United States nor into the office of discount and deposit, &c., but still retains the same; but whether, in law, he converted the said three sums, viz.: the $6,238.35, $4,479.68, and $6,824.25, or either of them, to his own use contrary to the tenor and effect of the condition of his said bond, they are ignorant, &c. If in law he so converted the whole to his own use, then **220***] they so find and assess *damages at $20,613.12. If he did not so convert the first of the said three sums, but did so convert the other two, then they so find and assess damages, at $14,374.77. If he did not so convert the first and second of the said three sums, but did so convert the third, then they so find and assess damages at $9,895.09. If he did not so convert the said third sum, but converted the two first sums, then they so find and assess damages at $10,718.03. If he did not so convert the said second sum, but converted the first and third sums, then they so find and assess damages at $16,133.44. If he did not so convert the two last of the said three sums, but converted the first, they so find and assess damages at $6,238.35. If he did not so convert the first and third of the said three sums, but converted the second, then they so find and assess damages at $4,479.68. And if he did not so convert either of the said three sums to his own use, then they so find.

3. As to the third breach, the jurors find that the defendant Giles did not receive the sum of $39,000, and as to the judgment upon the demurrer respecting the retainer of the sum of $21,000, they assess damages at $21,000.06.

4. As to the 4th breach, they find that the defendant Giles kept possession of the said fourteen bonds from the 1st of Febrnary, 1801, until the 3d of January, 1803, when he delivered them, with the assent and approbation of the comptroller of the treasury of the United States to Edward Livingston, then being the United States attorney for the District of New York. That on the 12th day of the same January, the comptroller of the treasury of the United States directed the said Giles to deliver the said fonrteen bonds to his sncccssor in office, John Swartwout, marshal of the said district, which the said Giles did not do.

But whether upon the whole matter aforesaid, he did, in law, convert the same bonds to his own use, contrary to the tenor and effect of the condition of his said bond, they are ignorant, &c., and if, &c., then they assess damages at $5,255.73.

221*] *5. As to the fifth breach, they find that the defendant Giles, having levied and received the said sum of $309.87, never had the same before the District Court to render to the United States, nor paid the same to the United States, bnt retains the same claiming to hold it in payment and satisfaction of so much due to him by the United States as aforesaid, but whether in law he converted the same to his own use, contrary to the tenor and effect of the condition of his said bond, they are ignorant; and if, &c., then they assess damages at $309.87.

6. As to the sixth breach, they find that the defendant Giles did not reudcr to the auditor of the treasury of the United States all his accounts and vouchers, &c., in manner aud form as the defendants in their rejoinder have averred, and assess damages at six cents.

This cause came up to this court in the year 1812, with a certificate from the court below, that after argument upon the special verdict thereunto annexed, "it appeared that the opin- "ions of the judges were opposed upon all the "points submitted by and in the said special "verdict, and thereupon, at the request of the "attorney of the United States for the said dis- "trict, the judges of the said conrt have di- "rected this disagreement of opinion to be "certified," &c.

The cause was argued in this court at February term, 1812, by *Dallas* and *Pinkney* for the United States, and by *Harper* for the defendants.

But this court, upon inspecting the record, was of opinion that the points on which the opinions of the jndges of the Circuit Court were opposed, were too imperfectly stated to enable this court to form an opinion thereon.

Whereupon the cause was remanded to the Circuit Court, and came back with a certificate that the opinions of the judges of that Court were opposed upon the ten following questions arising on the said special verdict, viz.:

1. Whether judgment onght to be given for the plaintiffs *or for the defendants, as [***222** to the sum of $3,763.98, being the damages assessed upon the first breach.

2. Whether, &c., as to the sum of $20,613.12, being the first sum assessed as conditional damages upon the second breach.

3. Whether, &c., as to the sum of $14,374.77, being the second sum assessed as conditional damages on the second breach.

4. Whether, &c., as to the sum of $9,895.09, being the third sum assessed as conditional damages on the second breach.

5. Whether, &c., as to the sum of $10,718.03, being the fourth snm assessed as couditional damages on the second breach.

6. Whether, &c., as to the snm of $16,133.44, being the fifth sum assessed as conditional damages on the second breach.

7. Whether, &c., as to the sum of $6,238.35, being the sixth sum assessed as conditional damages on the second breach.

8. Whether, &c., as to the sum of $4,479.68, being the seventh sum assessed as conditional damages ou the second breach.

9. Whether, &c., as to the sum of $5,255.73, being the damages assessed upon the fourth breach, and,

10. Whether, &c., as to the sum of $309.87, being the damages assessed upon the fifth breach.

The cause was now again argued by *Jones* for the United States, and *Harper* for the defendants.

On the part of the defendants it was contended,

1. That the obligors in this bond are not answerable *for the money received by [***223** Giles before the date of the bond.

2. That he had a right to retain the amount due to him by the United Statcs.

3. That his receiving the bonds was not an official act for which his sureties are liable upon this bond; but if it was, that he was discharged by delivering them over to E. Livingston, the attorney of the United States, with the assent of the comptroller of the treasury.

4. That the sureties upon this bond are not liable for the money received by the defendant Giles after he was removed from office.

5. That the payment of the $6,238.35, to E. Livingston, the attorney of the United States for the District of New York, with the assent and approbation of the comptroller, was a good payment to the United States, and ought to be applied to the discharge of the first money which Giles received.

1. This bond is prospective. It covers no past transgressions. He received $3,763.98 before the date of the bond, and the United States being indebted to him at the same time in a larger amount, he immediately applied and retained it in part satisfaction of their debt to him. If he had no right so to do, it was a conversion of it to his own use; and that conversion took place before the date of the bond. The defendants, therefore, are not liable therefor upon this bond. If Giles is answerable for it to the United States, it is not in this action.

2. The defendant Giles had a right to retain in his hands the amount which was due to him from the United States.

This is not claimed as a set-off, but as an equitable deduction to be taken into view by the court in deciding what sum is to be recovered under the penalty of this bond. By the 26th section of the judicial act (vol. 1, p. 65), it is provided, "that in all causes brought before "either of the courts of the United States to **224***] "recover the *forfeiture annexed to any "article of agreement, covenant, bond or other "specialty, where the forfeiture, breach or non-"performance shall appear by the default or "confession of the defendant, or upon demur-"rer, the court before whom the action is shall "render judgment therein for the plaintiff to "recover so much as is due according to equity." If, then, in this case there had been judgment by default or upon demurrer, or even upon confession, the court must have decided upon the principles of equity. The case, if not within the words of the statute, is within its spirit. He who seeks equity must do equity. But the defendant Giles was not a common debtor of the United States. He was an agent of the government, or a receiver of money, and bound to account for what he received. To account is to retain what he had a right to demand, and to pay over the balance only. If this principle does not apply to the poundage in the case of Hicks, yet it does to his expenses and compensation in taking the census. By the act of Congress of the 28th of February, 1800 (vol. 5, p. 24), it was made his duty to commence the business of taking the census, on the first Monday in August, 1800, and to close it in nine months, and he was authorized to employ assistants, and if he did not make his return within the period limited, he was liable to a penalty of $800. The act provides for the compensation of the marshal and his assistants, but no appropriation of money was made by Congress for his payment, until after the service had been performed, nor until March, 1801. (Laws of the United States, vol. 5, p. 300.) The marshal had only three ways to obtain the money necessary for this business, viz., either to advance his own money, which he was not bound to do, or to get an advance from the treasury, which it had no right to make, or to apply the money of the United States in his hands for that purpose. Congress having ordered him to do the work, gave him the right to use all the necessary means. The jury has found the fact absolutely that the United States was indebted to him at the time, which fact cannot now be denied. His obligation was not absolutely to pay over all the money which he received, but to account for it. If he shows that he expended it for the use of the United States, in a work which he was required to perform, he accounts for it. It was not strictly retaining the money, but applying it in a manner in which he was authorized to apply it.

*He was also entitled by law to the [***225** poundage upon the *ca. sa.* against Hicks. By the act of the 28th of February, 1799 (vol. 4, p. 273), the marshal is allowed "for all other services" not therein enumerated, "such fees "and compensation as are allowed in the Su-"preme Court of the state wherein such services "are rendered."[1]

3. It was not the official duty of the marshal to take the bonds from the purchasers of the property. He was only bound to execute all lawful precepts, according to the law of the land. He could officially sell for money only; not on credit. If by the order of the comptroller he sold on credit, he did not do it as marshal, but as the agent of the treasury department. The condition of his bond is that he shall faithfully do his duty. His sureties are not liable for any act not done in the course of his duty.

But if he did act as marshal in receiving the bonds, yet his delivery of them to the attorney of the United States, with the assent of the comptroller, is a complete discharge; and if it were not, and if the delivery of them to the attorney of the United States be a conversion of them to his own use, it was after his removal from office, and the defendants are not liable for it on their bond.

4. The sureties upon this bond are not liable for money received by the defendant Giles after his removal from office. The condition of the bond is that he shall faithfully execute the duties of marshal "during his continuance in the said office." Admitting that, for the purpose of finishing the business in his hands at the time of his removal, his authority may continue *quoad hoc*, yet the liability of his sureties is expressly limited, by their contract, to the time of his continuance in office. It is like the case of *Arlington* v. *Merricke* (2 Saund, 411), which was an action by the Postmaster-General against the sureties of one of his deputies, upon a bond, the condition of which was, "that whereas, the plaintiff had appointed one *Thomas Jenkins his deputy, &c., to ex-[***226** ecute the said office from the 24th of June next coming, for the term of six months next following; now, if the said Thomas Jenkins shall, for and during all the time that he shall continue deputy-postmaster, &c., execute all the duties," &c. The breach assigned was in not paying over moneys received by Jenkins after the expiration of the term of six months, and upon demurrer

1.—LIVINGSTON, J. It has been settled in the courts of New York that upon a *ca. sa.* the sheriff is entitled to poundage upon the whole sum due. But upon a *fi. fa.* he is only to receive poundage upon the sum received.

it was held that the defendant was only bound for moneys received within the six months. So in the case of *Barker*, executor of *Pyott* v. *Parker* (1 T. R. 287), the condition of the bond was that one J. H. should pay to E. Pyott, his executors or administrators, all such moneys as he should receive belonging to the said E. Pyott, his executors or administrators; but it was held that the defendant was not liable for moneys received by J. H. belonging to the executors of Pyott in their own right. So also in the case of the *Liverpool Waterworks Company* v. *Atkinson* (6 East., 507), the condition of the bond reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for twelve months," and afterwards stipulating that "at all times there-"after, during the continuance of such, his "employment, and for so long as he should "continue to be employed," he would justly account, &c., was held to confine the obligation to the period of twelve months mentioned in the recital. A similar decision was given by the Supreme Court of Pennsylvania, in the case of the *Commonwealth* v. *Benton* (4 Dall., 282), upon a sheriff's bond.

5. The payment to the attorney of the United States, which is found to have been in conformity with the usage in New York, and with the assent and approbation of the comptroller of the treasury, is a good payment to the United States.

The United States are represented by their attorney, as to everything relative to actions, in the same manner as a common person is represented by his attorney; an attorney at law has a right, within the year and day after judgment, to receive payment of the debt, and to enter satisfaction of the judgment upon the record. (Doug., 623, *Yates* v. *Freckleton;* 1 Com. Dig. tit. Attorney, B. 10.) The comp-
227*] troller is the agent of the United *States for the purpose of assenting, and his assent binds the United States.

The defendant Giles received $3,763.98 before the date of the bond, and $1,683.52 after that date and before his removal from office, making together the sum of $5,447.50. The payment of the sum of $6,238.35 to Mr. Livingston, not having been specifically appropriated to the payment of any particular part of the amount due from Giles, we contend ought to be applied to the payment of that part of the money which he first received, which will discharge all that the defendants can be liable for upon their bond.

On behalf of the United States, it was said:

1. As to the money received by Giles before the date of the bond, it remained in his hand at the time the bond was executed. It was as much his duty to pay it over afterwards as it was before; and by not paying it over he was guilty of default for which his sureties are liable. Besides, the writ was not returnable until after the date of the bond, and there was no breach of his duty until after the writ was returnable, when he ought to have had the money in court to render to the United States.

2. As to the marshal's right to retain money due to him by the United States, it was said, that the claim never had been submitted to the accounting officers of the treasury, agreeably to the provisions of the act of Congress of the 3d of March, 1797 (vol. 4, p. 423, § 4), by which it is enacted, "that in suits between the United "States and individuals, no claim for a credit "shall be admitted upon trial, but such as shall "appear to have been presented to the account-"ing officers of the treasury, for their examina-"tion, and by them disallowed in whole or in "part," &c. If a marshal might retain money to answer his own claims, there would be no necessity of an appropriation by law; and it would subject the whole revenues of the government to the caprice of juries. The jury had no right to find a debt due from the United States. It was a matter *coram non judice*, unless it had been first submitted to the accounting officers of the treasury.

*A defendant cannot set off a debt, [***228**
if he could not maintain a suit for it. (4 Dall., 303, *Commonwealth* v. *Blacklock*.) This defendant could not maintain a suit against the United States. To give him the benefit of the set-off would be a violation of the prerogative of the United States.

The court stopped the counsel for the United States, upon this point, saying they were satisfied.

3. As to the delivery of the 14 bonds to the attorney of the United States, it was said that they were made payable to the marshal for the time being, and ought to have been delivered to his successor. That in taking the bonds he acted officially. He could only sell as marshal whether he sold for cash or on credit. A plaintiff may waive a rule intended for his benefit, and authorize a marshal to sell on credit. He had no authority to sell as agent, nor had he any orders to deliver the bonds to the attorney. The assent of the comptroller is not sufficiently found, for the jurors find a fact inconsistent with such assent, viz., that the comptroller ordered him to deliver them to his successor. The violation of his duty in not delivering them to his successor was prior to his delivery of them to the attorney.

4. As to the question whether the sureties in this bond are liable for the money received by Giles after the revocation of his commission, it was said that by the 28th section of the judiciary act (vol. 1, p. 67), "every marshal, when "removed from office, shall have power, not-"withstanding, to execute all such precepts as "may be in his hands at the time of such re-"moval," and in case of the death of any marshal his deputies shall continue in office, unless otherwise specially removed, and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn; and the defaults or misfeasances in office of such deputies in the meantime, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them.

Here a liability is imposed upon the sureties which is not expressed in the condition of the bond.

*The words in the condition, "dur- [***229**
"ing his continuance in the said office," mean, so long as he shall have authority to act by virtue of the said office. So far as regarded the execution and return of the writ of *fieri facias* against John Lamb, his authority to act by virtue of his office continued after the revocation of his commission. The writ was not

completely executed until it was returned fully satisfied. *Quoad hoc* he still continued in office within the meaning and intention of the bond. In all the cases cited by the opposite counsel, the time was limited by months, and not by such a general expression as this. The act of Congress contemplates a course of duty, and intended that the bond should cover all his responsibility, and no doubt the parties intended to give such a bond as the act required. Congress could not have intended that upon the removal of a marshal, perhaps for wasting the public money, or for insolvency, he should still go on to collect other moneys, after his sureties upon his official bond should be discharged by his removal from office.

5. As to the payment of the sum of $6,238.35 to the attorney of the United States, it was said that the district attorney, as such, has no authority to receive the public money collected by the marshal. In common cases the authority of an attorney at law arises from presumption, and is limited to a year and day after judgment, in which time, if execution be not taken out, the judgment is presumed to be satisfied. But as to the attorney for a government no such presumption of authority arises. The United States is considered as a moral person only, and can only act by proper organs legally appointed; and their acts can bind the United States only so far as they act within the powers given them by law. In no other government does the law officer receive the public money without the order of the treasury. The treasury department is to manage the whole fiscal concerns of the nation. There is no exception in favor of the attorney of the United States. His duty is only to support the claims of the United States. There is no necessity that such a power should be lodged in his hands. He gives no security. Why should the money be taken out of the hands of a responsible officer and given to one not responsible?

230*] *But this payment is claimed as a credit, and it is a sufficient answer to say, that it has never been submitted to the accounting officers of the treasury. The jury had no right to find such a credit, or even to act upon it.

But if it is to be considered as a payment to the United States, still it does not appear that at the time of payment it was applied to the discharge of any particular part of the money which Giles had received. The United States have therefore a right now to apply it to such part as they please, and this court will make such application of it as will be most beneficial to the United States. That is to say, if the court shall be of opinion that the sureties are not liable for the money received by Giles after his removal from office, they will apply this payment to that part of the debt, and leave the sureties liable for the part received while he was in office.

March 7th. *Absent*—TODD, *J.*

LIVINGSTON, *J.*, delivered the opinion of the court as follows:

This is a joint action of debt on a bond dated the 9th of January, 1801, in the penalty of $20,000.

The condition of the bond is as follows: Whereas, the above bound Aquila Giles hath been appointed the marshal in and for the New York district, in pursuance of an act, entitled "an act to establish the judicial courts of the United States," now, the condition of the preceding obligation is such, that if the said A. G. shall, by himself and his deputies, faithfully execute all lawful precepts directed to the marshal of the said district, under the authority of the United States, and true returns make, and in all things well and truly and without malice or partiality perform the duties of the office of marshal in and for the said District of New York during his continuance in the said office, and take only his lawful fees, then the obligation to be void, &c.

General performance is pleaded by the defendant, to which a replication is filed assigning six breaches, to all of which there was a rejoinder, sur-rejoinder and issue.

*On the issue joined on the first breach [***231** the special verdict finds, that on the 20th of January, 1800, the said writ of *vend. exp.* and *fi. fa.* was delivered to Giles, who, before he proceeded to execute it, was authorized by the officers of the treasury to sell the land of Lamb, under said writ, for one-fourth part of the purchase money in cash, one-fourth part payable in two years from the time of sale, one-fourth part in three years, and the other fourth part in four years, with interest from the time of sale, to be secured by bonds and mortgages payable to Giles as marshal, or to the marshal of the district for the time being, to and for the use of the United States. That on the 17th of December, 1800, John Steel, being comptroller of the treasury, did instruct and order Giles to pay into the office of discount and deposit of the bank of the United States in New York, to the credit of the treasurer of the United States, all the moneys which might be levied from the property of Lamb, by virtue of the said writ of *vend. exp.* and *fi. fa.* That under these instructions Giles proceeded to sell the lands of John Lamb; the sales of which commenced on the 26th of November, 1800, and were continued until the 23d of December in the same year. That during the sales and afterwards, and before the execution of the bond by the defendants, Giles received from some of the purchasers several sums amounting to $3,713.98, and no more, which sums were paid as the fourth of the purchase money of the lands bought by them. That Giles has never brought into court, or paid into the bank, either of the said sums, of $50, which was received on the 20th of January, 1800, on a sale, by Giles, of the chattels of Lamb, or of $3,713.98, and that he never was required so to do by any order of the District Court. That while Giles was marshal as aforesaid, a writ of *capias ad satisfaciendum* was issued out of said court and delivered to him against Elias Hicks, on a judgment recovered by the United States, on which was indorsed a direction to Giles to levy the sum of $33,156.38, besides marshal's fees and poundage; that Hicks was arrested by Giles and in custody on said writ until discharged therefrom by the Secretary of the Treasury; that the poundage fees of Giles thereon, if any were due, have not been paid to him by anyone, and that they amount, if due at all, to $419.57. *That the United States became in- [***232** debted to Giles, while marshal as aforesaid, in

the sum of $8,133.96, for his fees and services, in taking the second census in his district, and for moneys paid to his assistants, in taking the said census, pursuant to the act in such case made and provided, which sums amount to $8,553.53, in part payment of which Giles retains the two sums of $50, and of $3,713.98. But whether in law he converted them to his own use contrary to the form and effect of the condition of the said bond, the jurors pray the advice of the court. If the court shall think that it was such a conversion the jurors assess damages on this breach at $3,763.98. But if the court shall be of opinion that such retaining was no conversion, then the jury say that he did not convert the same to his use.

2. The second breach assigned, is that Giles having, on the 17th of December, 1800, sold other lands of Lamb under the writ aforesaid for the further sum of $60,000, received the said sum on the 20th of January, 1801 (which was after the execution of the bond), and converted and disposed of the same to his own use.

On the issue joined on this breach, the jury find that Giles, having made the sales as aforesaid, and under the instructions and orders aforesaid, received from the purchasers, after the 9th of January, 1801, and before the 27th of March, 1801 (when he went out of office), the sum of $1,683.52; and after that day the sum of $17,191.58, amounting in the whole to $18,875.10, which sums were paid by the purchasers, as the cash payment which was to be made by them for the land so purchased (which sales took place between the 26th of November, and the 23d of December, 1800). That the poundage and charges due to and paid by Giles, and legally chargeable against the proceeds of these sales, amounted to $1,332.85, which leaves in the hands of Giles the net sum of $17,542.25 of the moneys received by him after the 9th of January, 1801. That on the 13th of April, 1803, he paid to Edward Livingston, who was district attorney, the sum of $6,238.35, which was receipted for on the said writ of execution. That it was then and yet is the usage and prac- [*233] tice *within the said district for the marshal to pay to the district attorney all moneys levied by executions issued by the said attorney, in suits in which the United States are plaintiffs. That this payment was made by and with the approbation of the comptroller of the treasury, and that Giles has never in any other way paid the said last-mentioned sum to the United States, or brought it into court in any other way than by paying it as aforesaid to the district attorney. That as to another part of the said sum of $17,542.25, to wit, the sum of $4,479.68, Giles retains the same towards satisfaction of an equal sum due to him as aforesaid from the United States. That the residue of the said sum, to wit, the sum of $6,824.22, Giles retains to this day. But they pray the advice of the court whether Giles converted to his own use, contrary to the condition of the said bond, the said several sums of $6,238.35, $4,479.68, and $6,824.22.

1. If he converted all of the said sums contrary, &c., then they assess damages at $20,613.12.

2. If he did not convert the said sum of $6,238.35, paid to Livingston, but converted the other two sums, then they assess damages at $14,374.77.

3. If he did not convert the two first sums, to wit, the sum of $6,238.35 and $4,479.68, but did convert the sum of $6,824.22 to his own use, then they assess damages at $9,895.09.

4. If Giles did not convert to his own use the sum of $6,824.22, but did convert the other two sums, then they assess damages at $10,718.03.

5. If Giles did not convert to his own use the said sum of $4,479.68, but did so convert the other two sums, they assess damages at $16,133.44.

6. If Giles did not convert to his own use the two sums *of $4,479.68 and $6,824.22, [*234 but did so convert the other sum of $6,238.35, then the damages are assessed at $6,238.35.

7. If Giles did not so convert the two sums of $6,238.35 and $6,824.22, but did so convert the other sums of $4,479.68, they then find damages to the amount of $4,479.68.

8. If, in the opinion of the court, Giles converted neither of those sums to his own use, contrary to the effect of the said condition, then the jury find that he did not so convert either of them.

On the issue joined on the fourth breach, the following facts appear on the special verdict: That, on the 1st of February, 1801, Giles had in his hands, as marshal, 14 bonds, described in assigning the fourth breach, belonging to the plaintiffs. That Giles continued marshal until the 27th of March, 1801, when he was duly removed and dismissed from office, and John Swartwout on the same day appointed marshal of the said district in his place, who continued marshal until the commencement of this suit. That the said bonds continued in the hands of Giles until the 3d of January, 1803, when they were delivered by him to Edward Livingston, who was then district attorney, by and with the assent and approbation of the comptroller of the treasury. That on the 12th of January, 1803, Gabriel Duval being comptroller of the treasury, as such did instruct, order and direct Giles as late marshal to deliver immediately the said 14 bonds to the said John Swartwout, his successor in office, which he did not do. If the court shall think this was a conversion of these bonds, the jury assess damages at $5,255.73. If the court think otherwise the jury find it to be no conversion.

On the subject of the fifth breach, it is found that Giles, on the 1st of September, 1800, received as marshal $309.87, on an execution issued against one Richard Capes at the suit of the plaintiffs, which he retains towards satisfaction of an equal sum due from them to him. If this be deemed a conversion by the court, *the jury assess damages at $309.87. [*235 But if the court shall not think so, then the jury, on this breach, find for the defendants.

It is certified that the Circuit Court were divided in opinion on the following points arising on this record:

1. Whether judgment should be given for the plaintiffs, or for the defendants as to the sum of $3,763.98, being the damages assessed upon the first breach assigned.

2. The like question as to the sum of $20,613.12, being the first sum assessed as conditional damages on the second breach.

3. The same question as to the sum of

$14,374.77, being the second sum conditionally assessed on the second breach.

4. The like as to the sum of $9,895,99, being the third sum assessed conditionally on the second breach.

5. The like as to the sum of $10,718.03, being the fourth sum assessed on the second breach.

6. The like question as to the sum of $16,133.44, being the fifth sum assessed on the second breach.

7. The like question as to the sum of $6,238.35, being the sixth sum assessed on the second breach.

8. The like question as to the sum of $4,479.68, being the seventh sum assessed on the second breach.

9. The like question as to the sum of $5,255.73, being the damages assessed on the fourth breach.

10. The like question as to the sum of **236***] $309.87, *being the damages assessed on the fifth breach.

The first point on which the direction of this court is asked will require a decision of the following questions:

1. Had Giles a right to retain out of the public moneys in his hands any sums which might be due to him for his services or for advances made by him as marshal?

2. Are the defendants liable, under the condition of their bond, for the two sums of $50, and of $3,713.98, received by Giles, the first sum on the 20th of January, 1800, and the other on some day prior to the 9th of January, 1801, which is the date of their bond?

The act of Congress providing for the settlement of accounts between the United States and the receivers of public moneys is so explicit as to preclude every difficulty in deciding on the first question. The third section of the law provides, that where a suit shall be instituted against any person indebted to the United States, the court shall grant judgment at the return term, on motion, unless the defendant shall in open court make oath or affirmation that he is equitably entitled to credits, which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected, specifying each particular claim so rejected in the affidavit. The next section declares that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been submitted to the accounting officers of the treasury for their examination and by them disallowed, unless it shall appear that the defendant at the time of trial is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit by absence from the United States, or by some unavoidable accident.

It is clear, then, that if this had been an action against Giles for moneys received by him as **237***] marshal, he could not *have availed himself of any credit against the public, however well founded the claim might be, unless he had previously submitted his title to such a credit to the accounting officers of the treasury and they had rejected the same, or unless he had been prevented from so doing by one of the accidents mentioned in the law.

On this subject the special verdict, on the issue joined on the sixth breach, finds that Giles did not render to the auditor of the treasury all his accounts and vouchers for the expenditure of moneys received by him as marshal as aforesaid.

If, then, in a suit against Giles himself, a claim for these credits, under existing circumstances, could not be sustained, neither can it in an action on this bond, without permitting the defendants to do indirectly what the marshal could not have done directly, and in this way avail themselves of what the law seems to regard as a default, or at least a negligence on the part of their principal.

We are next to consider whether the defendants are liable for the sum of $50, and the sum of $3,713.98, received by Giles. The first sum was received on the 20th of January, 1800, on the *fi. fa.* and *vend. exp.* issued against the estate of John Lamb; and the other was received on the same writ after the 27th of November, 1800, but before the date of the bond upon which the action is brought.

It is contended by the defendants that the retaining of moneys which were received by Giles anterior to the date of the bond, cannot be considered a conversion by him within the terms of its condition; while the plaintiffs, on the contrary, maintain that as these sums were in his hands at the time of its execution and have not been paid over to this day, his official delinquency is made out within the meaning of this instrument, and the responsibility of the defendants thereby established.

On this point two of the judges think that the conversion of these sums by Giles was complete by his not paying them into the bank, agreeably to the directions of the comptroller of the treasury under which he had acted, and that this having taken place prior to the execution of the *bond the defendants are not [***238** liable therefor within the terms of its condition, which are entirely prospective. Two other members of the court are of opinion that no demand appearing on the record to have been made on the marshal for these sums, either by rule of court or otherwise, no conversion of them is made out; and that therefore the defendants are not liable. The other two judges think that although these two sums were received before the date of the bond, yet as they remained in the hands of the marshal, afterwards, and have not been paid over to this day, the defendants are accountable for them.

Judgment must therefore be rendered for the defendants as to the sum of $3,763.98, being the damages assessed upon the first breach assigned.

The next question, on which the court below was divided, related to the sum of $20,613.12, being the first sum assessed as conditional damages upon the second breach.

By recurring to the special verdict it appears that Giles, having had a *fieri facias* put into his hands on the 20th of January, 1800, against the real estate of John Lamb, was directed by the officers of the treasury to make sales of it for one-fourth of the purchase money in cash, and for the other three-fourths on certain credits and securities specified in said instructions. These sales commenced on the 26th of November, 1800, and continued until the 23d of December following.

After the 9th of January, 1801, and before he went out of office, which was the 27th of March, following, Giles received of the purchasers of Lamb's estate, $1,683.52, and after that day the sum of $17,191.58, amounting in the whole to 18,875.10. Deducting the poundage and charges which the special verdict finds to be legally chargeable against this sum, there was left in Giles's hands the net sum of $17,542.25 of the moneys received by him after the 9th of January, 1801. On the 13th of April, 1803, he paid to E. Livingston, who was district attorney, with the assent and approba-
239*] tion of the *comptroller of the treasury, the sum of $6,238.35.

Before we examine into the deductions claimed by the defendants against the sums received by Giles for cash payments, it will be necessary to settle for what portion of these sums they are chargeable under the condition of their bond.

Of these sums a majority of the court think they are liable for the sum of $1,683.52, which was received between its execution and the marshal's dismission from office.

Are they also responsible for the sum of $17,191.50, which was received by Giles after another marshal came into office?

The bond on which this action is brought having been given for the faithful performance of the duties of Giles as marshal, during his continuance in office, two of the judges are of opinion that his sureties are not liable for the conversion of the last-mentioned sum, which took place after he was out of office, by not paying it as directed by the comptroller of the treasury. Two of the judges do not consider the finding of the jury as fixing upon Giles a conversion of this sum at any time, inasmuch as it does not appear that he was ever demanded to pay the same into court, or in any other way. The other two judges are of opinion that the marshal, being authorized to do certain acts even after his removal from office, the condition of the bond embraces defaults committed after such dismission, as well as before, and that the defendants are therefore liable for the said sum of $17,191.50, although received by Giles after he ceased to be marshal.

It is, however, the opinion of the majority of the court that the defendants are not so liable under this bond.

Another question arises under this opposition of opinion in the Circuit Court; and that is whether the payment to Edward Livingston in April, 1803, was a payment to the United States.
240*] *It was supposed that this payment, being made contrary to the comptroller's order of the 17th of December, 1800, which was to pay all moneys received under this execution into the branch bank, at New York, cannot be regarded as valid.

It is true such instructions are found by the jury, which certainly do not authorize such payment, yet it is also found, possibly, from some subsequent instructions of the comptroller which do not appear, or at any rate from evidence, which must have satisfied the jury that such payment was made with the assent and approbation of the comptroller of the treasury. This finding, correct or not, must conclude the court; and it has only to say whether a payment be good if made under such authority.

The comptroller is authorized by law "to direct prosecutions to be commenced for all debts due to the United States." During such prosecutions he gives directions how they shall be conducted, and how the moneys recovered shall be paid. If, therefore, he directed, or assented to, the payment to Livingston, it is difficult to say that Giles erred, or was guilty of any fault, either in pursuing his instruction or in making a payment with his assent and approbation.

It yet remains to settle, under this branch of the division of the Circuit Court, how the payment to Livingston is to be applied. For although the sum paid to him is much greater than the sum of $1,683.52, for which it is decided that the defendants are liable, the benefit, which they may derive from such payment, will depend in some measure on the manner of its application.

It does not appear that any direction was given by Giles, or that any election was made by either party how it should be applied. Nothing more is known than that Giles, being then indebted to a much larger amount for moneys received at different times under the execution against the property of Lamb, made this payment without declaring what particular item in the account of the United States against him should thereby be discharged. If there be no designation how a sum paid on account *shall be credited, and there be sureties [***241**
for part of the debt, as was the case here, it seems reasonable to some of the judges to let them have the benefit of it, by applying the credit in such a way as to exonerate them, so far as the sum paid shall be sufficient for that purpose. If regard be had to the order of time in which the moneys were received by Giles, it will be seen that the sum of $3,763.98, which is the first sum for which he is in arrear, was received by him prior to the 9th of January, 1801; and the next sum for which he is accountable, to wit, the sum of $1,683.52, came into his hands after that day, but previous to the 27th of March, 1801, and after this other moneys were received by him. These two sums together are not equal to the payment which was made to Livingston.

Following this order, the sum for which the defendants are liable being among the first that were received, and being recoverable with interest on their bond, would on this principle be extinguished by the first payment if it were sufficient, as was the case here, to discharge all the moneys which had been received prior to the receipt of the sum for which the defendants are answerable, and that also. But this is not the opinion of a majority of the judges. They think, and such is the decision of the court, that the United States have yet a right to apply these payments in a way most beneficial to themselves and so as not to extinguish the sum of $1,683.52, for which the defendants are accountable.

The court, then, is of opinion that judgment must be given for the defendants as to the sum of $20,613.12, being the first sum assessed as conditional damages upon the second breach.

Judgment must in like manner be given for the defendants as to all the other sums assessed as conditional damages upon the second breach.

It is next to be decided whether the conditional damages of $5,255.73, assessed on the fourth breach, be recoverable against the defendants.

These damages are given in consequence of **242*** a supposed *conversion by Giles of the fourteen bonds mentioned in the special verdict. But it being found that these bonds were delivered to Edward Livingston, by and with the assent and approbation of the comptroller of the treasury, the court is unanimously of opinion, for reasons already assigned, that such delivery was no conversion of these bonds by Giles, and that therefore judgment must be rendered for the defendants, as to the said sum of $5,255.73, being the damages assessed as aforesaid on the fourth breach.

The last question which is submitted to us regards the sum of $309.87, which it appears by the finding under the fifth breach assigned, was received by Giles on the first of September, 1800, on an execution at the suit of the United States, against Richard Capes, which was retained by Giles towards satisfaction of an equal sum due to him. This sum being received prior to the execution of the bond, must be regarded within the reasons assigned for not considering the defendants liable for the two sums of $50 and of $3,713.98, herein before mentioned, and judgment must, accordingly, in the opinion of a majority of the court, be given for the defendants, as to the said sum of $309.87, being the damages assessed upon the fifth breach.

It will be seen that the court is of opinion that the defendants are liable under their bond for the sum of $1,683.52, which was received by the marshal after its execution, and before he went out of office; but by not one of the findings on the different breaches assigned does it appear to have been contemplated that this sum alone might be recoverable in this action, and accordingly no conditional damages are assessed to suit that state of the case.

The court, therefore, can only give its directions as to the questions submitted to them, which are:

That it must be certified to the Circuit Court for the District of New York in the second circuit.

1. That judgment must be given for the defendants as to the sum $3,763.98, being the **243*** damages *assessed upon the first breach of the condition of the bond assigned in the replication of the plaintiffs.

2. That judgment must be given for the defendants as to the several sums of $20,613.12, of $14,374.77, of $9,895.09, of $10,718.03, of $16,133.44, of $6,238.35, and of $4,479.68, being the several sums assessed, as conditional damages on the second breach.

3. That judgment must be given for the defendants for the sum of $5,255.73, being the damages assessed upon the fourth breach, and,

4. That judgment must be given for the defendants for the sum of $309.87, being the damages assessed upon the fifth breach.

Cited—10 Pet. 132; 4 Wall. 629; 6 Wall. 489; 9 Wall. 764; 1 Otto, 562; 11 Otto, 549; 1 Wood. & M. 169; 1 McLean, 497; 2 McLean, 506; 3 Mc. Ar. 206.

THE UNITED STATES
v.
JOB L. BARBER.

Absent—TODD, *J.*

Fat cattle are provisions, or munitions of war, within the meaning of the act of Congress of the 6th of July, 1812, to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes.

THIS was a case certified from the Circuit Court for the District of Vermont, the opinions of the judges of which court were opposed.

Barber was indicted, "for that he being a citizen of the United States, and inhabiting the same, with force and arms, at," &c., "did attempt to transport over land thirty head of fat cattle, which were then and there articles of provision and munitions of war, and were all of the value of $300, from a place in the United States, to wit, from Berkshire, in the said District of Vermont, to a place in the province of Lower Canada, to wit, to St. Armons, in the province aforesaid, contrary to the form, force and effect of the statute of the United States, in such case made and provided," &c. There was another count in which he was charged with the actual transportation of them. After a verdict against him, he obtained a rule to show cause why judgment *should not be [***244** arrested, because fat cattle were neither provisions nor munitions of war within the meaning of the act of Congress entitled "an act to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes" or any other act of Congress.

By the second section of the act referred to, which was approved on the 6th of July, 1812, (vol. 11, p. 300), it is enacted, "that if any citizen of the United States, or person inhabiting the same, shall transport or attempt to transport, over land, or otherwise," "naval or military stores, arms or the munitions of war, or any article of provision, from any place of the United States to any place in Upper or Lower Canada, Nova Scotia or New Brunswick," "the person or persons aiding or privy to the same shall" "be considered as guilty of a misdemeanor, and be liable to be fined in a sum not exceeding $500, and imprisoned for a term not exceeding six months, in the discretion of the court."

March 7th. *Absent*—TODD, *J.*

This court ordered it to be certified to the Circuit Court, that it is the opinion of this court that fat cattle are provisions, or munitions of war, within the true intent and meaning of the act entitled "an act to prohibit American "vessels from proceeding to or trading with "the enemies of the United States, and for "other purposes."

Cited—2 Wheat. 122.

THE SCHOONER ADELINE AND CARGO.

Absent—TODD, *J.*

American property recaptured may be restored on payment of salvage, although the libel prays condemnation of it as prize of war, and does not

claim salvage. Salvage is an incident to the question of prize.

A test affidavit ought to state that the property at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant, but an irregularity in this respect is not fatal.

A test affidavit by an agent is not sufficient, if the principal be within the country, and within a reasonable distance from the court. But if test affidavits, liable to such objections, have been acquiesced in by the parties in the courts below, the objections will not prevail in this court.

By the act of the 3d of March, 1800, one-sixth part only is allowed to a privateer for salvage upon the recapture of the cargo on board a private armed vessel of the United States, although one-half be allowed for the recapture of the vessel.

The property of persons, domiciled in France, (whether they be Americans, Frenchmen or foreigners) is good prize, if recaptured after being 24 hours in possession of the enemy, that being the rule adopted in the French tribunals.

Further proof will be allowed by this court, where the national character and proprietary interest of goods recaptured do not distinctly appear.

Property unclaimed will be decreed as good prize.

THIS was an appeal from the sentence of the Circuit Court for the District of New York.

The American letter of marque schooner Adeline sailed from Bourdeaux for the United States with a cargo, owned in part by citizens **245***] of the United States, and *in part by French subjects. On the 14th of March, 1814, she was captured, in the bay of Biscay, by a British squadron, who put a prize crew on board and ordered her for Gibraltar. After being six days in the possession of the British she was recaptured, near Gibraltar, by the American privateer Expedition, who put a crew on board and ordered her for the United States, where she arrived and was libeled, with her cargo, by the recaptors, in the District Court at New York, as prize of war. The vessel was claimed by citizens of the United States residing therein, as was also part of her cargo.

Another part of the cargo was claimed by French subjects resident in the United States. Another part by French subjects, resident in France. Another part by citizens of the United States, resident in France. Another part by French subjects whose residence was not stated, and another part by citizens of the United States, whose residence was not stated, and another part by "alien friends," without stating of what nation, or where resident. Some of the claims stated the property, at the time of capture, to belong to the persons therein mentioned, and did not state to whom it belonged at the time of shipment.

The District Court condemned, as good prize, all the property owned by Frenchmen and other persons resident in France, and all the property of those persons whose residence was not stated; and restored all the property belonging to persons resident in the United States, upon payment of one-sixth for salvage. The vessel was restored, by consent of parties, on payment of one-half for salvage. The sentence was affirmed *pro forma*, by consent, in the Circuit Court.

The recaptors appealed as to the rate of salvage, which they contended ought to have been one-half, and those claimants, whose property was condemned, also appealed.

The case was submitted to the court by *J. Woodward* and *Emmet* for the recaptors, and by *Irving* and *D. B. Ogden* for the claimants, upon their written notes for argument.

*J. *Woodward*, for the recaptors, [***246** made the following points:

1. That such claims as date the property from the time of capture, instead of the time of shipment, are insufficient and invalid.

2. That the recaptors are entitled to the whole of the French property, by the rule of reciprocity.

3. That the captors are entitled to a rate of salvage of one-half upon the American property, or such other and higher rate than the rate decreed in the courts below, as this court may adjudge.

4. That the recaptors are entitled, by the same rule of reciprocity, to the whole of the property of such Americans as were at the time of capture domiciled in France, or resident there for commercial purposes.

5. That the recaptors are likewise entitled to all property the national character of which is not defined by the evidence.

6. That the property of those Frenchmen who are described as having a mere temporary residence in the United States, cannot be considered as American.

7. That the property of persons described as alien friends, without mentioning to what nation they belong or where they reside, must also be taken to be French, or decreed to the captors for uncertainty.

8. That the persons described in the claims as citizens of the United States, without stating their residence at the time of shipment, or at any other time, must, under the circumstances of the case, be considered as residing in France.

There are claims which date the property from the time of capture. This we say is insufficient. The claims should state the property from the time of shipment at least. This is necessary to prevent transfer *in transitu*, and to give effect to, and preserve the simplicity and dispatch of the *preparatorio* investigation.

*An important question in this case [***247** is, what is to become of the American part of the cargo of an armed American vessel, recaptured by an American private armed vessel?

The recaptors in the first place contend that the part of the cargo above mentioned is *casus omissus* as to the act of Congress of the 3d of March, 1800.

If the court should decide that there is a *casus omissus*, then the fate of this part of the cargo will depend upon the common law.

The recaptors contend that the common law is, that if property so situated has remained twenty-four hours in possession of the enemy of the captured party, they are entitled to the whole of the property as prize of war. To this they cite *Grotius de jure belli ac pacis*, lib. 3, ch. 16. (Vattel, book 3, ch. 13, § 196.) This right upon recapture is here clearly laid down to privateers to be devested only by the laws of each state and treaties. Our treaty with France is silent except as to restoration on capture by pirates; this being *ex delicto*, there is no change of property by the original capture. (See also Professor Marten's summary of the law of nations, book VIII, ch. 3, § 10). "In "order to encourage privateering, those con- "cerned in it are allowed to hold all the mer- "chant vessels and merchandise they take from

"the enemy or his subjects, without any re-
"serve whatsoever with respect to the redemp-
"tion of them by the proprietor."

The only remaining question on this point would be, what kind of possession consummates the right of the privateer? Twenty-four hours' possession has been considered "firm" possession, and sufficient to consummate this right by an almost common usage, and recognized by almost all the treaties of maritime powers. (1 Rob., 151, Amer. ed.; 2 Azuni, 306, 308, 312, in a note 275, 276, and 282.)

If the above considerations are inapplicable and the salvage of this part of the cargo is governed by the acts of Congress, then by those acts the recaptors are entitled to one-half.

248*] *The unqualified right of the privateer to the property captured, or recaptured, is, after firm possession, clear at common law, and the doctrine of taking away that right by salvage is derogatory to that law. If this be so, the act of Congress is derogatory to the common law, and must be liberally construed in favor of privateers.

The reward has always been out of the whole subject matter—the cargo as well as vessel and armament; and it is with confidence contended that a separation of the cargo so as to subject it to one-sixth salvage, while the vessel and armament affords one-half, is, if it exists at all, anomalous to the act of the 3d of March, 1800, and at war with the usage and treaties of all maritime states.

The reason of increasing the salvage upon an armed vessel is the merit of battle, and it is evident that the cargo is as well won by battle as the armament and vessel.

But if the whole of the act of Congress be to be taken together, and the 2d section be permitted to reflect a light upon the 1st section, it will appear that Congress could have had no other meaning than that the salvage should be increased upon the cargo as well as the vessel and armament. In the second section where they give a salvage upon their own property thus captured by a private armed vessel, they give one-half of the goods on board as well as of the vessel and armament.

But should not the cargo be considered as a mere incident to the vessel and follow its fate and character?

As to the French property we are entitled to the whole as prize of war by the foregoing rule of twenty-four hours' possession, which is the rule in France. Reciprocity is the rule in this case. (See the act of 1800, section 3.)

The twenty-four hour rule is established in France by ordinance of 15th June, 1779, with respect to all recaptures by privateers. France, in her treaty with Holland, 1st May, 1781, secures the twenty-four hour right to privateers. The court will find those acts of France referred to in 2 Azuni 276 and 282; 2 Dallas, 2, *Miller et*

249*] **al.* v. *Ship Resolution*. This is a strong case establishing the twenty-four hour right. It refers to an ordinance of Congress declaring this rule as to us, and refers to the French ordinance to the same point. It admits the twenty-four hour rule, but excludes its application to that case, that being the case of a neutral capture which conveyed no right. (See also the case of *The Mary Ford*, 3 Dall., 188, *M'Donough* v. *Dannery*.)

On the right of the recaptors on the 4th point of the case, they will not enlarge by argument, as they consider it well established; nor on that of the 5th point, than merely to observe that it appears to be just, *ex necessitate*, and comes under the description of confusion in the civil law; nor as to the 6th point, than to observe that there is no standard by which a character can be reflected upon these claimants but the voyage itself; which makes them either American or French. The description of the claim negatives the idea of their being American; they must, of course, be French. The 7th point must meet the same construction for the same reason.

As to the principle contended for in the 8th point of the case, it may be remarked, for elucidation, that some of the claimants described as in this point, turn out, by the evidence, to be resident in France for commercial purposes.

Is the owner of the vessel entitled to freight exclusive of salvage?

The recaptors say the vessel is not entitled to freight because she would have been condemned had she been brought into England. But if entitled to freight, the captors have saved that freight, and are therefore entitled to one-half as salvage. Freight may remain, after all the rights of the captors are deducted, to be adjusted between the vessel and the freighters.

This question can only apply to the American part of the cargo; for as to the French, the rule is to vest the property absolutely in cases of recapture after twenty-four hours' possession; the *postliminii* right and all its incidents are destroyed.

Irving*, in behalf of the owners of [250** the vessel, and of such parts of the cargo as were claimed by persons resident in the United States.

The schooner Adeline is a registered American vessel owned by Isaac Levis and William Weaver, native citizens of the United States, and residents of Philadelphia, and was commissioned as an American letter of marque. She commenced her voyage from Bourdeaux, to a port in the United States, in the month of March, 1814, having on board a cargo owned principally by citizens of the United States and others residing in our territory. In the course of this voyage she was first captured by two British vessels of war, and was afterwards, and before her condemnation as prize, recaptured by an American private armed vessel. Upon her first capture most of her papers were taken from on board by the captors, and those which were left have been delivered up to the District Court at New York, and transcripts of the same are contained in the record before this court.

In these cases most of the claims and test affidavits specify the property respectively claimed, at the time of shipment in the Adeline, and at the time of capture, to have been owned by citizens and residents in the United States.

Many of the claims and test affidavits testify that the goods thus claimed vested in the claimants before and at the time of capture and recapture; and generally all the claims are supported by the respective bills of lading. In truth, there is not a paper attached to this record

which falsifies any claim or casts any suspicion upon them. An objection has been taken to some of those claims, because they do not state that the property vested in the claimants at the time of shipment, and that, for aught that appears to this court, the property might have been transferred *in transitu*.

Admitting this to be the fact, how can such transfer prejudice those claimants? The vessel was an American vessel coming from a French port to a port of the United States.

The rule that the character of property must **251***] be determined *by its shipment, that the same cannot be transferred in its transit, but, as respects belligerent rights, must be considered as remaining the same as at the time of shipment, applies only to enemy property. (*Danckebaar Africaan*, 1 Rob., 99, Amer. Edit.; *The Vrow Margaretha*, 1 Rob., 285, Amer. Edition.)

But the claims objected to will be found, on examination, to agree with those which are in common use in the admiralty courts of England, even in cases where the property is captured as prize of war. (*The Fortuna*, 2 Rob. in the Appendix, 313.) It is sufficient to assert property in the claimants and to negative the allegation of title in the enemy at the time of capture. Those claims and teste affidavits are testimony in a prize cause, and will be deemed satisfactory, unless there is some evidence in the ship's papers or preparatory examinations to invalidate them. (See the Duke of Newcastle's letter in the appendix to Chitty; 6 Rob., 55, *The Haabet*.)

But to proceed to the merits of this case. Upon examining the libel of the captors, the first inquiry will be, whether this property could be captured as prize, for it has been so libeled.

The commission to our private armed vessels, under the act declaring war, authorizes the retaking of property captured which was originally American. The property thus retaken can only present a case of salvage, because the title of the original proprietors never has been devested; and that equally whether the property was originally American or neutral.

The interest of the captured property does not vest in the captor until after final adjudication. (5 Rob., 167, Am. Edit., *The Elsebe;* 4 sect. prize act, 11th vol. United States laws.) And the 5th section of the prize act provides, "that all vessels, goods and effects the property of any citizen of the United States, or of persons within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government or state in amity with the United States, which have been captured by the enemy and which have been recaptured by vessels commissioned as aforesaid, shall be restor-**252***] ed to the rightful owners, upon *payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law."

The present case, then, before the court, determines itself to be a case of salvage, if there was a right to recapture, and if the service rendered was meritorious. The right is not questioned, for the recapture was from the enemy; nor is the service questioned, for the property would have been otherwise lost.

It becomes, however, a matter of inquiry, whether the recaptors under their present libel can have a decree for salvage. The papers taken from on board the vessel, and the examinations in *preparatorio* proved that the recaptured vessel was an American vessel, and that her cargo was in part American and in part French. It was evident, therefore, that the recapture could only present a case of salvage; and as such the vessel and cargo should have been libeled. But the libelants have proceeded against the property as prize of war, and have asserted title to it as such in all their allegations. Must they not make out those allegations, and, if they fail, can they, as a last resort, seek for salvage, when such has not been prayed for in their libel, nor in any manner spread upon the record before this court?

But if the court should be of opinion that a decree for salvage can be made upon the libel, claims and disclosures in this record, then the only question will be the amount of this salvage. The recaptors contend for a moiety, and we, that they should have but a sixth. Which is right, must depend upon a just construction of the act in cases of recapture, passed 3d March, 1800 (5 vol. United States Laws, 38; 1 Graydon, 418).

The first branch of the first section of this act provides that "a recaptured vessel, other than a vessel of war or private armed vessel, shall be restored, on payment of one-eighth (if taken by a public armed vessel) of the value of the recaptured vessel and cargo; and if retaken by a private armed vessel, of one-sixth."

*The second branch of that section [**253** provides, "that if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards and before the retaking, the salvage shall be one moiety of the true value of such vessel of war or privateer."

The act contemplates two descriptions of cases as to vessels, viz., armed and unarmed; the former are to pay a moiety, the latter a sixth. The law having settled the amount, the court, when it ascertains what the law is, will adhere to the provision. Now, the construction must depend on the evident meaning and intent of the legislature, as clearly to be gathered from a view of the whole provision; and it may be adopted as a fundamental rule, that where there is an express provision, there shall not be a provision by implication; *expressio unius est exclusio alterius*.

The first clause provides for the case of unarmed vessels and goods. It commences by stating, "that when any vessel unarmed, or when any goods" (not on board such vessel, but wholly. in the disjunctive), when any goods (reaching any and every case of goods), when any such are captured by a private armed vessel, one-sixth shall be allowed. It proceeds throughout the whole clause in the disjunctive, saying that such vessel or goods shall be restored on payment of one-sixth as salvage.

The second clause is studiously confined to vessels, "and if such vessel" (passing by goods altogether and leaving the general provision for goods unimpaired), and if such vessel is

armed, then one moiety of the true value of such vessel is to be allowed; repeating and carefully confining the provision to the vessel, and that, too, with a peculiar particularity. Congress in express words distinguish; they place private unarmed vessels and all goods recaptured on the same footing.

The fifth section of the prize act, laws of the United States (vol. 11, p. 240, § 5), declares that the above provisions are to regulate cases of salvage.

But it is contended that the intent of a stat- **254*]** ute is to be *considered, that the design of the legislature is to be consulted. I grant it, wherever there is any ambiguity in a statute. In such case it is the privilege and duty of the court to give a just construction. But this only holds in cases where there is great obscurity, not in cases where the provisions of the statute are clear and explicit. To hold that a court can intermeddle with such provisions is to clothe the court with legislative as well as judicial powers—to authorize it to make laws instead of only expounding them.

It is laid down in Parker, 233, that where the words of a statute are expressed, plain and clear, they ought to be construed according to the genuine and natural signification and import, unless by such exposition a construction or inconsistency would arise in the statute by reason of some subsequent clause from whence it might be inferred that the inteut of parliament was otherwise."

But it is said that from the provision contained in the second section of the statute we may gather that it was the intent of the legislature to give a moiety of the goods on board a private armed vessel to the recaptor, as well as a moiety of the vessel. When we come to examine this section, which is thus pressed into the service of the first, we shall find that it relates entirely to the property of the United States which may be re-captured. It has no reference to the first section; it speaks of property of a different description, differently owned. In the last clause it provides, that if a vessel of war of the United States is recaptured by a private armed vessel, a moiety of any goods on board shall be allowed. The government, deeply interested in the preservation of our public vessels; the national character, deeply interested in the rescuing from the enemy our vessels of war and in not permitting them to exist as mementos of their triumph; the national prosperity, deeply interested in preserving to us the means of our own strength and in preventing the same from being added to that of the enemy; these are sufficient inducements for our goverument to make an extraordinary provision. The service is not rendered to an individual, it is rendered to the nation; it is more meritorious; feelings of patriotism more than of interest may have impelled to the performance of the duty; **255*]** *the danger was greater, the object more important; the recompense should therefore be increased.

But the first and second sections of this statute are wholly independent. The first relates to the recapture of private property, either by our public or private armed vessels. The second relates to the recapture of public property, either by our public or private armed vessels. Each section is perfect in itself, and each independent of the other; neither requires the interpositiou of any court to explain them.

"Wherever any words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to in order to find the meaning of the words." (Plowden 57, *Wimbish* v. *Tailbois*.)

Where words of a statute are plain and positive, it is not the province of the court to search after new constructions.

Justice Buller remarks in the case of *Bradley and another* v. *Clark* (3, T. R. 201), "that, with regard to the construction of statutes according to the intention of the legislature, we must remember that there is an essential difference between the expounding of modern and ancient acts of parliament. In early times the legislature used to pass laws in general and in few terms; they were left to the courts of law to be construed, so as to reach all the cases within the mischief to be remedied. But in modern times, great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore the courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes."

But the provisions in this statute respecting salvage were not unadvised provisions hurried over without deliberation. Congress, in consequence of the partial war with France, had been called on to legislate repeatedly upon the subject.

The first provision was by statute 28th June, 1798 (4 vol. United States' Laws, p. 154, § 2d). This is general *for vessel and cargo [***256** armed or unarmed, one-eighth; all are placed on the same footing.

The second provision was by statute of March 2d, 1779 (4th vol. United States Laws, p. 472). That gives, if detained 24 hours, one-eighth; if 48 hours, one-fifth; if 96 hours, one-half; without any distinction between vessel and goods, or armed and unarmed.

The next year, induced by the inconvenience or inequality of the former laws, they made a deliberate provision. The subject was fresh; every clause was weighed. Those provisions had been a matter of investigation for three successive sessions of Congress, and had been successively amended. Can it be said, then, that Congress had not a view of the whole ground, that they were hurried in the passing of this law. The very law they were considering was an amendment, and would naturally cause inquiry and reflection.

In mature deliberation, therefore, they, in the year 1800, enact the present law. They discriminate between private unarmed vessels and goods, allowing one-sixth for salvage, and for the vessel alone, if armed, a moiety. The recaptured property of the United States is placed in a distinct section, wholly unconnected with the other.

If we attend to the language of the last clause of the first section, giving to the recaptors the moiety of a private armed vessel, we shall ascertain the reason why a greater salvage was given for the vessel than the goods.

The section states, "and if the vessel so retaken shall appear to have been set forth and armed as a vessel of war." If the enemy are thus possessed of the means of injuring our

trade and of capturing other vessels, then, as the wresting those weapons from their hands prevents the perpetration of further mischief, for this meritorious service we will give to you one-half of those instruments of annoyance and destruction. The same reasoning will not apply to the goods; the public reap not the same benefit from their recapture.

But it has been heretofore argued in this cause, that a greater rate of salvage should be **257***] allowed than one-sixth, *and that a construction to that effect should be given to the statute, because the service was very meritorious; the property had almost reached an enemy port, and but for the management and intrepidity of the recaptors would have been wholly lost. And is not that the case in every capture by a belligerent? Did not Congress know, when they passed this law, the difficulty of getting prizes home? Were they not then in fact more destitute of a navy than at present? In pursuance of this argument of extraordinary merit upon the present occasion, it has been urged that the recaptured vessel was armed; and that life was hazarded equally in recapturing the goods as in recaptnring the vessel. In the present instance it is idle to talk of danger; the Adeline, from her armament, was incapable of making resistance, and whether she did or not is problematical, as from the preparatory examinations there appears to be an uncertainty whether any resistance was attempted. It is, however, certain that the resistance, if any, was a mere parade, and that having fired one or two guns, the vessel instantly surrendered. Not a soul was hurt on either side, and the privateer did not deem the resistance sufficiently important to return.

But admitting that the service, by any chance, might have been very meritorious; that great gallantry might have been displayed and many lives lost; yet under this statute I know not how any court can interfere with its settled provisions.

In the case of *The Apollo* (3 Rob., 250), which vessel was cut out from under the guns of a French fortress, where much daring spirit was evidenced on the part of the recaptors, and much danger hazarded, and where extraordinary salvage was applied for, Sir William Scott says, "all recaptures within the act are put upon the same footing of merit and reward; therefore all that is said on the particular gallantry of the service is foreign to any singularly favorable application of this act which has provided but one measure for all cases, without reference to circumstances."

With respect to the property of alien friends resident in the United States, and recaptured in **258***] this vessel, I *only remark that the provisions in the prize act apply equally to them as to our own citizens residing within our territory.

A claim has also been interposed by the owners of the schooner Adeline for freight and primage of that part of the cargo which is not owned by them. That such should be allowed I would respectfully contend there can be no question, as the voyage has been performed, and the cargo delivered at its port of destination. But the recaptors assert that they are entitled to a salvage of this freight. On the part of the owners this is opposed; first, because salvage of the freight is not given by the statute, and, second, because it is in fact allowed in the value of the goods.

The act has prescribed the terms on which the vessel and goods are to be restored. The court cannot add to those terms. The recaptors have no means of procuring this salvage except by withholding the goods; but the act declares that the goods shall be given up, upon payment of one-sixth of their value, without making any provision for salvage of freight. Against whom could the decree for a salvage of the freight lie? Not against the goods, for they are delivered up; not against the owners of the goods, for they are not before the court.

But salvage of freight is in fact paid in the increased value of the goods. The presumption is that the merchandise is enhanced that value by the importation. Now, the salvage is not on the invoice value, but on the true value of the goods. This value is ascertained by sale or appraisement at the place where the property is brought; no deduction is made except imports and duties. Besides, the recaptors should not claim an additional recompense for perfecting that without which they could not participate in the cargo. The bringing this property safely in entitles them to the one-sixth of its value, and that alone is specified in the statute as their reward.

The District Court, from whose decision the recaptors have appealed, decreed, on the 9th of August, 1814, that the recaptors should have as salvage one-sixth part of all the goods on board this vessel owned by American *citizens [**259** and alien friends residing in the United States, and also a moiety of the vessel, her tackle, apparel, &c.

In this decree the claimants of that description acquiesced.

The recaptors have by successive appeals brought this case before this court. The funds arising from a sale of this property, which sale took place before the decision of the District Court, have been lying unproductive in the last-mentioned court ever since. If this court should affirm the decree of the Circuit Court in the above-mentioned cases, then those claimants pray that costs and damages may be awarded them.

D. B. Ogden, for all the claimants.

This vessel and cargo were recaptured by the expedition from the English, who had captured her, on a voyage from Bourdeaux to New York. The Adeline is American property, and her cargo part of it American, part French.

The Adeline and cargo are libeled as enemy's property, and the libel prays that they may be condemned as such. The claims deny the fact of its being enemy's property, and aver that in some cases it is American property, in others that it is the property of alien friends.

Before I consider the questions raised by the captors, I must first beg leave to call the attention of the court to some observations upon the nature of this cause as it appears from the libel, claims and evidence.

The libel charges the property as being enemy's, and prays for its condemnation as such. The claim denies the fact of enemy's property, and avers that it is American or the property of alien friends.

It is evident that the only point in issue, the

only question arising between these parties upon the claim and libel, is whether this property be or be not enemy's, and as such liable to condemnation.

In all cases of prize there must be a regular **260***] judicial *proceeding, and so in all other cases in a court of admiralty as well as in any other court. (See the answer to the Prussian memorial, in the appendix to Chitty's Law of Nations, 314, also to be found in *collectanea juridica.*)

All regular judicial proceedings consist of the proofs and allegations of the parties. The allegations of the parties are first made, and then the proofs are produced to support them. I understand the rule to be universal in all courts in which there are regular judicial proceedings, that as a party cannot recover upon allegations without proof, so neither can he recover upon proofs without proper allegations. The judgment of the court must be according to the proofs and allegations.

What are the allegations of the parties in this case?

The libel is in the nature of a declaration in a common law court, or of a bill of complaint in a court of equity. It must state sufficient facts for condemnation, with sufficient certainty, and conclude with a proper and sufficient prayer. It must apprise the person claiming the property libeled of the grounds upon which a condemnation will be asked, otherwise it would be more than useless to require a libel at all.

Now, this libel alleges or charges that this is enemy's property, and asks for a condemnation of it as such.

Unless the evidence in the cause proves it to be enemy's property, I apprehend the court never will, under this libel, condemn it.

The documents on board the captured vessel, and all the examinations *in preparatorio,* so far from proving the property to be enemy's property, prove directly the reverse; and indeed it is not pretended by the counsel for the captors that there is the least ground to suspect the property or any part of it to be hostile.

Can the captors have a decree for salvage in this case? I think not, because they do not ask for it in their libel; because the question here is not whether the captors are entitled to salvage **261***]or not, but whether this is enemy's *property or not? I do not believe a single case can be produced in the books where salvage has been decreed unless it was especially asked for by the libel. A libel, like a declaration, may contain several grounds of a decree, or, to speak in common law language, several counts; and there must be a count for salvage, or it cannot be decreed.

In Hall's Admiralty Practice, 144, will be found a precedent of a libel where salvage is claimed, drawn by one of the most learned and experienced lawyers, particularly as a civilian, in the United States; which, although no authority, will certainly be considered as entitled to some weight, as showing the opinion of an enlightened lawyer upon the subject.

It is no answer to this argument to say that where property has been libeled as prize, property of friends is frequently condemned upon the ground of residence in an enemy's country or trading with an enemy, because such property is considered, *quoad hoc,* as enemy's property, and therefore comes within the allegation of enemy's property in the libel.

If I am right in the argument upon this subject, then I think it follows of course that if this is not enemy's property it cannot be condemned to the captors, but must be wholly restored to the claimants without any salvage whatever. It is no hardship to the captors to acquit the property; they knew the facts when they filed their libel; they made their election in what way to proceed against it; and, like all other parties in a court of justice, they must be bound by that election.

This being property recaptured from the enemy, must be considered, *prima facie,* not as enemy's property. It cannot be presumed that they would capture their own property.

Now, property recaptured from an enemy never can be proceeded against as prize of war; it is not considered as enemy's property until, in some countries, it has been carried *infra presidia;* in others, has been twenty-four hours in possession of the enemy; in England, and *under our prize act, until it has been [***262** condemned in a competent court.

If the captors have any claim to any part of this property, it must be because recaptured from the enemy. But no such claim is set up in the libel; the right of property remains in the claimants; it has never been changed, and must therefore be restored to them.

But it is said that some of these claims are insufficient, because they do not say that the property belonged to the claimants at the time of shipment, but merely at the time of capture.

I answer, if the property belongs to the claimants now it is all which the court will require in this case. I have already endeavored to show that the captors have no claim to the property; it follows, then, that the court will restore it to the proper owners at the time of the decree. Suppose, however, that I am wrong in the principles which I have endeavored to establish, and that the captors can have a decree in their favor in this case; let me inquire whether the claims above alluded to are not sufficient? All that is necessary for the claim is to deny the material allegations in the libel. The allegation here is that the property is enemy's property, and as such liable to be condemned. This allegation is expressly denied by the claim. Nothing more is ever required in a claim.

Where there are any circumstances which raise a presumption that the property is enemy's, such as coming from an enemy's port, found on board an enemy's vessel, &c., &c., then it becomes necessary for the claimant to explain away those circumstances, to prove the friendly nature of the property, to show it to have been friendly at the time of its shipment, &c., which is done in what is called "the teste affidavit," not in the claim.

But in cases where the property, from the circumstances of the case, must necessarily be presumed to belong to our own citizens or our friends (as in the case of a recapture), then no test affidavit can be necessary; then no explanation is asked, because none is required.

*If these claims are insufficient, does [***263** it follow that this property must be condemned?

The claims being insufficient, the court will either suffer the claimants to amend them or

they will consider them as no claims, and dispose of the property accordingly.

If an amendment is allowed, there can be no difficulty in removing this objection.

If the claims are considered as no claims, is the property to be condemned as a matter of course?

If the captors in case of capture send in a vessel, after taking out the master, supercargo and every other person who would probably claim, and leave on board only one or two of the crew whose examinations may be taken *in preparatorio*, and who are wholly ignorant as to the property on board; if a vessel and cargo thus sent in is libeled as prize, is it to be condemned, of course, as prize, because no claim is put in or filed for it?

If all the papers and documents, and evidence *in preparatorio* prove the property not liable to condemnation, is it to be condemned because no claim is filed for it by the owner?

This doctrine would follow from the arguments upon the other side, but is too monstrous to be supported by any court.

I take the law upon this subject to be this, viz.: The proceedings in a court of admiralty are *in rem*. The subject matter is, in substance, in possession of the court, and they never will decree it to the captors or to any other person, unless they can show a right to it. They never will give the captors my property because I do not claim it, not being, possibly, in a situation to know that it has been captured or libeled.

If there be no claim filed, the court will examine the papers and examinations in *preparatorio*, and if, from the face of them there appears good ground of condemnation, they will condemn, otherwise not.

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It is not like the case of a judgment by default in a court of common law, where the plaintiff takes judgment for his debt; because, at common law, the process has been personally served upon the defendant, he is actually in court, or has been proceeded against to outlawry. No surprise can be complained of by him. Not so in a court of admiralty, where the proceeding is *in rem;* and when the owner may never know that his property is in jeopardy. The court being possessed of it, are bound to give it up to nobody but him who has a good right to it. If, from the libel and the proofs before the court, it appears that the captors are entitled to the property, the court will decree it to them; otherwise not. And for this, among other reasons, it is an invariable rule that a claim must always be put in under oath, so that if the court order property to be restored to the claimant, they may at least have some evidence of his right to it.

For these reasons if there were no claims put in to this property at all, yet, as from the proofs in the case taken *in preparatorio* it is clearly not enemy's property, I contend that the court could not condemn it as prize of war.

This case, being that of a recapture, is a case in which the questions are, whether the property shall be restored to the original owners, and upon what terms. As there is no pretense that the property belongs to an enemy, there is no reason that the claim should negate a transfer *in transitu;* which transfer is void only when its effect would be to neutralize belligerent property.

If the libel in this case be such as the court can proceed upon to award salvage to the captors, I shall now briefly examine upon what terms the property in question must be restored to its former owners. This property consists,

1. Of the vessel, claimed as American property and proved to be so.

*2. Of property of American citizens, [**265** stated to be resident in the United States.

3. Of property of American citizens whose place of residence is not stated.

4. Of property of alien friends, resident in the United States.

5. Of property of subjects of France, residing in France.

First, as to the vessel.

By the act of Congress of 26th June, 1812, entitled "an act concerning letters of marque, "prizes and prize goods" (section 5, vol. 11, p. "240)," it is enacted, that all vessels, goods and "effects, the property of any citizen of the "United States, or of persons resident within "and under the protection of the United States, "or of persons permanently resident within and "under the protection of any foreign prince, "government or state in amity with the United "States, which shall have been captured by "the enemy, and which shall be recaptured by "vessels commissioned as aforesaid, shall be "restored to the lawful owners, upon payment "by them respectively of a just and reasonable "salvage, to be determined by the mutual agree-"ment of the parties concerned, or by the de-"cree of any court having competent jurisdic-"tion, according to the nature of each case, "agreeably to the provisions heretofore estab-"lished by law."

Now, the provisions heretofore established by law are to be found in an act of Congress passed on the 3d March, 1800 (vol. 5, p. 38.)

This act, after providing for the restoration of vessels and goods, after recapture, upon the rates of salvage therein mentioned, proceeds in these words: "And if the vessel so retaken shall "appear to have been set forth and armed as a "vessel of war, before such capture or after-"wards and before the retaking thereof as "aforesaid, the former owner or owners, on the "restoration *thereof, shall be adjudged [**266** "to pay, for and in lieu of salvage, one moiety "of the true value of such vessel of war or "privateer."

Under this act I presume the court cannot hesitate in affirming the judgment of the Circuit Court, with costs and expenses of prosecuting this appeal.

Second. As to the property of American citizens, resident in the United States.

The act of March, 1800 (vol. 5, p. 38), is positive in its provisions upon this subject; the property must be restored upon one-sixth salvage.

The decree of the Circuit Court upon this property, I contend, ought also to be affirmed with costs.

Third. As to the property of American citizens whose place of residence is not stated.

This, in my view of the subject, is the only point in the cause upon which the mind can at all hesitate, and when this is fully considered, I trust all doubt upon it will vanish.

It is contended on the part of the captors, that as no place of residence is mentioned, these American citizens must be considered as resi-

dent in France, and that the rule as to the restoration of the property of French subjects must therefore apply to them. To this I answer,

First. I do not think the presumption a fair one, that because no place of residence is mentioned they are therefore to be considered as residing in France. As they are citizens of the United States, it would seem to me that they ought fairly to be presumed as residing in the United States, until some evidence is produced to the contrary.

If, however, the court think it important that the claimants should prove their place of residence, they will, I presume, give us an opportunity of doing so.

267*] *Secondly, that the place of residence is wholly immaterial.

Because, being American citizens, and there being nothing unlawful in their residing in France, or any other country with which we are at peace, they have not forfeited any of their rights as citizens of the United States. And the doctrine that residence abroad gives a national character applies only to the case of the subjects of two nations which are at war with each other, or to neutrals residing in one of the two belligerent nations, but cannot be applied to such a case as this. I forbear, however, to enlarge upon this point as unnecessary. Because,

The question as to the terms upon which this class of claimants are to have their property restored, depends upon the construction of the act of Congress, which I shall now consider.

By the act of March, 1800, before referred to, it is declared, that when any goods which shall hereafter be taken as prize "by any vessel, act-"ing under authority from the government of "the United States, shall appear to have been "belonged to any person or persons resident "within or under the protection of the United "States, and to have been taken by an enemy "of the United States," &c. This question depends upon the construction of the above clause of the section.

In order that the property should be restored upon the payment of one-sixth salvage, it must belong "to some person or persons resident "within or under the protection of the United "States."

If it belongs to any person resident within the United States, it is to be so restored; or if it belongs to any person who is under the protection of the United States, whether he resides therein or not, it is to be restored upon the same terms.

All foreigners who are permitted to reside in the United States are under their protection, but no person who resides out of the United States is under the protection of the United States, but their own citizens.

268*] *In 2 Cranch, Rep., 120, this court held "that an American citizen residing abroad is entitled to the protection of his government."

Again, every foreigner who resides in the United States must necessarily be under their protection; the words, therefore, "or under the protection of the United States," would be nugatory if intended to be applied to such foreigners, and no effect can be given to those words, unless they are applied to citizens residing out of the United States, but who are still under their protection. But if the words of the act of March, 1800, are of doubtful import, their true construction is, I think, put out of all doubt by the act of 26th June, 1812, before referred to. These two acts of Congress being in *pari materia*, must be considered as one act, and construed accordingly.

The 5th section of the act of June, 1812, declares "that all vessels, goods and effects, the "property of any citizen of the United States, "or of persons resident within and under the "protection of the United States," shall be restored "agreeably to the provisions heretofore "established by law."

Now, there were no other provisions established by law than those contained in the act of March, 1800.

It is evident that Congress must have intended by the act of March, 1800, to provide for restitution of the property of any citizen of the United States, whether he resided within the United States or not. This is the only construction by which the provisions of these two acts can be reconciled.

That this was the construction intended by Congress when these laws were passed, will be still more evident when we examine with a little more care the different phraseology of them.

The act of March, 1800, says nothing about citizens of the United States, but speaks of property belonging to persons resident within or under the protection of the United States, thereby meaning, as I contend, all persons who reside within the United States, and all citizens *under the protection of the United [**269** States, let them reside where they may.

The act of June, 1812, provides for the cases of property "of any citizens of the United "States," and of "persons resident within and "under the protection of the United States."

A foreigner residing in and under the protection of the United States is entitled to have his property restored under this act. This clause of the sentence does not apply to citizens at all, because their property is already provided for by the words "any citizen of the United States."

By the act of March, 1800, the property of all persons resident within or of persons under the protection of the United States is to be restored; without which latter words no provision was made for citizens out of the country these words were for that reason unquestionably inserted.

For these reasons I contend that it is immaterial where the American citizens reside; they are entitled to have their property restored upon paying one-sixth as salvage.

Fourth. As to property of alien friends, resident in the United States.

No observations are necessary to prove that under the acts of Congress referred to they are entitled to restoration upon paying one-sixth salvage.

As to them the decree, I presume, will be affirmed with costs and expenses.

Fifth. As to the property of subjects of France residing in that country.

By the 3d section of the act of March, 1800 (vol. 5, p. 40), this property is to be restored upon the same salvage on which, by the laws

of France, the property of American citizens would have been restored to them under sim-
270*] ilar *circumstances. And if no law or usage of France is known upon the subject, the same salvage is to be allowed as if it were the property of a person resident in the United States (viz., one-sixth).

Now, I confess I have not been able to find what was the rule in France upon that subject.

Whether the ordinance of 1779, made upon this subject, and which is referred to in the argument on the other side, was in force at the time of this recapture or not, or whether that ordinance, like almost everything else in that country, was destroyed during the dreadful revolution which she has just passed through, I know not. I confess my ignorance, and I have endeavored in vain to obtain information about it.

If no such French rule is known to the court, then I claim this property belonging to French subjects, residing in France, upon the same salvage which, by the act of Congress, it ought to be restored to them if they resided in the United States.

Emmet, for the recaptors, in reply.

Most of the cargo has been claimed; but no claim whatsoever has been put in for the property expressed in the bill of lading No. 23 (26 bundles of steel to be delivered to C. W. Huty, of Philadelphia), nor to that expressed in No. 35 (a harp and case of strings to be delivered to T. Delort, who has come in and claimed other property), nor to that expressed in No. 39 (1 case of pencils, on account and risk of Mr. Fongarolly, of New York). This circumstance would not have been noticed here, but that it is called for by part of Mr. Ogden's argument, who (partially admitting that a bad claim is tantamount to none at all) contends that the want of one is no ground for condemnation. In England, by the prize acts, regulations are made in case of non-claims for a limited time. In our courts, for want of any such regulations, defaults, as I understand, are usually taken, but the property not put out of the power of the court for a reasonable time. It is unnecessary to discuss the propriety of that arrangement in the present case; for certainly, after the lapse of a year, where the parties who
271*] ought to claim *are in the immediate vicinity of the court, and have come forward with no claim at all, or one not disclosing what is necessary to ascertain the innocent character of the property, or the foundation or terms upon which restoration should be had; where they have refused the sanction of an oath to verify documents that, without it may well be questionable; there can be no ground for awarding restitution to them. Their silence, or evasive mode of claiming, must be regarded as intentional; and indicating that they cannot make out a fair case for restoration.

Mr. Ogden contends for restitution without salvage, on another ground: that this libel being for condemnation as enemy's property and prize of war, salvage cannot be awarded under it; therefore, says he, it must be restored without salvage. That conclusion is clearly illogical, for if it were true that salvage could not be awarded under these proceedings, the only consequence would be that the property should be retained, and the recaptors turned round to libel for salvage. The position itself, from which the conclusion is drawn, is also erroneous; for in all cases of military salvage, the proceedings are as against a prize, and the payment of salvage is a condition necessarily imposed by the decree of restitution on the claimant. It is not properly the thing sought for by the libelant and contested by the claimant. I do not mean to say that it may not have been done from greater caution and perhaps want of practical experience, in the United States; or that if done, it ought not to be supported, but it is neither usual nor necessary. Mr. Ogden refers to a precedent of that kind in Hall's Admiralty Practice. I have not the book by me, and cannot refer to the authority, but if it be a libel for mere military salvage, the introduction of it in that book shows that the author's ideas were not very well arranged upon the subject which occupied him; for his book is only a translation of Clark's *Praxis Curiæ Admiralitatis*, which treats exclusively of the Instance Court, and has no relation to the Prize Court of Admiralty. It is sufficient, however, for me to say that no precedent of a libel for military salvage is to be found in Maryatt's Formulary, or any English book of authority, and that obviously all the cases in Robinson's Reports, where such salvage is decreed, are brought up under the prize jurisdiction, *and were [*272 proceeded against as prize of war. Let me ask by what right was the Adeline taken by the Expedition and held? Unquestionably *jure belli*. By what right, or by what course of proceedings were the recaptured crew examined *in preparatorio*, or the papers on board her opened and inspected by the prize commissioners? Because she was subject to be dealt with according to prize law. By a former prize act of England (33 G. 3 c. 66, § 42), it was enacted that recaptured ships set forth by the enemy as vessels of war, should wholly belong to the captors, and not be restored to the original owners. How was such a vessel to be proceeded against, but by libeling her as prize and condemning her as enemy's property? So in the present case, part of the recaptured property is French, which we contend (and for the present I shall take for granted) ought to be condemned to the captors and not restored at all. How are we to proceed for that condemnation, but by libeling as prize of war? Why, under the rule of reciprocity, is it not to be restored? Because by the French law belligerent property, of which an enemy has had 24 hours' possession, is considered to have changed owners, to be the absolute property of that enemy, and when recaptured it is treated as the absolute property of that enemy, and condemned as such by libel for prize of war. The rule of reciprocity (1 Rob. Ad. Rep. Am. Edit. p. 53, in the case of *The Santa Cruz*) induces us to consider French property (placed in such circumstances as would, under the laws of that country, be held to make a complete change of ownership of American belligerent property) as also acquired by the enemy; and to adjudicate upon it as actual enemy's property; of course, to libel and condemn it as prize of war. *Non constat* till the claims are put in and sworn to, but that property, apparently American, is actually French; and it is necessary to proceed

for prize, in order to get those claims and ascertain that fact. A remarkable instance of that occurs even in the present case. The bill of lading (No. 15), of 280 cases of claret, state them to be shipped by order and for account and risk of David Dunham (presenting a *prima facie* case of American property), but when Mr. Dunham comes to claim on oath, he states them to be the property of Messrs. Johnson & Dowling, subjects of the French empire. How was the knowledge of that fact to be obtained, but by forcing a claim on oath? and if we **273***] *had proceeded by libeling only for salvage of the property as American, how should we have learned that it was really subject to total condemnation as enemy's property, under the reciprocal application of the French law? The proceedings in this way are also the most simple. The libelant claims the benefit of his *prima facie* right arising from capture out of enemy hands *jure belli*. If there be any title to be opposed to this, it must be shown and sworn to, and the court will then decree, according to the extent of that title, either total restitution or restitution on terms of salvage. In ordinary civil salvage, which falls within the jurisdiction of the Instance Court (2 Rob. Ad. Rep. Am. Edit., p. 178, note on the case of *The Hope*), the salvors never acquire a right of seizing the property, and their first step (if they proceed against it) is a warrant of arrest; they then libel for salvage, because they have no superior or *prima facie* title to the thing itself; and the contestation is about the amount. But a careful examination of Robinson's Reports, (1 Rob., Am. Ed., 32, *Aquail;* 42 Santa Cruz, 228, *The Two Friends;* 3 Rob. Am. Ed., 249, *The Apollo;* 4 Rob. Am. Ed. 120, *The Franklin;* 5 Rob., Eng. Ed., 54, *The Carlotta;* 6 Rob., Eng. Ed., 410, *The Sansom*), will show that is not the course of proceeding, where the property has been recaptured in war; and the only reason why it is not more clear, is that the matter, being long established and of course, is not noticed in the very brief statements which that reporter prefixes to the arguments of counsel and judgment of the court. Enough, however, is given to establish my position. *The Aquila* (1 Rob., 32, 25) was a case of derelict, and, properly speaking, would have belonged to the Instance Court. It appears, however, from the judgment, that "some suspicions occurred that "it was in fact the property of an enemy; and "under these circumstances it became expedi- "ent to proceed against it as prize, for the pur- "pose of meeting the pretensions of the osten- "sible neutral owner, and of bringing the ex- "amination of his claim, where alone it could "be properly discussed, into the prize court. "These measures were highly necessary, and "therefore no objection can justly be made "against the mode of proceeding." In the case of *The Two Friends* (1 Rob., 228, 231, 238), a protest was made against the jurisdiction of the court over an American ship. The counsel on both sides allow that recapture is a matter of prize jurisdiction; and in the judgment **274***] *Sir William Scott says: "But what- "ever may be the law as to wreck and derc- "lict, I conceive it does not apply to these "goods, which I consider to be goods of prize; "for I know no other definition of prize goods, "than that they are goods taken on the high "seas *jure belli* out of the hands of the enemy; "and there is no axiom more clear than that "such goods, when they come on shore, may "be followed by the process of this court." In the case of *The Franklin* (4 Rob., 140), the property was libeled as enemy's property and prize of war, and further proof was ordered of the property and destination. It was made and deemed satisfactory; but the captors insisted that restoration should only be made on terms of salvage. This was resisted by the claimants with arguments which perhaps have given rise to the present point by the claimants, although it was not a case of recapture or seizure *jure belli* from an enemy. Sir William Scott held it was a case in which no military salvage was due; but directed (as the price of restoration in this prize cause) a civil salvage of £500 to be paid. In the case of *The Jonge Lambert* (5 Rob., 54), reported in a note to *The Carlotta*, a Dutch ship and cargo captured by a French privateer and recaptured, was libeled as enemy's property and prize of war. She was condemned in the court below. The sentence was reversed on appeal, but as it was neutral property recaptured, the lords of appeal referred it to their surrogates to decide whether any and what salvage was due, with provisions for executing their decree. The surrogates decided that no salvage was due; but it is clear that if it had been a case for salvage, the restitution, on this reversal of the sentence of condemnation, would have only been on payment of it. It is unnecessary to discuss the arguments drawn from our different and totally inapplicable modes of proceeding under our municipal code. And I shall only add that if the objection taken to this mode of proceeding should be sustained, as the error, though fallen into after much consideration, arose from want of sufficient light and information in our books, it is hoped that the opportunity will be afforded to the salvors of instituting such proceedings as may be thought adapted to their case.

There is a matter about which the counsel for the claimants have fallen into a mistake. They state the libelants *to have ap- [***275** pealed from that part of the decree which restores the ship on payment of a moiety of the value for the salvage. There is no such decree on the record. The restoration of the vessel on paying a moiety for salvage was agreed to by all parties, and therefore has in fact never been decreed at all and never has been disputed. If the vessel were understood to be included in the words of the decree, "American property," we should indeed have ample grounds of appeal; for the salvage ordered would be only one-sixth. That, however, is not the case, and nothing is brought before this court but the questions relating to the recaptured goods. The same answer applies to the mistake that we have appealed from the decree of the court refusing us salvage on the freight. There is no such decree, and we never asked it, as our libel shows, though the case of *The Dorothy Foster* (6 Rob., Eng. Ed., 88), shows we are entitled to it. No question of freight was ever presented in this case, but by the claim of Alexander Cranston (for the ship-owners) of freight for the goods not claimed by him for them; meaning to make our salvage on the goods pay a proportion of it, and so diminish its amount. That

was not adjudged, and of course we have not appealed; though, if it had been decreed we certainly should; for it could be supported by no principle, and would be directly contrary to the act of Congress.

These questions being out of the way, nothing more remains but to consider what is to be the fate of the recaptured goods which have been claimed, with the incidental consideration of costs and expenses. Part of this property has been claimed, and sworn to, only as belonging to the alleged owners before and at the time of capture, without saying anything as to its ownership at the time of shipment. On this insufficient mode of claiming and its consequences I shall add nothing to Mr. Woodward's argument, except a reply to Mr. Ogden's observation, that there is no reason why such transfers *in transitu* between belligerent friends should be prevented. This very case shows otherwise; for if the property continued French, it would be subject to condemnation as enemy's property and prize of war; which belligerent right would be defeated by such a transfer.

I shall endeavor to simplify the discussion by **276***] first *considering the great general division of French property, and of American property, recaptured; and will endeavor to class the doubtful cases under one or other of those heads.

As to the French property, it clearly must be judged upon according to the rule of reciprocity. In France, American belligerent property which had been 24 hours in the possession of the enemy captors would be treated and considered as their property, and not restored on salvage. The law of 24 hours' possession has in truth been always the rule adopted by France and Spain, and most if not all the powers on the continent; for, although they may desire a decree of condemnation, they desire it only as the most portable and compendious proof of the facts (including 24 hours' possession) from which the title has accrued. They do not regard the decree as creating a title to the property, which doctrine is in truth only confined to England and this country; and was not held even by this country during the revolutionary war. France has also made an ordinance on that subject, which is to be found in 2 Azuni, 276, and of which this court must well be held to have judicial knowledge; for the prize court, to which it has succeeded, has recognized it in the case of *Miller et al., Appellants*, v. *Ship Resolution* (2 Dallas, 2). That this was the law of France down to and long after the revolution, has not been doubted; and indeed cannot; for Azuni's work was published after 1803 (*Vid.*, 2 Azuni, 218), but it is thought possible that it may have been subsequently altered; and from the pretended ignorance on that subject, a claim for restoration on American salvage is made. The claim is singular; for it is predicated not on the rights of the parties, but on the supposed ignorance of the court. It is not sanctioned by the words of the act of March 3d, 1800 (§ 3, vol. 5, p. 38), which provides that "where no such law or usage shall be known" the same salvage shall be allowed as is provided by the 1st section of that act. That means, where no such law or usage shall be made known or promulgated or acted upon. It refers to cases in which, on inquiry, a state shall not be found to have adopted any precise law or usage on the subject; but it founds no right to a suitor, on supposed judicial ignorance. The ordinance of 1779 is, however, a known law, and it must be considered as valid until those who insinuate *its [***277** abrogation give some proof of their assertion. The *onus* is with them, and the means of proof, coming from their own country, are certainly within their power. (1 Rob., Am. Ed., p. 56, 57.) The presumption as well as the fact, therefore, is, that there has been no variation or abrogation of the ordinance of 1779.

The property of American citizens resident in France must, as I conceive, be considered as French, and subject to the same rule. This effect of domicile or national character is produced in every case where that character is judged of merely by the law of the nations. Birth, by the municipal laws of many countries, is considered as fixing an indelible national character; but that doctrine seems entirely dependent on municipal law, and is not to be found in the writers on the law of nations. Birth, with them, affords a *prima facie* presumption of residence, and serves to establish it where other facts are equivocal or silent; and in that sense Sir W. Scott must be understood, when he says, in the case of *La Virginie* (5, Rob., 98, 99), "that the native character easily "reverts, and that it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country." But birth ceases to afford evidence of the national character under the law of nations, when opposed to a clear residence, *animo manendi*, in another country; for, says Sir William Scott, in *The Indian Chief* (3 Rob., Am. Ed., 23), "no position is more established "than this, that if a person goes into another "country, and engages in trade, and resides "there, he is by the law of nations to be considered as a merchant in that country." In some of these cases (the particulars of which I shall hereafter point out) it may perhaps be contended, that although the owner of the property appears to be resident in France, the permanency of his residence or the *animus manendi* does not appear; but to that I again answer in the words of Sir Wm. Scott, in the case of *The Bernon* (1 Rob., Am. Ed., 87, 88), "wherever it "appears that the purchaser was in France, he "must explain the circumstances of his residence there. The presumption arising from "his residence is, that he is there *animo manendi*, and it lies on him to explain it." For every purpose, therefore, either of commerce or of war, to be decided upon *solely [***278** by the law of nations, these American citizens resident in France must be regarded as Frenchmen. But it is contended that with respect to salvage they are protected by the words used in the act of Congress of March 3d, 1800 (§ 1, vol. 5, p. 38), "any person or persons resident "within or under the protection of the United "States;" which last expression, it is said, necessarily includes American citizens everywhere. If this were the intention of the legislature, it is very singular that it did not simply say "any citizen of the United States, or any "person or persons resident therein." It seems to me, however, that the word resident which

is expressed in the first, is understood in the second member of the sentence; and that it should be read, "any person or persons resi- "dent within, or resident under the protection of "the United States." An inhabitant of one of the territories comes within the last but not the first description; so does a consul or other public minister who has not by habitual commerce and residence acquired another national character. Other instances of residence under the protection of the United States might be produced; but an American who has changed his national character, and become, for every purpose of war and commerce, a member of another community, can no longer be regarded as under the protection of the United States. I am at a loss to see how America could afford protection to him. If she were neutral, and the country of his residence belligerent, would his commerce from that country be under her protection? The laws relating to recapture and salvage were made with a view to America's being belligerent, and must be construed in relation to that state of things. In that state, does she or can she afford any protection to a merchant residing abroad, whose protection and character must exclusively depend on the hostility or neutrality of the country to which he belongs as a permanent member? The interpretation put upon this phrase by Mr. Ogden would make the first and third sections of the act of March 3d, 1800, at variance with each other, and the same person subject to two inconsistent measures; for unquestionably such an American permanently resident in a foreign friendly country comes under the description of a "person permanently resi- "dent within the territory and under the pro- "tection of a foreign prince," &c.

279*] *The fifth section of the act of June, 1812, cannot explain the antecedent law of March, 1800; for it is obviously inadvertently worded, and not intended for any purpose of explaining, altering, or affecting that law. If the mistaken substitution of the word "and" for "or" could have any effect, it would be only to show that no person residing out of the United States in a consular or public capacity could be deemed under their protection. The truth, however, is, that the last act contemplates nothing more than to place recaptors by private armed ships, on the same footing with those made by public vessels of war; and it accomplishes that by a very loose phraseology.

If I am well founded in the foregoing arguments, it will follow that the decrees of the courts below respecting French property and that of all the residents in France, whether native Americans or not, should be affirmed; and (if costs and expenses are to be at all given in this case) with both.

I shall now consider the question as to clear American goods recaptured. The Adeline was a private vessel of war, having a letter of marque; and, when in the possession of the English, she fought with and made resistance to the privateer Expedition. There can, therefore, be no question but that the salvage of the vessel itself must be one-half. The claimants, however, contend that such a rate of salvage only extends to the vessel; but that goods recaptured on board of even an armed and commissioned vessel must be restored on paying one-sixth, that being the rate specified in the act of March 3d, 1800; and in support of this opinion several rules for the construction of statutes have been cited. It is my duty, and I trust I shall do it successfully, to maintain the opposite doctrine. In order to do so, I shall observe that salvage has, in every country and in every code of laws, been considered as a matter of general average; the service is an act done for the common benefit, and to be recompensed by common and proportionate contributions. Vessel and cargo always contribute expressly; freight, in some cases, expressly; in others, really but less obviously, where the salvors receive their proportion of the cargo or its value without paying freight. If the act of 3d March, 1800 meant to *break in upon this established [***280** principle of proportionate contribution for a common benefit, it is without precedent in any other code; and an unreasonable departure from an universal usage founded on justice and common utility. Such a supposition should not be indulged in; and it is indeed fully contradicted by the second section of the same law; for there, regulating the salvage on the recapture of a public armed vessel, it enacts that for the recapture of a public armed vessel or any goods therein, one moiety of the true value thereof shall be paid. No satisfactory reason has been or can be assigned why the United States should be obliged to pay differently and in a greater proportion for the benefit of recapture than private individuals deriving equal advantage from the act. This second section of the act naturally presents the question, how it happened that the legislature omitted to mention expressly in the first section, goods on board such armed vessel. I think I can answer it. The first section is copied from the English statutes on the same subject, varying the proportion of salvage, and with one addition the operation and force of which perhaps was not sufficiently adverted to at the time. (Statutes of 13, G. 2, c. 4; 17, G. 2. c. 3; 29, G. 2, c. 34; 16, G. 3, c. 5 and 33, G. 3, c. 66.) They give one-eighth for salvage of vessel and goods, but enact, that if the recaptured vessel shall have been set forth as a vessel of war during its possession by the enemy, the salvage for the vessel shall be one-half. Here the principle of proportionate contribution for a common benefit was not departed from; for to set the vessel out for war, it must have been conducted into port, and, of course, the cargo which it carried at the time of capture discharged, and the connection between them broken; the goods which such a vessel might have on board when recaptured would be enemy's property, and condemned as prize of war. The British acts, therefore, made no mention of such goods, they not being a fit subject for restoration on salvage. Congress, in preparing their system, although they adhered to the phraseology of the English code, thought that the same service was rendered by capturing an armed vessel, whether it was originally fitted for war by Americans or their enemies, and therefore awarded an equal compensation in both cases; but perhaps they did not advert to the fact that, in the new case which they were introducing, recaptured *goods [***281** would have to be restored, and they therefore adopted the language of the British laws without inserting a provision to meet a situation of

things that could not exist under them. Or else, considering the character of average contribution as necessarily fixed on salvage by universal usage, and equal justice, they thought it unnecessary to do more than settle the rate of contribution; and the state of the vessel being the circumstance that was to affect that rate, they spoke of it alone; but conceived and intended that a proportionate contribution from everything connected with it in danger and benefit conferred, would follow as an incident. If the first supposition be true, the awarding of salvage for the recaptured goods on board an armed vessel is a *casus omissus;* and the least we can be warranted in saying is, that it is in the discretion of the court to settle that rate. If it be, I trust it will be settled by analogy to the rule made in the act itself, and so as to preserve the harmony of the whole system. If the second supposition be correct, then the word vessel must be considered with a liberal interpretation, as also including all on board of it. And in support of such an interpretation, calculated to preserve received and established usage against a literal meaning, I may refer to the opinion of the court as delivered in the case of *Talbot* v. *Seaman* (1 Cranch, 1). There the court had occasion to consider the meaning of the expression "any nation in amity with the United States" used in the act of March 2d, 1799, relating also to recaptures from the enemy. The counsel for the captors contended that the words of this law gave salvage on the recapture of neutral property; founding themselves, like our adversaries, on the literal extent of the expression. On which the court observes (1 Cranch, 43): "The words of the "act would certainly admit of this construction. "Against it, it has been urged, and we think "with great force, that the laws of the United "States ought not, if it be avoidable, so to be "construed as to infract the common principles "and usages of nations, or the general doctrines "of national law." The impossibility of having access to authorities prevents my citing many instances of statutes similarly construed, which I have no doubt could be easily furnished. The following, however, happen to be within my power: Plowd., 366, *Zouch* v. *Stowell*, "a thing which is within the intention of **282***] "the makers *of the statute, is as much "within the statute as if it were within the "letter." In *Eyston* v. *Studd* (Plow., 467), that equitable construction which enlarges the letter of a statute is thus defined: "*Æquitas est verborum legis directio effectius cum una res sollummodo legis caretur verbis ut omnis alia in æquali genere eisdem careatur verbis.*" And there the remedy given by the 9 E. 3, c. 3, against executors, it is said, has been always extended by an equitable construction to administrators; because they are within the equity of the statute. *Platt* v. *The Sheriff of London* (Plowd., 36), the words of the 13 E. 1, are, "*circumspecte agatis de negotiis tangentibus Episcopum Norwicensem;*" yet this statute, although only the bishop of Norwich be named, has been always extended, by an equitable construction, to other bishops.

Some of the claims in this cause are for property owned by aliens resident in the United States. Where that residence is not clearly made out to be permanent, the claimants must take the consequence of the insufficiency of their claims and proofs. They are all Frenchmen, and if they have not shown a sufficient domicile to obtain for them the American national character, they must be considered as Frenchmen and abide the reciprocity resulting from their law. Where they are clearly permanent residents within the United States, they will be entitled to the benefit of that character, if my reasoning as to Americans domiciled in France be correct; if it be not, they must suffer under the rule the court will then lay down, and be regarded as Frenchmen.

It only remains for me now to say a few words of costs and expenses which are asked for by the claimants. This case is brought before this court by their voluntary act and a clear consent, without which it could not have been presented on appeal. The District Judge declared the principles he would adopt for his decision; but, strictly speaking, he made no decree on the case of any individual claimants. Those principles were considered in some respects erroneous by the counsel for the captors, and in others, by those for the claimants. It was therefore considered better to bring all the principles in review before the Supreme Court, as the expense would be little if at all increased by so doing; and if any claimant had been unwilling to become a party *to this ar- [***283** rangement, he might have withheld his consent; and his case could not have been brought up on appeal till a decree had been made on his individual claim. I submit that it is therefore now too late for him to talk of costs and expenses; and in truth impossible to ascertain what proportion of costs or expenses he can sustain.

March 10th. *Absent*—TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

The American letter of marque schooner Adeline, with a valuable cargo on board, was captured on her voyage from Bourdeaux to New York, on or about the 14th of March, 1814, by a British squadron; and, on or about the 19th of the same month was recaptured by the American privateer Expedition, James Clayton, commander, and brought into New York for adjudication. Prize proceedings were immediately instituted against the vessel and cargo as enemy property; and various claims were interposed in behalf of the American and French merchants. Upon the hearing of the cause, the District Court decreed a restoration of all the property of American citizens and other persons resident in the United States, upon the payment of one-sixth of the value as salvage, and condemned all the property of French subjects and of American citizens domiciled in France, and of all others whose residence remained unexplained, as good and lawful prize to the captors. From the former part of the decree the captors appealed, and from the latter part the claimants appealed to the Circuit Court; and from an affirmance *pro forma* of the decree in that court, the parties have appealed to this court. It does not appear in the record that any decree was pronounced in respect to the vessel; and it is therefore probable, as intimated by counsel, that she has been restored on a compromise between the parties interested.

Before we proceed to the consideration of the principal questions which have been argued, it will be proper to notice several objections to the regularity of the allegations, proceedings and proofs in the cause.

It is, in the first place, asserted on behalf of **284***] the claimants, *that if this should turn out not to be a case of enemy property, but of salvage merely (as most certainly as to some of the claims it must be held to be), the recaptors can take nothing by the present libel, because it proceeds upon the mere footing of the property being prize of war. And it is likened to the case of a declaration at common law, where the party can only recover *secundum allegata et probata;* and if no count hit the precise case the party must be non-suited.

If, indeed, there were anything in this objection, it cannot, in any beneficial manner, avail the claimants. The most that could result would be that the cause would be remanded to the Circuit Court with directions to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. This practice, so consonant with equity and sound principle, has been deliberately adopted by this court on former occasions. After all, therefore, the claimants would, in the language of an eminent civilian, but change postures on an uneasy bed.

But we are all of opinion that there is nothing in this objection. No proceedings can be more unlike than those in the courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are in general, modeled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.

In cases of mere civil salvage, it may be fit and proper that the libel should distinctly allege and claim salvage, though we do not mean to assert that, even in such cases, it is indispensable. In cases of military salvage, also, the party may, if he please, adopt a similar proceeding. But it is by no means necessary, and, in most cases, would be highly inexpedient. Recaptures are emphatically cases of prize; for the definition of prize goods is, that they are ***285**] goods taken on the high seas, **jure belli*, out of the hands of the enemy. When so taken, the captors have an undoubted right to proceed against them as belligerent property in a court of prize; for in no other way, and in no other court can the questions presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possesssion of the enemy affords *prima facie* evidence that it is his property. It may have previously possessed a neutral or friendly character; but if the property has been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual, the neutral or friendly owner is forever ousted of his right.

It depends altogether upon future proceedings; upon the examinations taken in preparatory and the documents on board; upon the verity of the claims, and the diligence and good faith of the claimants; and upon the principles of international law, comity and reciprocity, whether a restoration can be decreed or not. How can these questions be decided, unless the customary proceedings of prize are instituted and enforced? How can it be known whether all the documents on board be not colorable and false, or whether the conduct of the claimant be not unneutral or fraudulent, unless the truth is drawn from the parties intrusted with the property for the voyage by the trying force of the standing interrogatories and the test affidavits? The very case before us presents a strong illustration of the propriety of these proceedings. There is a large shipment on board, which, on the bill of lading, purports to be the property of an American claimant; yet the claimant himself expressly swears that it is the sole property of the French shipper. What the consequences are of that fact will be presently seen.

The court, then, has a legitimate jurisdiction over the property as prize; and, having it, will exert its authority over all the incidents. It will decree a restoration of the whole or of a part; it will decree it absolutely, or burdened with salvage, as the circumstances of the case may require; and whether the salvage be held a portion of the thing itself or a mere lien upon it, or a condition annexed to its restitution, it is an incident to the principal question of prize, and within *the scope of the regular prize [***286** allegation. If, therefore, the case stood upon principle alone, we should not doubt as to the sufficiency of the libel for this purpose; but it has, also, the clear support of the practice of the admiralty. (*The Aquila*, 1 Rob., 37; *The Franklin*, 4 Rob., 147; *The Jonge Lambert*, 5 Rob., 54, note.)

Another objection urged on behalf of the captors is to the sufficiency of the claims and test affidavits. It is asserted, and truly, that the goods are not alleged, in the claim or affidavits, to have belonged to the claimants at the time of shipment; it is only alleged that they so belonged at the time of capture. Regularly, the test affidavit should state that the property, at the time of shipment and also at the time of capture, did belong and will, if restored, belong to the claimant; but an irregularity of this nature has never been supposed to be fatal. It might, in a case of doubt or suspicion, or in a case calling for the application of the doctrine as to the legal effect of changes of property *in transitu*, have justified an order for further proof; or, in cases of gross negligence or pregnant fraud, have drawn upon the party more severe consequences. But in ordinary cases it is not deemed to work any serious consequences. In this instance it probably passed unnoticed in the courts below, where, if the blot had been hit, it might have been instantaneously removed by an amendment. Another irregularity undoubtedly was, that the test affidavits were put in, on behalf of many of the claimants, by their agents, although the principals were resident in the United States, and within the reasonable reach of the court. Where the principal is without the country, or resides at a great distance from the court, the admission of a claim and test affidavit by his agent is the common

course of the admiralty. But where the principal is within a reasonable distance, something more than a formal affidavit by his agent is expected. At least the suppletory oath of the principal as to the facts should be tendered; for otherwise its absence might produce unfavorable suspicions. If, indeed, the principal might always withdraw himself from the view of the court, and shelter his pretensions behind the affidavit of an innocent or ignorant agent, there would be no end to the impositions practised upon the court. The court expects, in proper cases, something more than the mere formal **287***]test *affidavit of an agent, who may swear truly, and yet, from his want of knowledge, be the dupe of cunning and fraud. It is not meant to assert that any such imputations belong to the present case. This irregularity, like the former, probably passed in silence; and it would be highly injurious if an objection of this sort should now prevail, when all parties have hitherto acquiesced in its immateriality.

We are now led to the principal question in this cause, viz., what rate of salvage is to be allowed to the recaptors? This depends upon the true construction of the salvage act of Congress of 3d of March, 1800, ch. 14. That act provides, that, upon the recapture of any vessel (other than a vessel of war or privateer), or of any goods belonging to any persons resident within or under the protection of the United States, the same, if recaptured by a private vessel of the United States, shall be restored on payment of one-sixth part of the value of the vessel or goods; and if the vessel so recaptured shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, then upon a salvage of one-half of the true value of such vessel of war.

It is argued, in behalf of the recaptors, that the Adeline being an armed vessel, they are entitled to a moiety of the value of the cargo as well as of the vessel, either upon an equitable construction of the statute, or upon general principles, as a case not within the purview of the statute.

We are all, however, of a different opinion. The statute is expressed in clear and unambiguous terms. It does not give the salvage of one-sixth part of the value upon goods, the cargo of an unarmed vessel; but it gives it upon any goods recaptured, without any reference to the vehicle or vessel in which they are found. We cannot interpose a limitation or qualification upon the terms which the legislature has not itself imposed; and if there be ground for higher salvage in cases of armed vessels, either upon public policy or principle, such considerations must be addressed with effect to another tribunal. This decision affirms the decree of the Circuit Court as to the claims of all the parties domiciled in the United States.

288*] *As to the claims of the parties domiciled in France, whether natives or Americans, or other foreigners, their rights depend altogether upon the law of France as to recaptures; for by the act of Congress, as well as by the general law, in cases of recapture, the rule of reciprocicy is to be applied. If France would restore in a like case, then are we bound to restore; if otherwise, then the whole property must be condemned to the recaptors. It appears that by the law of France in cases of recapture, after the property has been 24 hours in possession of the enemy, the whole property is adjudged good prize to the recaptors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case, to apply the same rule; and as the property in this case was recaptured after it had been in possession of the enemy more than 24 hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors; and the decree of the Circuit Court as to them must be affirmed.

As to the claims of the other persons whose national character and proprietary interest do not distinctly appear, considering all the circumstances, we shall direct further proof to be made on both points. As, indeed, the master has not been able to swear directly to the proprietary interest of the cargo, but simply says that the goods were, as he presumes and believes, the property of the shippers or the consignees, perhaps, in strictness, further proof might have been required in the courts below as to the whole cargo. It was not, however, moved for there by the captors; and as we are satisfied in relation to the claims which we shall restore, it would be useless now to make such a general order.

Upon these principles, the property embraced in the claims by and in behalf of Alexis Gardere, of William Weaver and Isaac Levis, jointly, and of William Weaver alone, of Andrew Byerly, of George I. Brown and William Hollins, of Peter A. Karthous, of William Bayard, Harman Leroy, James M'Evers and Isaac Iselm, of William Hood, of Theophilus DeCost, of John Dubany, of Messrs. John B. Fonssatt & Co., of Edward Smith, James Wood and Samuel W. Jones, of Victor Ardaillon, of Lewis Chastant, of Lewis Labat, of Benjamin Rich, of Nath'l Richards, Nayah Taylor and Gustavus Upson, of *Ferdi-[***289** nand Hurxthal, must be restored on payment of the salvage of one-sixth part of the value. The property embraced in the claims on behalf of Peter Boue, Jun., of R. Henry, of P. Doussault, of William Johnston and James Dowling, of G. Broussc, must be condemned to the captors.

The remaining claims must stand for further proof. And as to the property unclaimed, it must be condemned as good and lawful prize to the captors.

The decree of the Circuit Court is to be reformed so as to be in conformity with this decision.

Cited—3 Wheat. 92; 4 How. 154; 11 How. 526; 5 Wall. 71; 9 Otto, 43; 3 Wash. 488; 1 Curt. 202; Blatchf. Pr. 114, 146, 384; 1 Bank Reg. 518.

THE BRIG ANN, M'CLAIN, MASTER.

Absent—TODD, *J.*

If a seizure, by a collector, for a violation of the revenue laws of the United States be voluntarily abandoned, and the property restored before the libel or information be filed and allowed, the District Court has not jurisdiction of the cause.

APPEAL from the sentence of the Circuit Court for the District of Connecticut.

which reversed that of the District Court, and restored the property to the claimant.

STORY, *J.*, delivered the opinion of the court as follows:

This is an information against twelve casks of merchandise, part of the cargo of the brig Ann, alleged to have been imported or put on board with an intent to be imported contrary to the non-importation act of 1st of March, 1809 (ch. 91, § 5.)

It appears from the evidence that the Ann sailed from Liverpool for New York in July, 1812, having on board a cargo of British merchandise. She was seized by a revenue cutter of the United States, on her passage towards New York, while in Long Island Sound, about midway between Long Island and Falkland Island, and carried into the port of New Haven about the 7th of October, 1812, and im-**290***] mediately taken possession of by *the collector of that port, as forfeited to the United States. On the morning of the 12th of October the collector gave written orders for the release of the brig and cargo from the seizure, in pursuance of directions from the Secretary of the Treasury, returned the ship's papers to the master, and gave permission for the brig to proceed without delay to New York. Late in the afternoon of the same day, the present information was allowed by the District Judge, and on the ensuing day the brig and cargo were duly taken into possession by the marshal, under the usual monition from the court. On the trial in the District Court, the property now in controversy was condemned; and, upon an appeal, that decree was reversed in the Circuit Court.

It has been argued that the decree of the Circuit Court ought to be affirmed, because, on the whole facts, the District Court had no jurisdiction over the cause; and this argument is maintained on two grounds; first, That the original seizure was made within the Judicial District of New York; and, second, That if the seizure was originally made within the Judicial District of Connecticut, the jurisdiction thereby acquired by the District Court was, by the subsequent abandonment of the seizure and want of possession, completely ousted.

It is unnecessary to consider the first ground, because we are all of opinion that sufficient matter is not disclosed in the evidence to enable the court to decide whether the seizure was within the District of New York or of Connecticut, or upon waters common to both.

The second ground deserves great consideration. By the judicial act of the 24th September, 1789 (ch. 20, § 9,) the district courts are "vested with "exclusive original cognizance "of all civil causes of admiralty and maritime "jurisdiction, including all seizures under laws "of impost, navigation or trade of the United "States, where the seizures are made on waters "navigable from the sea by vessels of ten or "more tons burthen within their respective "districts, as well as upon the high seas." Whatever might have been the construction of the jurisdiction of the district courts, if the legislature had stopped at the words "admiralty and maritime jurisdiction," it seems manifest, **291***] by the subsequent clause, that *the jurisdiction as to revenue forfeitures was intended to be given to the court of the district, not where the offense was committed, but where the seizure was made. And this with good reason. In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*. If the place of committing the offense had fixed the judicial forum where it was to be tried, the law would have been, in numerous cases, evaded; for, by a removal of the thing from such place the court could have had no power to enforce its decree. The legislature, therefore, wisely determined that the place of seizure should decide as to the proper and competent tribunal. It follows, from this consideration, that before judicial cognizance can attach upon a forfeiture *in rem*, under the statute, there must be a seizure; for until seizure it is impossible to ascertain what is the competent forum. And, if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is devested by the subsequent proceedings; and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize court to proceed to adjudication, if it be voluntarily abandoned before judicial proceedings are instituted. It is not meant to assert that a tortious ouster of possession, or fraudulent rescue, or relinquishment after seizure, will devest the jurisdiction. The case put (and it is precisely the present case) is a voluntary abandonment and release of the property seized, the legal effect of which must, as we think, be to purge away all the prior rights acquired by the seizure.

On the whole, it is the opinion of the majority of the court that the decree of the Circuit Court ought to be affirmed.

Cited—23 Wall. 464; 6 Otto, 396; 1 Sawy. 155; 2 McLean, 333; 1 Abb. U. S. 578, 579; 4 Blatchf. 102; 8 Blatchf. 482; 1 Sprague, 552.

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*THE TOWN OF PAWLET [*292

v.

DANIEL CLARK AND OTHERS.

Absent—TODD, *J.*

This court has jurisdiction, where one party claims land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although at the time of the first grant Vermont was part of New Hampshire. A grant of a tract of land in equal shares to 63 persons, to be divided amongst them in 68 equal shares, with a specific appropriation of 5 shares, conveys only a sixty-eighth part to each person. If one of the shares be declared to be "for a glebe for the church of England as by law established," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares.

The Church of England is not a body corporate, and cannot receive a dônation *eo nomine*.

A grant to the church of such a place is good at common law and vests the fee in the parson and his successors. If such a grant be made by the crown it cannot be resumed by the crown at its pleasure.

Land at common law may be granted to pious uses before there is a grantee in existence competent to take it, and in the meantime the fee will be in abeyance. Such a grant cannot be resumed at the pleasure of the crown.

The common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, was recognized and adopted in New Hampshire. It belonged exclusively to the crown to erect the church, in each town that should be entitled to take the glebe, and upon such erection to collate through the governor, a parson to the benefice. A voluntary society of Episcopalians within a town, unauthorized by the crown, could not entitle themselves to the glebe. Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the state which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it; or might erect an Episcopalian church therein, and collate, either directly or through the vote of the town indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance.

By the revolution, the state of Vermont succeeded to all the rights of the crown to the unappropriated, as well as appropriated glebes. By the statute of Vermont of 30th October, 1794, the respective towns became entitled to the property of the glebes therein situated.

A legislative grant cannot be repealed. No Episcopal Church in Vermont can be entitled to the glebe, unless it was duly erected by the crown before the revolution, or by the state since.

THIS was a case certified from the Circuit Court for the District of Vermont, in which, upon an action of ejectment brought by the town of Pawlet to recover possession of the *glebe lot*, as it was called, in that town, the opinions of the judges of that court were opposed upon the question whether judgment should be rendered for the plaintiff or for the defendants, upon a verdict found, subject to the opinion of the court, upon the following case stated:

"In this cause it is agreed on the part of the "plaintiffs, that the lands demanded in the "plaintiffs' declaration are a part of the right "of land granted, in the charter of the town of "Pawlet, by the former governor of the prov-"ince of New Hampshire, as a glebe for the "Church of England as by law established; "and that in the year 1802 there was, in the "town of Pawlet, a society of Episcopalians "duly organized agreeably to the rules and "regulations of that denomination of Chris-"tians heretofore commonly known and called "by the name of the Church of England. That "in the same year the said society contracted "with the Reverend Bethuel Chittenden, a "regular ordained minister of the Episcopal "Church, who then resided in Shelburn, in the "county of Chittenden (but had not any settle-"ment as a clerk or pastor therein), to preach "to the said society in the town of Pawlet at "certain stated times, and to receive the avails "of the lands in question, and that the said "Chittenden thereupon gave a lease of the said "land to Daniel Clark and others, who went into "possession of the premises, and still holds the "same under the said lease, and that the said "Chittenden regularly preached and adminis-"tered the ordinances to the people of the said "society, according to his said contract, and "received the rents and profits of the said "land until the year of our Lord Christ "*1809, when the said Chittenden de- [*293
"ceased; and that in 1809 the said society con-"tracted with the Rev. Abraham Brownson, a "regular ordained minister of the Episcopal "Church, residing in Manchester, and officiating "there a part of the time, to preach to the said "society a certain share of the time, and to re-"ceive the rents and profits of the said land; "and that the said Brownson has regularly at-"tended to his duty in the said church, and "administered ordinances in the same until "September, 1811, about which time the said "society regularly settled the Rev. Stephen "Jewett, who now resides in the said town of "Pawlet, and who from the time of his settle-"ment is to receive all the temporalities of the "said church. And it is further agreed by the "said parties, that the general assembly of the "state of Vermont on the 5th of November, "1805, did grant to the several towns in this "state, in which they respectively lie (reference "being had to the act of the general assembly "aforesaid), all the lands granted by the King "of Great Britain to the Episcopalian church "by law established (reference being had to "the charter of the town of Pawlet afore-"said for the said grant of the King of "Great Britain), and that the lands, in the "plaintiffs' declaration mentioned and described "are part of the lands so granted by the King "of Great Britain to the Episcopalian Church."

The charter of Pawlet is dated the 26th of August, 1761, and purports to be a grant from the King, issued by Benning Wentworth, governor of New Hampshire, and has these words: "Know ye, that we, of our special grace," &c. "have, upon the conditions and reservations "herein after made, given and granted, and by "these presents for us, our heirs and succes "sors, do give and grant, in equal shares, unto "our loving subjects, inhabitants of our said "province of New Hampshire, and our other "governments, and to their heirs and assigns "forever, whose names are entered on this "grant, to be divided amongst them into sixty-"eight equal shares, all that tract or parcel of "land situate, lying, and being within our said "province of New Hampshire, containing by "admeasurement 23,040 acres, which tract is "to contain six miles square and no more," &c., "and that the same be and hereby is incorpo-"rated into a township by the name of Pawlet," &c. "To have and to hold the tract [*294
"of land as above expressed, together with all," &c., "to them and their respective heirs and "assigns forever," &c.

On the back of which grant were indorsed, "The names of the grantees of Pawlet, viz.: "Jonathan Willard," and others, being in all 62, then follow these words: "His Excellency "Benning Wentworth, Esquire, a tract of land "to contain five hundred acres as marked in "the plan B. W., which is to be accounted two "of the within shares—one whole share for the "incorporated society for the propagation of "the gospel in foreign parts; one share for a "glebe for the Church of England as by law "established; one share for the first settled min-"ister of the gospel; one share for the benefit "of a school in said town."

The act of the 5th of November, 1805, is entitled, "An act directing the appropriation of "the lands in this state, heretofore granted by "the government of Great Britain to the Church "of England, as by law established."

"Whereas, the several glebe rights granted "by the British government to the Church of "England, as by their law established, are in "the nature of public reservations, and as such "became vested by the revolution in the sov-"creignty of this state; therefore,

"Sect. 1. Be it enacted by the general as-"sembly of the state of Vermont, that the sev-"eral rights of land in this state granted under "the authority of the British government to "the Church of England as by law established, "be and the same are hereby granted severally "to the respective towns in which such lands "lie, and to their respective use and uses for-"ever, in manner following, to wit:

"It shall be the duty of the selectmen in the "respective towns in the name and behalf, and "at the expense of such towns, if necessary, to "sue for and recover the possession of such "lands, and the same to lease out according to "their best judgment and discretion, reserving "an annual rent therefor, which shall be paid "into the treasury of such town, and appro-
295*] "priated to *the use of schools therein, "and shall be applied in the same manner as "moneys arising from school lands are, by law, "directed to be applied."

This cause was argued at last term by *Pitkin* and *Webster* for the plaintiffs, and by *Shepherd* for the defendants.

Pitkin, for the plaintiffs.

On the part of the plaintiffs it is contended, that the share in question, or the sixty-eighth part of the town of Pawlet, which in the charter was granted or reserved "for a glebe for the Church of England, as by law established," did not at the time of the grant pass from the king, for want of proper persons to take; that it remained in the grantor until the revolution, when it passed over and vested in the state of Vermont, who had, therefore, full right to dispose of it. By the words of the charter, the tract of land therein described is to be divided among those whose names are entered on the charter into 68 equal shares. The names of 63 persons are mentioned, including Benning Wentworth, who has two shares, making for those 63 persons 64 shares, leaving four shares, one of which is for the incorporated society for the propagation of the gospel in foreign parts; one for a glebe for the Church of England, as by law established; one for the first settled minister of the gospel; and one for schools; making in the whole 68 shares.

It is clear, from the terms of the grant, that no person named on the back of the charter, or intended as grantee, except B. Wentworth, can take but one share, as the town is to be divided into 68 shares, and those shares are to be equal. B. Wentworth is to have 500 acres, which are particularly designated and marked in the plan annexed to the charter, and are to be accounted two shares. This exception also proves that the other grantees are to have one share only. In no event, therefore, could the share in question, or the two other public shares, as they have been called, be divided among the individual persons named. Nor has this ever been the case. In the division of the town of Pawlet the share intended for a glebe was located by itself, and called the glebe lot. It was intended, in the grant, as a name; and if it could not pass as designated, for want of *proper grantees, it remained in the [*
296 king, the grantor (as if one half of the names inserted had been fictitious), and at the revolution vested in the state of Vermont.

The nature of the estate intended to be conveyed is expressed in the word "glebe," well known in the English law as a provision for the parson of a parish. The law says that the freehold only vests in the regular parson; not the fee; consequently the grant or disposition of land, in such case for a glebe, does not make or imply a disposition of the fee; the fee, therefore, remains in the grantor.

The words "for a glebe for the Church of England as by law established," express clearly the intention of the grant, viz., for the support and extension of the national church, considered in its political connection. It is not a grant to the national church as a body. No such grant ever was made, or if made, would be valid. Every provision for its support is to some organ of the church, as to the bishop of such a see, or the parson of such a parish, and his successors. A parish church, in the English law, is the building consecrated and endowed. There must be a glebe, which may be the church yard only. The parson has, in the glebe, no more than a freehold estate. He is considered in law as a sole corporation, and the freehold passes by succession. Parishes are a civil and ecclesiastical division; the inhabitants of a parish, the parishioners, the members of the national church, are never said to be members of the parish church; neither the parishioners nor the vestry have any right in, or power over the glebe, not even during a vacancy. (See 1 Black., p. 417.) The Church of England never was established by law, either in New Hampshire or Vermont, before or since the revolution. Neither the civil nor ecclesiastical law, as applicable to glebes, was known or recognized at the date of the charter; nor has it been adopted or recognized since in either of those states. The intention of the grant, therefore, even before the revolution, could never have been carried into effect. It is also well known that, at the date of the charter, the land therein granted was a wilderness, and so continued for a long time afterwards.

At the time of the grant, therefore, [
297 there was not only no Church of England established by law, but in the town of Pawlet there was no organ of that or any other church, capable of taking the share in question.

The grant, of course, could not take effect, and the revolution has rendered it utterly impossible that it ever can take effect agreeably to the intention of the donor. By the revolution we have become completely severed from the Church of England as by law established. Individuals and societies may profess the same creed, have the same mode of worship, and the same ordinances administered in the same manner, and submit to the same discipline, as far as may be effected without the assistance of the civil arm. But this constitutes, in the view we are now taking of the subject, similarity, not identity. It furnishes no ground for legal deriva-

tion of civil or legal connection. In every political, civil and legal view, and in all the civil and legal consequences, the dissolution of the Church of England, as by law established, was in the United States as total and complete on the revolution as that of the civil power of the British government. Nor has there ever been in the state of Vermont a substitute adopted. Every idea of a national or state religion has been exploded. The court will consider how many things are requisite to the legal possession and enjoyment of a glebe; how much of the common law of England, and how much of the canon law must be adopted or considered as in force; although, in every civil and political view, the institution or establishment to which they applied is abolished. There must be a parish, a church with cure, a parson, legally and canonically introduced. Four things are requisite to constitute a parson: 1, Holy orders; 2, Presentation or collation; 3, Institution; 4, Induction; he must be a sole corporation. No part of the common law on this subject has been adopted in the state of Vermont; either by the constitution, by statute, or by legal adjudications.

It would be absurd to consider any number of Episcopalians, formed into a society in Vermont, as standing in the place of a parish, and capable, contrary to the doctrine of the common law under which they must derive title, of succeeding to the freehold of a glebe, or of taking **298***] and *holding by succession or otherwise, by or under a grant of lands for a glebe, made by the King of Great Britain before the revolution. There is a statute in Vermont (see an act for the support of the gospel. passed in 1797, Revised Laws, vol. 2, page 474), under which religious societies may be formed; but it does not appear, in the case, that the society in the town of Pawlet is formed under that act. But, if so formed, the members of such society are not confined to any particular limits, and if associated from 4 or 5 different towns, they may have a claim equally good to the glebe lands, in each town. This statute, which extends equally to all denominations of Christians, constitutes societies or associations formed under it, corporations or *quasi* corporations; and enacts, "That they shall have power to "hold to themselves and successors, all such "estates and interests as they may hereafter "acquire, by purchase or otherwise, and the "same to sell and transfer, for the benefit of "such association." A society so formed has the precise power given by the act and no other. The power is limited to future acquisitions; the power to sell is co-extensive with the power of acquisition. Nothing is to be holden which shall be perpetually appropriated, as a glebe is. Such society is not empowered to succeed to estates, rights or interests, granted previous to their existence, although limited to objects similar to its own. Indeed, the expression in the act seems to have intended an exclusion of such claim.

If the share in question should be considered as a reservation for a future particular use, it then remains in the king, the donor, until a state of things should arise when it could be applied to such use. This use is specified in the charter, viz., for a glebe, &c. We have before proved that, prior to the revolution, it had not been, and could not, consistently with the institutions of the country, be so applied. It, of course, remained in the king at the revolution, and at that time vested in the state of Vermont.

At the date of this charter a separation of the provinces or colonies from the mother country was not contemplated. It was undoubtedly intended at that time, by the donor, that the Church of England should be established by law in the province of New Hampshire, as *it had been in some of the other prov- [***299**
inces, and particularly in Virginia. In this charter, therefore, as well as in all other charters granted by the Governor of New Hampshire, provision was made, by a reservation of a certain share of every township, for such an establishment.

If the share in question be considered in the nature of a grant, then, as we have before stated, the grant of "a glebe," if it took effect at all, is of the freehold only, and not of the fee; of the freehold to be taken and held by the incumbents in succession.

The fee, of course, not being granted, remained in the grantor. By the English law, as well as our own, on the dissolution or political death of a corporation, all estates granted to such corporation revert to the grantor or donor. And if a grant was made by the king to any person, or number of persons, incapable of taking or holding, or if the object ceased to exist, or never came into existence, the estate was considered as never having passed, or as reverting to the king, according to the nature of the case.

On the revolution the state of Vermont, as a sovereign state, succeeded, in full and sovereign right, to all the property and rights of property within the same, which, at the time, were vested in or appertained to the King of Great Britain, whether in possession or reversion. The case, then, stands thus: A tract of land in the town of Pawlet was, by the King of Great Britain, before the revolution, granted "for a glebe for the Church of England, as by law established;" that is, the freehold to vest to a particular use, when that use should arise, the remainder or reversion in the crown. There is no securing, in the constitution of Vermont, to any man or body of men, of any rights or benefits which under the crown were intended for the Church of England as by law established. At the time of the revolution there had never been, within the territory, now state, of Vermont, a regular parson, who could make any possible legal claim or pretense to the use of any of the glebe lands within the same. The sole corporation, as the parson was denominated, was not dissolved or extinguished by a political death, because in Vermont it *never [***300**
came into existence, but the possibility of such existence ceased. A provision might have been made by the constitution, or by statute, in favor of Episcopalians; but it must have operated as a new grant, or new organization. No such provision has been made; the right, therefore, vested in the state of Vermont, and the grant is well made to the town of Pawlet.

Shepherd, contra.

It is contended by the counsel for the plaintiff that nothing passed by the grant contained in the charter of Pawlet, so as to devest the King of Great Britain of the title to the prem-

ises in question. If this position is correct, it must be admitted that the plaintiff is entitled to recover; because it cannot be denied that the title of the crown to any lands antecedent to the revolution, within the jurisdiction of the now state of Vermont, would, of course, become the property of the state. If, however, the ground taken by the plaintiff's counsel shall be found untenable, and that the title of the king was devested by the grant; then, whether the defendants have a title or not, will be a matter of indifference; so long as the plaintiffs must recover on the strength of their own title, and not on the weakness of ours.

If, by the grant, the title passed from the then king, the state of Vermont could acquire no right by the revolution; but the title must remain, unless forfeited, as at the time of the grant.

The reason given by the counsel for the plaintiff to show that, notwithstanding the charter the title remained in the grantor is, that when made there was no grantee in *esse* capable of taking the fee, or other estate, so as to devest the king of his. If this be true, on a fair construction of the letters patent, it must also be admitted that the plaintiff is entitled to judgment.

It is believed that, on examination of the charter, the court will be of opinion that there was a sufficient grantee in *esse*, and that the title did pass by that instrument. And if there **301***] was then, no matter what has *happened since, unless there has been a forfeiture and office found, which are not pretended.

1. The words of the granting clause are: "Do give and grant in equal shares, unto our "loving subjects, inhabitants of New Hamp- "shire, and our other governments, and to "their heirs and assigns forever: whose names "are entered on this grant, to be divided to "and amongst them into sixty-eight equal "shares, all that tract or parcel of land," &c., describing and bounding the whole township of Pawlet.

It is contended here that the whole of the land contained within the boundary lines of the township was designed to be granted without any saving or reservation to the crown of any part of the same. The whole of the six miles square was granted; to whom? To the loving subjects of His Majesty in New Hampshire and elsewhere. How was it granted? In fee-simple; and in sixty-eight equal shares, to be equally divided to and amongst the king's loving subjects named on the grant.

He granted to them (be they more or less in number) the whole township of Pawlet as tenants in common, and not in severalty. Hence, each man named on the grant became entitled to his proportionable part of the whole township, whether he was one of sixty-eight or one of three.

It is presumed the court in this case will be much inclined to do as courts have generally done, if possible by their construction to satisfy the object of the grant, and give it a meaning which was intended by the grantor. It is a rule of construction to search out the intention, and make that a landmark.

Possessing liberal views of this instrument, it will no doubt be found that the grantor designed to pass the title to the whole town of Pawlet, to his loving subjects named thereon, and not to confine the grant to a sixty-eighth part of the township to each, but in proportion to the whole number, more or less.

Now, supposing that a part of the names written on *the grant should have been [***302** fictitious, the grant of a proportion would not have been to them, but directly to the others, who answer the description given, "Loving subjects of the grantor."

Fictitious persons could not be loving subjects; therefore the whole land would pass to the real persons. Most unquestionably the whole tract was granted to those capable of taking a title.

It will be seen by the grant that the lands were not allotted; of course no partition was made amongst the patentees until after the charter was made. The grant was in common and not in severalty; therefore no inference of an intention to give each proprietor but a single share can be drawn from the circumstance of the whole town being required to be divided into sixty-eight equal shares. As well might the counsel contend that it was inferable from a law incorporating a bank with three thousand shares that the stockholders could have but one share each.

If the foregoing is a correct construction of the instrument before the court, then it results as a certain inference that the crown had not a rood of land remaining in Pawlet; and, consequently, the state of Vermont could have none; as the state pretends to no greater right or title than that of the king.

2. It will be attempted to be shown that on the 26th day of August, 1761, there was in *esse* a Church of England, as by law established, which could be a grantee of the crown. If so, the title passed directly to the church in fee-simple; and would need no auxiliary to sustain her right.

It is said by the counsel that lands granted for the benefit of the church are granted to the bishop, or some other ecclesiastical person; but it would be strange doctrine to say that the king had not power to grant directly to the church established by law, and therefore distinctly identified as a Christian society. The position will here be ventured, that such a grant to the Church of England as by law established was, and still is, valid.

*To maintain the point that, the [***303** church existed at the date of the grant, we need only appeal to historical facts in the English books, and the still more authentic testimony of the body of the English law, the statutes and adjudged cases of the realm, within the recollection and familiar to the mind of the court.

It is said "that when the grant was made there was no church in Pawlet; it was all new. There was no established church in New Hampshire or New York." Whether true or not, as it respects this part of the argument, is not worth inquiry; for it will be remembered that the words of the grant do not confine the bounty of the sovereign to Pawlet, New Hampshire, or the American continent; it is co-extensive with his dominions, and may be claimed by the church wherever found within them.

That there was a church established by law

in Great Britain no one will deny; if so, what should prevent that church from being the grantee? It can hardly be denied that the king could grant lands lying in one of his American colonies to his subjects beyond the Atlantic as effectually as those who resided in that colony. It was all within his territorial jurisdiction; and place of residence could have no influence. It may be said that the grant is to the king's subjects in New Hampshire. True; but the words "and our other governments" are added. These words may embrace the whole governments and dominions of His Majesty.

If, however, this ground should fail us, there can be no difficulty, it is presumed, to ascertain the existence of a church in the colonies capable of taking a title to the property in question.

In Virginia, if information is correct, the Episcopalian Church was established by a law of that colony before the date of the grant; but whether so or not we feel indifferent, because by a future construction of the grant we have the utmost confidence that the true meaning is not a church established by any law in the American colonies, but that the words "as by law established" are used as descriptive of the denomination of Christians intended as the sub-
304*] jects of royal munificence. *As much as to say that sect of Protestants who are known in England as the established Episcopalian church. That you, churchmen of America, must embrace the same creed; the same church government must be the rule of your discipline; and your ordinances must be administered in every respect as by the established church in England. You must be neither Catholics nor Dissenters, but be identified in every part of your religious establishment in faith and practice with the mother church.

That this is a natural construction is manifest from the fact that the government could not have been ignorant of the state of the church in the colonies, and it would be the height of absurdity to suppose a grant to be made to a body of Christians which the grantor well knew did not exist. The court surely will never impute to the officers of any government such trifling and mockery. If, therefore, the colonial Episcopal Church was intended as the subject of this bounty, and if she was not established by law, it must follow, as an irresistible inference, that the words "as by law established" are words of description and not of identity.

Having established this point, we will show by historical proof a church in the state of New Hampshire, long anteecdent to the date of the grant.

In Belknap's Hist. of New Hampshire (2 vol. 118), it is stated that in the year 1732 a building for an Episcopal Church was erected at Portsmouth, in New Hampshire. In 1734 the church was consecrated, and in 1736 they obtained a clergyman of that order by the name of Arthur Browne.

If this church was capable of taking a title to land, as I shall hereafter show, all the difficulty suggested on the part of the plaintiff will be removed.

Some reasons will now be given to show that such a church as was established in New Hampshire was capable of taking a title to real property.

1. The king, by the act of granting, creates sufficient corporate powers to carry into effect his designs. That *he can create cor- [***305**
porations cannot be doubted. He did, by the very instrument before the court, create in the town of Pawlet all the corporate powers and prerogatives which they now possess; a body sufficiently known in law to be invested with the supposed legal estate in the premises in question; and by an act of the very legislature who have authorized them to bring this action. If the king had the authority to incorporate, it can be easily and legally inferred from the grant that this body was sufficiently incorporated thereby.

Should Congress, by law, give to the Presbyterian Church of the city of Washington a portion of the public lands, would the court endure to be told that there was no proof of the incorporation of the church, *ergo* the law was void—the title never passed either by the law or grant made in pursuance thereof?

In a case thus situated, the court may, indeed they ought to, infer, for it is a just legal deduction, and bottomed upon the soundest judgment of law, that a sovereign granting power (always supposed, *prima facie* at least, to be right), had not indulged in the foolish blunders of granting real property for most desirable ends to shadows and nonentities. And it is confidently believed that the court will determine as a reasonable and legal intendment, that the church of New Hampshire was made capable of holding this property.

There is a further reason to suppose the church capable of taking a title. The grant being a governmental act, and of such high and incontrovertible authority, every statement and fact contained in it is so far proved that it cannot be denied. If this be correct, the grant itself proves the whole that need be proved to make this part of the grant valid, and to vest the title in the church. The court, therefore, will not receive any statements, history, conjectures, or Vermont preambles, to contradict the acts of the British government made in solemn and official form. It is true that a prior grant from the same authority may be shown to defeat a subsequent. But that is permitted for very different reasons; because the first act of a government granting away its lands vests a title in the grantee, and there is nothing left to give.

*In support of this position it is sub- [***306**
mitted, whether the words "one share as a glebe for the Church of England," &c., are not tantamount to a positive averment of an existing church in this country which could be the legal subject of donation by letters patent. There is this strong reason to support such an opinion, that we never can impute ignorance or error to a sovereign while exercising the high prerogatives of his station. We never can say that he, as the organ of the government, has been granting land without a grantee; that he has mistaken the facts or the law, and consequently nullify his acts. It is enough that the instrument points to the grantee and gives the object; its legal attributes are to be presumed.

The plaintiff comes, claiming under the very title granted to us; in which grant we are acknowledged to have a prior right. Had this grant been from other than the government on

whom the doctrine of estoppel cannot fasten, it would be enough for us to hold up the charter between the claim and our possession and shut the plaintiff at once from even a view of the court. Even now, whether the doctrine of estoppel will apply or not, one thing is true: that what the king, under whom the plaintiff claims, has solemnly recognized as correct, must be binding upon the government of Vermont, and, consequently upon the plaintiff in this cause.

The act of the British government is not the only governmental act which the church has to secure their possession.

The legislature of Vermont, on the 26th day of October, 1787, passed an act "to authorize the selectmen in the several towns of the state to improve the glebe lands," &c. And, after enacting that the selectmen should have power to lease out the glebe lands, receive the rents, bring actions of ejectment, recover the possession thereof, when possessed by persons without right, they make a proviso in the words following: "Provided, nevertheless, that nothing contained in this act shall extend so far as "to prevent any Episcopal minister, during the "time of their ministry, that now are or hereafter may be in possession of any glebe lot or **307*]** "right, or actually officiating *in said "town where the land lies, and who is an ordained minister of the Episcopalian Church, "from having the management of said lots, and "the avails arising therefrom."

By this proviso it is perfectly obvious that the legislature intended to manifest a legal recognition of the right of the church to the property.

It is also equally obvious that by the act authorizing the selectmen to take care of the glebe lots, and obtain possession by action of ejectment of those which were possessed by squatters, the legislature designed not to filch away the land from the church, and in the plenitude of their power to forget right, but to secure the title and promote the interests of the church. If not, why in the proviso are the Episcopal clergy preferred to other clergy in the management of the lands; and why are they preferred even to the selectmen as the guardians of the property. The proviso is high and indisputable proof that the object of the statute was solely to preserve the property from waste for the benefit of the church, to preserve for it the income which might result from its prudent management, and to save the title from loss by long adverse possession.

After all this one would suppose that the state would never indulge itself in attempting to devest the church of their property; yet, strange as it may appear, on the 30th of October, 1794, the legislature of Vermont make another act concerning the glebe lots, and the following is its preamble:

"Whereas, by the first principles of our government it is contemplated that all religious "sects and denominations of Christians, whose "religious tenets are consistent with allegiance "to the constitution and government of this "state, should receive equal protection and "patronage from the civil power. And, whereas, it is contemplated in the grants heretofore "made by the British government, commonly "called glebe rights, that the uses of the said "rights should be to the sole and exclusive "purpose of building up the national religion of a "government diverse from and inconsistent "with the rights of our own; for which reason, "and on the *principles of the revolu- [***308** "tion, the property of said lands is vested in "this state." They, therefore, go on to enact that the rents and profits of all the glebe lots shall be appropriated to the support of religious worship in their respective towns forever; without regard to the sect of Christians, and all should share alike, according to the number of taxable inhabitants, in the parishes respectively.

In this preamble they seem to admit that the title to the glebe lots was vested in the church. They do not deny such a construction of the grant, nor do they urge, as a reason for taking away the property from the Episcopalians, that the grant was void, or that the title was in the crown before the revolution, and that thereby they became entitled to the property; but they say these lots were granted "exclusively to build up a national religion of a government diverse from and inconsistent with the rights of their government;" and for these reasons they attempt to devest the church of their title in order to give the property, or the income of it, to other sects of Christians.

The reason given for enacting this law is strong evidence of the opinion of the legislature that the title had passed out of the crown and vested in the church. But as they disliked an established religion, supposed it anti-republican, and what was more to be dreaded, it was established in a government "diverse from the government of Vermont," and inconsistent with their rights, or rather their religious and political opinions; being disagreeable in the particulars they take away the income of the land from the Episcopalians to appropriate it to other, and, no doubt as they supposed, better purposes.

Notwithstanding the length and force of this preamble, and the cogent reasons given for making the law, on the fifth day of November, 1799, the legislature repeal this act, and in so doing most manifestly abandon all pretensions to the church property; for in the repealing law they take care to secure those who have trespassed upon those lands from actions which might be brought for so trespassing; admitting in the fullest sense that men who had intermeddled with the property *by the authority and [***309** in pursuance of their law had so trespassed. Hence the court will see that the legislature, both in the making and in the repealing of the law of 1794, show that the act was an unjust attempt at usurpation.

By the record of the case of *Pettibone* v. *Barber*, tried before the late Justice Patterson at a Vermont circuit, it appears that the plaintiff failed in an action brought in pursuance of this law. It is said that the judge pronounced the law unconstitutional and void. This decision might have induced the repeal, as the trial was had in the intermediate time between the passage and repeal of the act.

The legislature in the year 1805 passed another act, and by that discover less solicitude for the Christian Church in any form. This, too, has a preamble, contradicting in its terms the old, in which they say: "Whereas, the several glebe rights, granted by the British government to the Church of England as by law "established," are in "the nature of public

"reservations," they, therefore, give them to the select men of the towns where they lie respectively, for the use of schools, &c.

The first act contains by implication a decided confirmation of the title in the church. The second, although contradictory in its provisions and repugnant to that right, exhibits in a striking light in its preamble and in the repealing clause, a thorough conviction, in the mind of the legislature, of the fallacy of their pretensions, urging facts which, if true, would contribute nothing in support of those pretensions. In the last they urge a new reason for their law, and as we suppose, equally unsound. Here they become wiser, and not only act the legislators but judges, scout what had been done by their predecessors, and give a construction of the grant which is indeed a strange one, but which, if correct, is supposed, as will be hereafter shown, to defeat the right to recover in this case.

3. In the third place it is supposed the grant of the crown may be considered valid by adopting the opinion that this is one of the cases **310***] where the fee may be in abeyance, *until the existence of the church in the town of Pawlet so organized as to be capable of receiving it.

To maintain this point the court are referred to 2 Blac. Com., 106; Co. Lit., 342, where it is laid down, that an estate may be granted to John for life, and then to the heirs of Richard, although Richard has no heirs at the time of the grant.

Here, although the life estate vests in John immediately, yet the fee must be in abeyance until the heirs of Richard are *in esse*. Indeed the happening of the event is perfectly contingent, for those in remainder may never exist. Should it be said that the fee remains in the grantor during the life estate, ready to vest in the heirs of Richard if they exist at the determination of the life estate, or to continue in him by *reverter* if Richard has no heirs; it is met by urging that if this doctrine be correct, then with equal propriety may it be contended on our part that the fee remained in the king ready to vest, whenever there should be a church.

But says the state of Vermont, "we have a right by forfeiture to the king's property." True, but no greater right than the king had; which was a naked legal title; the use belonged elsewhere. Of this hereafter.

In the 2 Black. Com., 318, it is said that ecclesiastical estates must sometimes necessarily be in abeyance, and that where there is no person in whom the fee can vest, it potentially exists in abeyance; as between the death of the incumbent and the next presentation.

The parson having but a life estate in the glebe, unless it could so exist on his death it must revert to the grantor.

Christian, in his Notes on Blackstone, supposes the fee to be all the while in the lord of the manor.

This is by no means the opinion of Blackstone, or of the still greater lawyer, Coke; both of whom, if they are correctly understood, lay down the law to be that the fee exists, between the death of the parson and his successor, not in the lord, but in abeyance.

311*] *4. If the construction of the patent contended for in the inception of this argument is correct, there will be no difficulty in finding a grantee to uphold the fee, and make it subservient to the benevolent intentions of the crown. It would not be a violent or unnatural construction to say that the town of Pawlet was granted to the persons named on the grant, in fee, upon condition that they should, in the location of the town, lay out and set apart "one share as a glebe for the Church of England, &c.," together with the other shares for Benning Wentworth, the first settled minister, and the school, according to the directions indorsed.

Under such a construction, whether the church were incorporated or not, they might reap the benefit of the use; for as soon as they become organized, and a clergyman settled, they would be capable of receiving the income of the land.

This construction was adopted by the proprietors of the town. In locating the same they did survey a share and mark it off as a glebe right. This appears from the several acts of the state and in the argument of the counsel for the plaintiff.

The present inhabitants of the town must all hold their lands under the grant before us, and not only so, but from the original proprietors who so located and consecrated the glebe right which is now claimed by those persons.

By the laws of England, and probably of all civilized countries, the claimer or possessor of land is bound by the acts and confessions of those under whom he holds the claim or possession. By this rule, then, the present inhabitants of Pawlet are bound by the act of their predecessors. That act was a complete recognition of the right of the church to the property; an act which spoke louder than any language.

It may be said that the share was located by the proprietors of the town in their corporate capacity. If that was the case it is still the worse for them, because a corporation never dies, and the location was the act of the plaintiff upon the record in this cause; and they are now *claiming property which they [***312** once voluntarily admitted to belong to the church.

Again, it appears that the plaintiff in this cause is now enjoying the benefits of this construction in the share given to a school and the first minister settled in the town. Without this, or the third position taken in this argument, the town would have but slender pretenses to the use of those two shares; but it seems they claim those two lots by the same, or a more uncertain title, hold them by the same tenure, derive the right from the same source, and yet claim the glebe also, and in order to support that claim are driven to the necessity of denying the legal and efficient properties of the instrument by which they as well as the church claim.

5. This is a trust estate. The patentees named upon the grant are the trustees for the use of the church whenever it should be organized in the town of Pawlet, so as to be enabled to receive the rents of the land.

If a use can result from a grant by implication, it is supposed this is a case of that kind.

In expectation that objections will be made to such an interpretation of the case those objections are endeavored to be answered.

1. It may be said that the grant is silent as

to any use or trust, and therefore it is not to be implied.

The answer is, wherever from the nature of the grant a trust estate can be implied, with propriety, where it is necessary to carry into effect the object of letters patent, the court will adopt the implication.

The court are referred to 7 Bac. Ab., new ed., 89; Sand. on uses, 208, for the doctrine of the implication of uses. In 12 Mod., 162, *Jones* v. *Morley*, it is said that a use may be declared without the word use. Any words that show the meaning of the party are sufficient. If the court can suppose that the legal estate was granted in fee, to the patentees, there can be no difficulty in deciding the nature of their title.

313*] The instrument upon *which such legal estate depends, will indubitably show that their only right was for the use of the church.

2. It may be said that as there is no church in existence, the legal estate must fail for the want of a use.

It has already been shown that a church was in *esse* when the grant was made, and whether the church was or was not incorporated cannot be material; in either case the title in the trustee would be valid. To this point the court are desired to look at 1 Rep., 23, 24 and 25, and Gilb. Law Cases, 44, where it will be found that public institutions are capable of enjoying a trust, and it was decided that the poor of the parish of Dale, although not incorporated, were capable of a trust. Without adopting the principle that the church can take an equitable interest in these premises, there would in many cases be an end to the workings of benevolence. Science might often lose her patrons, the needy their benefactors, and religion her warmest supporters.

Before we part with this point we will once more look at the act of 1805, upon which the plaintiff founds his right to recover; and to its preamble, which declares the glebe lands in the nature of public reservations. If this means anything, it must mean that the legal estate was reserved to the crown. As a proof that the legislature so meant, observe the following language: "And as such by the revolution became "vested in the sovereignty of this state." Now, sovereign as the state may be, she can have no other or greater title than the crown of Great Britain had after the grant and before the revolution, and that right could be no more than a right reserved for the use of the church; because it never ought to be supposed that the crown made this grant with no other design than to reserve to itself what it before had. If the king had an inclination to retain for his own use a few shares of the land, he might have done it directly; in the same manner as the pine trees were reserved for his royal navy.

This, then, is the right of the state of Vermont, on their own construction, a right to do what, by the act of 1787, the legislature did, like honest men, and added security to the already existing title of the church.

314*] *If the right of the crown was of the nature described, and if the court can suppose the land reserved to the crown, and that the king could be a trustee, they will then say that the state of Vermont could take no estate to the exclusion of the equitable right of the *cestui que trust*, but any forfeiture of the king or any act of his could only prejudice his own rights, and not the rights of third innocent parties. This doctrine will be found in 1 Blk. Rep., 123, *Burges* v. *Wheat;* Sand. on uses, 152–3, also 252, 257.

If, therefore, the construction of the legislature of Vermont should be adopted, it would only help the plaintiff to be defeated in this action; for it cannot be believed that the use as well as the legal estate could be reserved by the grant before the court.

Webster, in reply.

1. It is said to be the obvious intention of the grantor to pass, by the grant, all the territory of Pawlet, without any saving or reservation. But this is against the express words of the grant. The grant is made "upon the conditions and reservations hereafter made;" nor is there anything in the grant to which the term "reservation" can be properly applied, except it be the public rights, as they are usually called, of which the part appropriated for a glebe, &c., is one.

The defendants' counsel further supposes, that although the territory was to be divided into sixty-eight equal parts, yet this was not to designate the proportion which each grantee was to receive; but that if any person named in the grant should not accept, or not be capable of taking, or not happen to be a person *in esse*, or in other such case, then the whole tract would be to be divided among the residue. This is believed not to be a sound construction of the words of the grant. Those words are, "do give and grant in equal shares unto our "loving subjects, &c.. whose names are entered "on this grant, to be divided amongst them into "sixty-eight equal shares, all that tract," &c. To what purpose was the tract to be divided into sixty-eight equal shares, if it were not to ascertain what portion each grantee should have?

*But what is conclusive on this point, [***315** is the disposition made of B. Wentworth's right. He was to be entitled to two shares. These are actually severed from the common mass, by the grant itself, and marked out on the land. This shows that the share of each proprietor was not thought liable to be increased by any incapacity in others to take, or other such cause.

A great part of the states of New Hampshire and Vermont were granted by charters, issued in the name of the crown, by the provincial governors of New Hampshire, which charters were in all respects like this. These charters or grants have received a settled construction, which has been followed by long usage, in both states. No case is known to have existed in which any grantee has claimed a greater portion of the whole land than his name bore to the names on the charter, including the public right; nor has any severance or partition been made, in any case, upon any other rule or principle. To divide the land into sixty-eight equal parts, and then adopt the plan of appropriating the whole to a less number of owners, as in the example supposed by the defendant's counsel to three, giving each twenty sixty-eighth parts, and two-thirds of one sixty-eighth part more, would be to act without object or motive. Such, therefore, has never been supposed to have been the course contemplated in the grant. The division or partition of lands holden under these char-

ters has been, as is believed, in every instance, by dividing the whole into as many parts, commonly called rights, as there were individuals named on the charter, together with the public rights, and allowing two parts to B. Wentworth. The shares allotted to the public rights are usually designated as the "school right," "minister right," "society right," and "glebe right," respectively. These have never been claimed by the original proprietors. In New Hampshire (where the plaintiffs' counsel is better acquainted with judicial proceedings and judicial history than in Vermont) no legislative provision is recollected to have been made. The first settled minister has usually possessed the right designated for him. The town corporations, bodies totally distinct from the original proprietors, and owing their corporate existence, in all cases, to their charters, or to acts of the legislature (for although this **316***] charter *undertakes to erect a corporation, yet in fact no corporation ever existed or was erected by these grants) have had the management and disposition of the school right. The statutes of the state make it the duty of the towns, in their corporate character, to make provision for the support of free schools, within the town, and under the management of the town authority. These school rights having been originally intended to aid in the support of schools, it has been holden that the law throwing the duty of this support on the town has given them the disposition of this fund for that purpose. There being no manner of privity between the town corporations and the original grantees of the soil, the former can derive no title to these school rights, but from the law of the state. That they have right to them has been settled by many decisions, followed by uniform practice.

The grant to the society for propagating the gospel presented a different case. That was a corporation, then existing and still existing in England, capable by its charter of holding lands, and doubtless entitled, originally, to take the portion intended for it in this grant. Whether this society was not so far connected with the national church and the realm of England as that its rights were devested by the revolution, has never been decided. Actions are pending, both in the circuit and state courts, in which this society is party, in relation to these lands.

The glebe right has generally, in point of fact, been occupied or disposed of by the town. No individual has been able to maintain a right to one of these lots, or portions, upon his ecclesiastical character. It has been holden, on the contrary, that the grant, so far as it undertook to give one sixty-eighth part for a glebe, was void for want of a grantee. The plaintiff's counsel have been obligingly favored, by the present Chief Justice of New Hampshire, with notes of the case of *Mead* v. *Kidder*, in the Supreme Court of that state in 1806; in which court the same judge then presided. To which case this court is respectfully referred.

Whether the better construction is, that there is a reservation of these lands by charter, point- **317***] ing out *merely the future use, or, that a grant was intended, which cannot take effect for want of a grantee, is immaterial in this case. The result is the same.

2. The defendant contends that there was a church of England, as by law established, capable of taking. On this point the plaintiffs' counsel will only remark:

1. That no grant to the Church of England, *eo nomine*, could avail, even in England, to pass the fee. Would such a grant enure to the see of Canterbury, or the diocese of London? The Church of England in the aggregate is not a corporation, but one of the estates of the realm.

2. But the grant is limited by the words of the charter itself, to the Church of England, as by law established in the town of Pawlet. Just as the school right is to be for the support of schools in that town, and the right of the minister first to be settled there. It is hardly necessary to draw into the argument even the obvious intent of the grantor. The words themselves are unequivocal; and does not the defendant himself rest his title upon his connection with the Episcopal society in Pawlet?

As to the laws of Vermont, before 1805, they all show that the legislature acted on the opinion that it might dispose of these lands, as public property, in any way it thought proper. It was a question of expediency and propriety; and provision is made, in some of the laws, allowing Episcopal clergyman, already in possession, to remain seven years.

With respect to the opinion ascribed to a late judge of this court, it need only be remarked, that if the cause turned on the point supposed (which does not appear at all from the record), it was but the opinion of an able judge; formed and pronounced instantly, in the course of a jury trial, without case reserved, or solemn argument; and it is no disrespect to say, possibly without a knowledge of all circumstances, or a full view of all consequences.

3. The defendants contend that the fee may have *passed out of the king, and yet [***318** not vested anywhere, but remained in abeyance. But the text of Blackstone, which he cites, does not bear him out. The estate in abeyance, in the case put by Blackstone, is a fee, remaining after a freehold has been granted and vested. With respect to the freehold of a glebe, after the death of the parson and before the uaming of a successor, both Fearne and Christain maintain the contrary of Blackstone's opinion; but that is not at all this case. To meet this case, the defendants must show, that if a grant be made to a person not *in esse*, the land nevertheless passes out of the grantor, and remains in abeyance until, in the course of events, some person arises into being who answers the description in the grant.

4. The observations already made are deemed a sufficient reply to the remarks of the defendants' counsel under this head.

5. It is not supposed possible to give in to the opinion that this is a trust estate, granted to the individuals named in the charter. The idea is wholly novel. Not a syllable in the grant itself intimates any such thing. All is the other way. How can it be imagined that the intention was to convey an estate in trust to a large number of individuals, who were to be, at first, tenants in common; then, to divide and hold in severalty; and whose estates, by law, would descend, in *gavel-kind*, to their heirs? Was B. Wentworth to be a trustee, whose estate was severed by the charter it-

self? Was the corporation in England to be one of the trustees? It is hardly necessary to add that the court would not very willingly construc this grant so as to raise a trust, which from the nature of the case never could be executed.

This, then, is a case in which the highest courts of both states have concurred in giving to the grant in question a practicable and beneficial construction; under which very many estates are holden, and the court would not incline to disturb these titles, but for irresistable reasons. It must be remembered that there are two hundred townships granted by charters precisely like this. In the whole, there are not probably more than a dozen associations of Episcopalians. If the court should decide that the legislatures may not dispose of these **319***] *lands, what shall be done with them in towns where there are no Episcopal societies to claim them? Are they to remain without owners or rightful occupants till such changes in religious opinions shall take place as that there shall be an Episcopal society in each town?

If this case is to be considered, not as a reservation, but a grant; and if this grant is not void for want of a grantee; then it must, of necessity, receive this construction: *i. e.*, that it was in fact a grant for the use of such ministry, or such religious purposes, as the town should choose, or the state appoint; at least unless the Church of England should have been established by law. The general purpose was religious instruction. This duty the laws of the state throw on the towns, and it is a reasonable construction which gives this fund, even without any particular grant of the legislature to the towns for that purpose. This constructiou will answer the general object of the grant. In no other way can any of its objects be answered, in one case out of fifty. This puts it on the same ground as the grants for schools and for the use of the ministry (a common grant in the charters in the eastern part of New Hampshire). The main purposes of the grants were education and religious instruction; and, in the events which have happened, the most safe and only practicable construction is to give the funds intended for the promotion of these purposes to those on whom the law imposes the obligation of making adequate provision for these objects. I venture to say such is the law of New Hampshire.

There is still another question to which the plaintiff's counsel wishes to draw the attention of the court, and that is, has the court jurisdiction of the cause? Is this a case coming within that clause of the constitution which gives to this court jurisdiction over "controversies between citizens of the same state, "claiming lands by grants of different states?" It is submitted, with some confidence, that this is not such a case. These two grants are not to be considered as the acts of different states, in the sense of the constitution. At the time of the first grant both the present states of New Hampshire and Vermont formed but one state. They have become two by subsequent **320***] sub-division. The first grant *was made by the state of Vermont as much as by the state of New Hampshire. The power from which it emanated was the sovereign power of what is now Vermont, precisely as much as it was the sovereign power of what is now New Hampshire. The question is, between an act of the sovereign power of what is now Vermont, passed in 1761, and another act of the sovereign power of Vermont, passed in 1805. If, on the division of territory, that part lying west of Connecticut River had been called New Hampshire, and the part lying east of that river, Vermont, instead of the reverse, it seems to the plaintiff's counsel that in that case the whole ground on which the jurisdiction of the court over this case rests would have been removed.

It is easy to perceive the class of cases for which this provision was made; for example, when disputes about boundaries between two states arise. It is easy, also, to imagine many other cases, apparently within the letter, and yet not within the meaning, and so excluded by a just construction of the clause. These cases arise from the sub-division of states. One may imagine, for example, that in the state of Kentucky ejectments must be often tried, in which grants of Virginia before the division, and grants of Kentucky since, might be respectively relied on by the parties; and yet it would hardly be contended that that circumstance should oust the courts of Kentucky of their jurisdiction, and give the cognizance of all such causes to the courts of the United States. It might be said, in such case, that the grants emanated from different states; and, nominally, they did so. Still they both originated from a power having undoubted authority to grant the territory. The first grant was not so much the act of a different state as of the parent of both states. Virginia now differs as much from Virginia before the severance as Kentucky now differs from Virginia before the severance. Kentucky has the same power over her territory now as Virginia had over the same territory formerly. She is therefore, as to this, to be considered the same sovereign power—in other words, the same state. If integrity of territory, or retention of jurisdiction over the whole of the same soil, is necessary to preserve the identity of political powers, then Virginia herself is not what she was; a grant of hers before the severance and a grant since would be grants from different states.

Shepherd*, in reply, as to jurisdiction. [321**

The counsel for the defendants, in answer to the objection made to the jurisdiction of the court, will only say, that this case is certainly within the literal provision of the constitution, and it is presumed the court will not search with solicitude to find a far-fetched meaning in repugnance to the letter so long as it can produce no other object than to send the parties to a trial in the courts of Vermont, where, perhaps, there is not a judge to be found but is interested for or against the plaintiff in this cause.

This is a case where the lands in dispute have been granted by different states; that is, by New Hampshire and Vermont.

Now, although these states were all under one jurisdiction, yet when the land was granted by the state of Vermont they were two sovereign, independent states, and the same reason exists here that can exist in any case of state controversy, for depriving the states respectively of the power to determine the dispute.

If this cause is to be tried in Vermont, the judges are to decide under the very strong impressions of a legislative construction, unequivocally made, of the grant; and to give us what we claim as right, they must decide against a positive statute of their legislature. So far, therefore, is this case from being taken from the letter of the constitution, by any equitable construction with a view to set up the spirit against the letter, that it is within all the reasoning that governed the framers of the constitution, and, most perfectly within the meaning of that clause; and one of the evils which must have been intended to be guarded against exists, at full length, in the present case.

Why was the case of parties claiming land under the grants of different states made cognizable before the United States courts? Undoubtedly because where this state of things exists it is reasonable to suppose that the judges of the states respectively will feel strong prepossessions, and are therefore unfit to decide the strife in relation to the powers and rights [**322*] of the conflicting states. *It is the same reason which induced the giving jurisdiction in several other cases, such as citizens of different states, and a state and citizens of another state. In these cases the state courts may be deprived of their jurisdiction; and why? Most indubitably because the judges of the courts of the United States have less interest and fewer prejudices to overcome, and the parties will be more sure of an impartial decision. And can this reason exist strouger in any case than in the one now before the court?

March 10th. *Absent*—TODD, *J.*

STORY, *J.*, delivered the opinion of the court as follows:

The first question presented in this case is, whether the court has jurisdiction. The plaintiffs claim under a grant from the state of Vermont, and the defendants claim under a grant from the state of New Hampshire, made at the time when the latter state compreheuded the whole territory of the former state. The constitution of the United States, among other things, extends the judicial power of the United States to controversies "between citizens of "the same state claiming lands under grants of "different states." It is argued that the grant under which the defendants claim is not a graut of a different state within the meaning of the constitution, because Vermont, at the time of its emanation, was not a distinct government, but was included iu the same sovereignty as New Hampshirc.

But it seems to us that there is nothing in this objection. The constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different states; and it supposed that a state tribunal might not stand indifferent in a controversy where the claims of its own sovercign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or auother. It simply regarded the fact whether grants arose under the same or under diffcrent states. Now, it is very clear that although the territory of Vermont was once a part of New Hampshire, yet the state of Vermont, in its *sovercign capacity, is not, [*323 and never was, the same as the state of New Hampshire. The graut of the plaintiffs emanated purely and exclusively from the sovereiguty of Vermont; that of the defendants purely and exclusively from the sovereignty of New Hampshirc. The sovereign power of New Hampshire remains the same, although it has lost a part of its territory; that of Vermont never existed until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the states the same than the circumstance that a part of the members of one corporation constitutes a component part of another corporation makes the corporation the same. Nor can it be affirmed, in any correct sense, that the grants arc of the samc state; for the grant of the defendants could not have been made by the state of Vermont, since that state had not at that time any legal existence; and the grant of the plaintiffs could not have been made by New Hampshire, since, at that time, New Hampshire had no jurisdiction or sovereign existence by the name of Vermont. The case is, therefore, equally within the letter and spirit of the clause of the constitution. It would, indeed, have been a sufficient answer to the objection, that the constitution and laws of the United States, by the admission of Vermont into the union as a distinct government, had decided that it was a different state from that of New Hampshirc.

The other question which has been argued is not without difficulty. It is contended by the plaintiffs that the original grant, in the charter of Pawlet, of "one share for a glebe for "the Church of England as by law establish-"ed," is either void for want of a grantee, or if it could take effect at all, it was as a public reservatiou, which, upon the revolution, devolved upon the state of Vermont.

The material words of the royal charter of 1761 are, "do give and grant in equal shares "unto our loving subjects, &c., their heirs and "assigus forever, whose names are entered on "this grant, to be divided amongst them into "sixty-eight equal shares, all that tract or par-"cel of land, &c., aud that the samc be and "hereby is incorporated *into a town- [*324 "ship by the name of Pawlet; and the inhabit-"ants that do or shall hereafter inhabit the "said township, are hereby declared to be in-"franchised with and entitled to all and every "the privileges and immunities that other "towns within our province by law exercise "and enjoy. To have and to hold the tract of "land, &c., to them and their respective heirs "and assigns forever, upon the following con-"ditions," &c.

Upon the charter are indorsed the names of sixty-two persons, and then follows this additional clause: "His Excellency, Benning "Wentworth, a tract of land to contain 500 "acres as marked in the plan B. W., which is "to be accounted two sharcs; one share for the "incorporated society for the propagation of "the gospel in foreign parts; one share for a "glebe for the Church of England as by law "established; one share for the first settled "minister of the gospel; one share for the "benefit of a school in said town." Thus

making up, with the preceding sixty-two shares, the whole number of sixty-eight shares stated in the charter.

Before we proceed to the principal points in controversy, it will be proper to dispose of those which more immediately respect the legal construction of the language of the charter. And in our judgment, upon the true construction of that instrument none of the grantees, saving Governor Wentworth, could legally take more than one single share, or a sixty-eighth part of the township. This construction is conformable to the letter and obvious intent of the grant, and, as far as we have any knowledge, has been uniformly adopted in New Hampshire. It is not for this court upon light grounds or ingenious and artificial reasoning to disturb a construction which has obtained so ancient a sanction, and has settled so many titles, even if it were at first somewhat doubtful. But it is not in itself doubtful; for it is the only construction which will give full effect to all the words of the charter. Upon any other, the words "in equal shares," and "to be divided amongst them in sixty-eight equal shares," would be nugatory or senseless. We are further of opinion that the share for a glebe is not vested in the other grantees having a capacity to take, and so in the nature of a con-
325*] dition, *use, or trust, attaching to the grant. It is nowhere stated to be a condition binding upon such proprietors, although other conditions are expressly specified. Nor is it a trust or use growing out of the sixty-eighth part granted to the respective proprietors, for it is exclusive of these shares by the very terms of the charter. The grant is in the same clause with that to the society for the propagation of the gospel, and in the same language, and ought, therefore, to receive the same construction, unless repugnant to the context or manifestly requiring a different one. It is very clear that the society for the propagation of the gospel take a legal, and not a merely equitable estate: and there would be no repugnancy to the context, in considering the glebe, in whomsoever it may be held to vest, as a legal estate.

We are further of opinion that the three shares in the charter "for a glebe," "for the first settled minister," and "for a school," are to be read in connection, so as to include in each the words "in the said town," *i. e.* of Pawlet; so that the whole clause is to be construed, one share for a glebe, &c., in the town of Pawlet, one share for the first settled minister in the town of Pawlet, and one share for a school in the town of Pawlet.

We will now consider what is the legal operation of such a grant at the common law, and how far it is affected by the laws of New Hampshire or Vermont.

At common law the Church of England, in its aggregate description, is not deemed a corporation. It is indeed one of the great estates of the realm; but is no more, on that account, a corporation than the nobility in their collective capacity. The phrase, "the Church of England," so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate under the superintendence of its spiritual head. In this sense the Church of England is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the state. In this sense it is used in Magna Charta, ch. 1, where it is declared "*quod ecclesina anglicana libera sit, et "habeat omnia jura sua integra, et libertates "*suas illæsas;*" and Lord Coke, in his [***326** commentary on the text, obviously so understands it (2 Inst., 2, 3). The argument, therefore, that supposes a donation to "the Church of England," in its collective capacity, to be good, cannot be supported, for no such corporate body exists even in legal contemplation.

But it has been supposed that the "Church "of England of a particular parish" must be a corporation for certain purposes, although incapable of asserting its rights and powers, except by its parson regularly inducted. And in this respect it might be likened to certain other aggregate corporations acknowledged in law, whose component members are civilly dead, and whose rights may be effectually vindicated through their established head, though during a vacancy of the headship they remain inert; such as the common law corporations of abbot and convent, and prior and monks of a priory. Nor is this supposition without the countenance of authority.

The expression, parish church, has various significations. It is applied sometimes to a select body of Christians forming a local spiritual association; and sometimes to the building in which the public worship of the inhabitants of a parish is celebrated; but the true legal notion of a parochial church is a consecrated place, having attached to it the rights of burial and the administration of the sacraments. (Com. Dig. Esglise, C. Seld. de Decim., 265; 2 Inst., 363; 1 Burn's Eccl. law, 217; 1 Woodes, 314.) Doctor Gibson, indeed, holds that the church, in consideration of law, is properly the cure of souls, and the right of tithes. (Gibs., 189; 1 Burn's Eccl. law, 232.)

Every such church, of common right, ought to have a manse and glebe as a suitable endowment; and without such endowment cannot be consecrated; and until consecration it has no legal existence as a church. (Com. Dig. Dismes, B. 2; 3 Inst., 203; Gibs., 190; 1 Burn's Eccl. law, 233; Com. Dig. Esglise, A; Dort. of Plural, 80.) When a church has thus acquired all the ecclesiastical rights, it becomes, in the language of law, a rectory or parsonage, which consists of a glebe, tithes and oblations established for the maintenance of a parson or rector *to have cure of souls within the [***327** parish. (Com. Dig. Eccl. persons, C. 6.)

These capacities, attributes and rights, however, in order to possess a legal entity, and much more to be susceptible of a legal perpetuity, must be invested in some natural or corporate body; for in no other way can they be exercised or vindicated. And so is the opinion of Lord Coke in 3 Inst., 201, 202, where he says, "albeit they" (*i. e.* subjects) "might "build churches without the king's license, yet "they could not erect a spiritual politic body to "continue in succession and capable of endow-"ment without the king's license; but by the "common law before the statute of Mortmain "they might have endowed the spiritual body "once incorporated *perpetuis futuris tempori-*

"*bus*, without any license from the king or any "other."

This passage points clearly to the necessity of a spiritual corporation to uphold the rectorial rights. We shall presently see whether the parish church, after consecration, was deemed in legal intendment such a corporation. In his learned treatise on tenures, Lord Chief Baron Gilbert informs us that anciently, according to the superstition of the age, abbots and prelates "were supposed to be married to the church, "inasmuch as the right of property was vested "in the church, the estate being appropriated, "and the bishop and abbot as husbands and "representatives of the church had the right of "possession in them; and this the rather be- "cause they might maintain actions and re- "cover, and hold courts within their manors "and precincts as the entire owners; and "that crowns and temporal states might have "no reversions of interests in their feuds and "donations. Therefore, since they had the "possession in fee, they might alien in fee; but "they could not alien more than the right of "possession that was in them, for the right of "propriety was in the church." But as to a parochial parson, "because the cure of souls "was only committed to him during life, he "was not capable of a fee, and, therefore, the "fee was in abeyance." (Gilb. Tenures, 110, &c.)

Conformable herewith is the doctrine of Bracton, who observes that an assize *juris utrum* **328***] would not lie *in cases of a gift of lands to cathedral and conventual churches, though given in *liberam eleemosynam*, because they were not given to the church solely, but also to a parson to be held as a barony, *non solum dantur ecclesiis, sed et personis tenendæ in baronia;* and, therefore, they might have all the legal remedies applicable to a fee. But he says it is otherwise to a person claiming land in right of his church, for in cases of parochial churches, gifts were not considered as made to the parson, but to the church, *quia ecclesiis parochialibus non fit donatio personæ, sed ecclesiæ, secundum perpendi poterit per modum donationis.* (Bracton, 286, b; 1 Reeves Hist. law, 369.) And in another place, Bracton, speaking of the modes of acquiring property, declares that a donation may well be made to cathedrals, convents, parish churches and religious personages, *poterit etiam donatio fieri in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialibus vivis religiosis*, &c. (Bracton, 27, b; 1 Reeve Hist. law, 303.)

The language of these passages would seem to consider cathedral, conventual, and parochial churches as corporations of themselves, capable of holding lands. But upon an attentive examination it will be found to be no more than an abbreviated designation of the nature, quality and tenure of different ecclesiastical inheritances, and that the real spiritual corporations, which are tacitly referred to, are the spiritual heads of the particular church, viz., the bishop, the abbot, and, as more important to the present purpose, the parson, *qui gerit personam ecclesiæ.*

Upon this ground it has been held in the year books (11 H. 4, 84, b), and has been cited as good law by Fitzherbert and Brook (Fitz: Feoff't. pl. 42; Bro. Estate pl. 49, S. C. Viner, ab. L. pl. 4), that if a grant be made to the church of such a place, it shall be a fee in the parson and his successors. *Si terre soit done per ceux parolz, dedit et concessit ecclesiæ del tiel lien, le parson et ses successeurs serra inheriter.* And in like manner if the gift be of chattels to parishioners, who are no corporation, it is good, and the church wardens shall take them in succession, for the gift is to the use of the church. (37 H. 6, 30; 1 Kyd. Corp. 29.)

* In other cases the law looks to the [***329** substance of the gift, and in favor of religion, vests it in the party capable of taking it. And notwithstanding the doubts of a learned, but singular mind, (Perk., § 55,) in our judgment the grant in the present charter, if there had been a church actually existing in Pawlet at the time of the grant, must, upon the common law, have received the same construction. In the intendment of law the parson and his successors would have been the representatives of the church entitled to take the donation of the glebe. It would in effect have been a grant to the parson of the Church of England, in the town of Pawlet, and to his successors, of one share in the township, as an endowment to be held *jure ecclesiæ;* for a glebe is emphatically the dowry of the church; *Gleba est terra qua consistit dos ecclesiæ.* (Lind., 254.)

Under such circumstances, by the common law, the existing parson would have immediately become seized of the freehold of the glebe, as a sole corporation capable of transmitting the inheritance to his successors.

Whether, during his life, the fee would be in abeyance according to the ancient doctrine (Litt., § 646, 647; Co. Lit., 342; 5 Edw., 4, 105; Dyer 71, pl., 43; Hob., 338; Com. Dig., Abeyance A; Id.; Ecclesiastical persons, C., 9; Perk., § 709), or whether, according to learned opinions in modern times the fee should be considered as *quodam modo* vested in the parson for the benefit of his church and his successors, (Co., Lit., 341 a.; Com. Dig., Eccl., persons, C., 9; Fearne, cont. rem., 513, &c.; Christian's note to 2 Black., Com., 107, note 3; Gilb., tenures 113; 1 Wooddeson 312), is not very material to be settled; for at all events the whole fee would have passed out of the crown. (Litt., § 648; Co. Lit., 341, a.; Christian's note *ubi supra;* Gilb. tenures, 113.) Nor would it be in the power of the crown, after such a grant executed in the parson, to resume it at its pleasure. It would become a perpetual inheritance of the church, not liable, even during a vacancy, to be devested; though by consent of all parties interested, viz, the patron, and ordinary, and also the parson if the church were full, it might be aliened or encumbered. (Litt., § 648; Co. Lit., 343; Perk., § 35; 1 Burn's Eccl. law, 585.)

* But inasmuch as there was not any [***330** church duly consecrated and established in Pawlet at the time of the charter, it becomes necessary further to inquire whether, at common law, a grant so made is wholly void for want of a corporation having a capacity to take.

In general no grant can take effect unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further; for if there be an aggregate corporation, having a head, as a mayor and commonalty, a grant or devise made to the corpora-

tion during the vacancy of the headship is merely void; although for some purposes, as for the choice of a head, the corporation is still considered as having a legal entity. (13 Ed., 4, 8; 18 Ed., 4, 8; Bro. Corporation, 58, 59; Dalison, R., 31; 1 Kyd. Corp., 106, 107; Perk., § 33, 50.) Whether this doctrine has been applied to parochial churches duriug au avoidance has not appeared in any authorities that have fallen within our notice; and perhaps can be satisfactorily settled only by a recurrence to analogous principles, which have been applied to the original endowments of such churches.

We have already seen that no parish church, as such, could have a legal existence until consecration: and consecration was expressly iuhibited unless upon a suitable endowment of land. The canou law, followiug the civil law, required such endowment to be made, or at least ascertained, before the building of the church was begun. (Gibs., 189; 1 Burn's Eccl. law, 233.) This endowment was in ancient times commonly made by an allotment of mause and glebe, by the lord of the manor, who thereupon became the patron of the church. Other persons also at the time of consecration often contributed small portions of ground, which is the reason, we are told, why, in England, in many parishes, the glebe is not only distant from the manor, but lies in remote, divided parcels. (Keu. Par. Aut: 222, 223, cited in 1 Burn's, Eccl. law, 234.) The manner of foundiug the church and making the allotment was for the bishop or his commissioner to set up a cross and set forth the ground where the church was to be built, and it then became the endowment of the church. (Degge., p. 1, ch. 12, cited 1 Burn's, Eccl. law, 233).

331*] * From this brief history of the foundation of parsouages and churches, it is apparent that there could be uo spiritual or other corporation capable of receiving livery of seizin of the endowment of the church. There could be no parson, for he could be iuducted into office only as a parson of an existing church, and the endowment must precede the establishment thereof. Nor is it even hinted that the land was conveyed in trust, for at this early period trusts were an unknown refinement. The land, therefore, must have passed out of the donors, if at all, without a grantee, by way of public appropriation or dedication to pious uses. In this respect it would form an exception to the generality of the rule, that to make a grant valid there must be a person *in esse* capable of taking it. And under such circumstances until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance, or be like the *hæreditas jacens* of the Roman code in expectation of an heir. This would conform exactly to the doctrine of the civil law, which, as to pious donations, Bracton has not scrupled to affirm to be the law of England. *Res vero sacræ, religiosæ, et sanctæ in nullius bonis sunt, quod enim divini juris est, id in nullius hominis bonis est, immo in bonis dei hominum censura*, &c. *Res quidam nullius dicuntur pluribus modis, &c. Item censura (ut dictum est,) sicut res sacræ religiosæ et sanctæ. Item casu, sicut est hæreditas jacens ante additionem, sed fallit in hoc, quia sustinet vicum personæ defuncti, vel quia speratur futura hæreditas ejus, qui adibit.* (Bracton, 8, a; Justin. instit. lib. 2, tit. 1; Co. Lit. 342, on Litt., § 447).

Nor is this a novel doctrine in the common law. In the familiar case where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. (*Lade* v. *Shepherd*, 2 Str. 1,004; Hale in Harg. 78.) So, if the parson or a stranger purchase a bell with his own money and put it up, the property passes from the purchaser, because, when put up, it is consecrated to the church, 11 H. 4, 12, 1 Kyd. Corp., 29, 30. These principles may seem to savor of the ancient law; but in a modern case in which, in argument, the doctrine was asserted, Lord Hardwicke did not deny it, but simply decided that the circumstances of that case did not amount to a donation of the land, on which *a chapel had been built, to public and [***332** pious uses. (*Attorney-General* v. *Foley*, 1 Dick. R., 363.) And in an intermediate period, Lord Chief Justice Dyer held that if the Crown by a statute renounced an estate, the title was gone from the Crown, although not vested in any other person. but the fee remained iu abeyance.

It is true that Weston, *J.*, was, in the same case, of a different opinion; but Lord Chief Baron Comyns has quoted Dyer's opinion without any mark of disapprobation. (Com. Dig. Abeyance, A., 1).

For the reasons, then, that have been stated, a donation by the Crown for the usc of a nonexisting parish church may well take effect by the common law as a dedication to pious uses, and the Crown would thereupon be deemed the patron of the future benefice when brought into life. And after such a donation it would not be competent for the Crown to resume it at its own will, or alien the property without the same consent which is uecessary for the alienation of other church property, viz., the consent of the ordinary, and parson, if the church be full, or in a vacancy, of the ordinary alone.

And the same principles would govern the case before the court if it were to be decided upon the mere footing of the common law. If the charter had been of a township in England, the grant of the glebe would have taken effect as a dedication to the parochial church of England to be established therein.

Before such church were duly erected and consecrated the fee of the glebe would remain in abeyance, or at least be beyond the power of the Crown to alien without the ordinary's consent. Upon the erection and consecration of such a church and the regular induction of a parson, such parson and his successors would, by operation of law and without further act, have taken the inheritance *jure ecclesiæ*.

Let us now see how far these principles were applicable to New Hampshire at the time of the issuing of the charter of Pawlet.

New Hampshire was originally erected into a royal *province in the 31st year of [***333** Charles II., and from thence until the revolution continued a royal province, under the immediate control and direction of the crown. By the first royal commission granted in 31 Charles II., among other things, judicial powers, in all actions, were granted to the pro-

vincial governor and council, "so always that "the form of proceedings in such cases, and "the judgment thereupon to be given, be as "consonant and agreeable to the laws and stat- "utes of this, our realm of England, as the "present state and condition of our subjects in- "habiting within the limits aforesaid (*i. e.* of "the province) and the circumstances of the "place will admit." Independent, however, of such a provision, we take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges. *A fortiori* the principle applies to a royal province.

By the same commission or charter the crown granted to the subjects of the province, "that "liberty of conscience shall be allowed to all "Protestants, and that such especially as shall "be conformable to the rites of the Church of "England shall be particularly countenanced "and encouraged." By a subsequent commission of 15 Geo. 2, the governor of the province, among other things, is authorized "to col- "late any person or persons to any churches, "chapels, or other ecclesiastical benefices, "within our said province, as often as any "shall happen to be void," and this authority was continued and confirmed in the same terms by royal commissions, in 1 Geo. 3, and 6 Geo. 3. By the provincial statute of 13 Ann, ch. 43, the respective towns in the province were authorized to choose, settle and maintain their ministers, and to levy taxes for this purpose, so always that no person who constantly and conscientiously attended public worship according to another persuasion should be excused from taxes. And the respective towns were further authorized to build and repair meeting houses, ministers' houses and school houses, and to provide and pay school-masters. This is the whole of the provincial and royal legislation upon the subject of religion.

Inasmuch as liberty of conscience was al- **334***] lowed and *the Church of England was not exclusively established, the ecclesiastical rights to tithes, oblations and other dues had no legal existence in the province. Neither, upon the establishment of churches, was a consecration by the bishop, or a presentation of a parson to the ordinary, indispensable; for no bishopric existed within the province.

But the common law, so far as it respected the erection of churches of the Episcopal persuasion of England, the right to present, or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, seems to have been fully recognized and adopted. It was applicable to the situation of the province, was avowed in the royal grants and commissions, and explicitly referred to in the appropriation of glebes, in almost all the charters of townships in the province. And it seems to be also clear that it belonged to the crown exclusively, at its own pleasure, to erect the church in each town that should be entitled to take the glebe, and upon such erection to collate, through the governor, a parson to the benefice. The respective towns in their corporate capacity had no control over the glebe; but inasmuch as they were bound, by the provincial statute, to maintain public worship, and had therefore an interest to be eased of the public burthen, by analogy to the common law in relation to the personal property of the parish church, the glebe could not, before the erection of a church, be aliened by the crown without their consent; nor after the erection of a church and induction of a parson, could the glebe be aliened without the joint consent of the crown as patron, the parson as *persona ecclesiæ*, and the parishioners of the church as having a temporal as well as spiritual interest, and thereby in effect representing the ordinary.

But a mere voluntary society of Episcopalians within a town, unauthorized by the crown, could no more entitle themselves, on account of their religious tenets, to the glebe, than any other society worshipping therein.

The church entitled must be a church recognized in law for this particular purpose. Whenever, therefore, within the province, previous to the revolution, an Episcopal church was duly erected by the crown in any town, *the [***335** parsons thereof regularly inducted had a right to the glebe in perpetual succession. Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the state which succeeded to the rights of the crown might, with the assent of the town, alien or encumber it; or might erect an Episcopal church therein, and collate, either directly or through the vote of the town, indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance.

Such, in our judgment, are the rights and privileges of the Episcopal churches of New Hampshire, and the legal principles applicable to the glebes reserved in the various townships of that state previous to the revolution. And without an adoption of some of the common law in the manner which I have suggested, it seems very difficult to give full effect to the royal grants and commissions, or to uphold that ecclesiastical policy which the crown had a right to patronize and to which it so explicitly avowed its attachment.

It seems to be tacitly, if not openly, conceded, that before the revolution no regular Episcopal church was established in Pawlet. By the revolution the state of Vermont succeeded to all the rights of the crown as to the unappropriated as well as appropriated glebes.

It now, therefore, becomes material to survey the statutes which the state of Vermont has, from time to time, passed on this subject.

By the statute of the 26th of October, 1787, the selectmen of the respective towns were authorized during the then septennary (which expired in 1792), to take the care and inspection of the glebes and to lease the same for, and during the same term; and further, to recover possession of the same, where they had been taken possession of by persons without title; but an exception is made in favor of ordained Episcopal ministers, who, during their ministry within the same term, were allowed to take the profits of the glebes within their respective towns. The statute of 30th October, 1794, granted to their respective towns the entire property of the glebes therein situate, for the sole use and support of religious worship; and *authorized the selectmen of the towns [***336**

to lease and recover possession of such glebes. This act was repealed by the statute of the 5th of November, 1779. But by the statute of the 5th of November, 1805, the glebes were again granted to the respective towns, for the use of the schools of such towns; and power was given to the selectmen to sue for possession of, and to lease the same.

By the operation of these statutes, and especially of that of 1794, which, so far as it granted the glebes to the towns could not afterwards be repealed by the legislature so as to devest the right of the towns under the grant, the towns became respectively entitled to all the glebes situate therein which had not been previously appropriated by the regular and legal erection of an Episcopal church within the particular town; for in such case the towns would legally represent all the parties in interest, viz., the state which might be deemed the patron, and the parish.

Without the authority of the state, however, they could not apply the lands to other uses than public worship; and in this respect the statute of 1805 conferred a new right which the towns might or might not exercise at their own pleasure.

Upon these principles the plaintiffs are entitled to recover, unless the defendants show, not merely that before the year 1794 there was a society of Episcopalians in Pawlet, regularly established according to the rules of that sect, but that such society was erected by the crown, or the state, as an Episcopal church (*i. e.*, the Church of England), established in the town of Pawlet. For unless it have such a legal existence, its parson cannot be entitled to the glebe reserved in the present charter.

The statement of facts is not, in this particular, very exact; but it may be inferred from it that the Episcopal society or church was not established in Pawlet previous to the year 1802. In what manner and by what authority it was then established does not distinctly appear. As the title of the plaintiffs is, however, *prima facie* good, and the title of the defendants is not shown to be sufficient, upon the principles which have been stated the plaintiffs would seem entitled to judgment.

337*] *There is another view of the subject which if any doubt hung over that which has been already suggested would decide the cause in favor of the plaintiffs. And it is entitled to the more weight because it seems in analogous cases to have received the approbation and sanction of the state courts of New Hampshire. In the various royal charters of townships in which shares have been reserved for public purposes (and they are numerous) it has been held that the shares for the first settled minister and for the benefit of a school, were vested in the town in its corporate capacity; in the latter case as a fee-simple absolute, in the former case as a base fee, determinable upon the settlement of the first minister by the town.

The foundation of this construction is supposed to be that the town is by law obliged to maintain public worship and public schools; and that therefore the legal title ought to pass to the town, which is considered as the real *cestui que* use. By analogy to this reasoning the share for a glebe might be deemed to be vested in the town for the use of an Episcopal church; and then, before any such church should be established, and the use executed in its parson, by the joint assent of the legislature and the town, the land might at any time be appropriated to other purposes.

We do not profess to lay any particular stress on this last consideration, because we are entirely satisfied to vest the decision upon the principles which have been before asserted.

On the whole, the opinion of the majority of the court is, that upon the special statement of facts by the parties, judgment ought to pass for the plaintiffs.

JOHNSON, *J.* The difficulties in this case appear to me to arise from refining too much upon the legal principles relative to ecclesiastical property under the laws of England.

I find no difficulty in getting a sufficient trustee to sustain the fee until the uses shall arise.

It is not material whether the corporation of Pawlet *consist of the proprietors or in- [***338** habitants. The grant certainly vests the legal interest in the proprietor; and it is in nothing inconsistent with this idea to admit that the corporate powers of the town of Pawlet are vested in the inhabitants. The proprietors may still well be held trustees, but the application of the trust may be subject to the will of the whole combined population.

I therefore construe this grant thus: We vest in you so much territory, by metes and bounds, in trust to divide the same into sixty-eight shares; to assign one share in fee to each of you, the grantees, two to the governor, one to the Church of England as by law established, &c. This certainly would be a sufficient conveyance to support the fee for the purposes prescribed.

But the difficulty arises on the meaning of the words "Church of England as by law established." This was unquestionably meant to set apart a share of the land granted for the use of that class of Christians known by the description of Episcopalians. But was it competent for any man, or any number of men, to enter upon this land without any legal designation or organization identifying them to come within the description of persons for whose use this reservation was made? I think not. Some act of the town of Pawlet, or of the legislature of the state, or at least of Episcopal jurisdiction, became necessary to give form and consistency to the *cestui que* use, until such person or body became constituted and recognized I see nothing to prevent the legislature itself from making an appropriation of this property.

Their controlling power over the corporate body denominated the town of Pawlet certainly sanctioned such an act; and before the act passed in this case there does not appear to have been in existence a person, or body of men, in which the use could have vested.

I therefore concur in the decision of the court.

Cited—2 Wheat, 378; 4 Wheat, 695; 2 Pet. 583; 6 Pet. 436, 437; 6 How. 332; 10 How. 536; 14 How. 274; 16 How. 389; 1 Black. 373; 5 Otto, 313; 1 Wood. & M. 448; 1 Bald. 553.

339*] *OTIS *v.* WATKINS.

Absent—TODD, *J.*

If the facts stated in a special plea do not amount in law to a justification, yet if issue be joined thereon, and if the facts be proved as stated, it is error in the judge to instruct the jury that the facts so proved do not in law maintain the issue on the part of the defendant.

If a collector justify the detention of a vessel, under the 11th section of the embargo law of the 25th of April, 1808, vol. 9, p. 150, he need not show that his opinion was correct, nor that he used reasonable care and diligence in ascertaining the facts upon which his opinion was formed. It is sufficient that he honestly entertained the opinion upon which he acted.

Quære. Whether, under that act, the collector was bound to transmit to the President a statement of the facts upon which he formed his opinion that the vessel intended to violate the embargo laws; and whether he was bound in law to use reasonable care and diligence in ascertaining the facts thus to be laid before the President. Whether the collector had a right, under that act, to remove a vessel from one harbor to another, as well as to detain her.

ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts, under the 25th section of the judiciary law of the United States (vol. 1, p. 63), in an action of trespass by Watkins against Otis, a deputy-collector of the district of Barnstable, for taking, carrying away and destroying the plaintiff's schooner Friendship, and her cargo of cod-fish.

The defendant pleaded that he was a deputy-collector for the district of Barnstable; that by the 11th section of the act of Congress of the 25th of April, 1808 (vol. 9, p. 150), it is enacted, "that the collectors of the customs be, and they "are hereby respectively authorized to detain any "vessel ostensibly bound with a cargo to some "other port of the United States, whenever, in "their opinions, the intention is to violate or "evade any of the provisions of the acts laying "an embargo, until the decision of the Presi- "dent of the United States be had thereupon." That the schooner Friendship with her cargo was lying in the harbor of Provincetown, in the district of Barnstable, ostensibly bound to some other port in the United States, in the opinion of the collector with an intent to violate or evade the provisions of the acts aforesaid; whereupon the collector, by the defendant, his deputy, caused the said vessel and her cargo to be detained and removed from the port and harbor of Provincetown to the port and harbor of Barnstable, that she might be securely kept; and there also caused her to be detained, as it was lawful for him to do, so that the decision of the President of the United States might be had thereupon; and that the President, afterwards, on the 3d of January, 1809, upon the report and representation of the said collector, approved and confirmed the detention; all which is the same taking, &c. To this plea there was a general replication and issue, upon the trial of which a bill of exceptions was taken, which stated that the defendant, in order to show that the collector had reasonable ground to believe that this vessel intended to violate or evade the embargo laws, **340*]** *offered in evidence the deposition of an inspector of the customs, who testified that he went on board the schooner, at Provincetown, which was wholly laden with fish in bulk, and a barrel of beef and a number of packages of small stores and three or four barrels of water. That he supposed she was bound to sea and gave information thereof, and of his suspicions, to the collector. That she had also a number of kegs of pickled oysters on board; and that he judged that the groceries were sufficient for the crew of such a vessel for thirty days, and that he had no doubt of her being bound to sea; which was the reason of his giving the information. Upon cross-examination he said he had never lived in the county of Barnstable, and did not know the course and manner of their trade and navigation. It further appeared in evidence, that on the 19th of December, 1808, written orders were given by the collector to one Andrew Garrett to detain the schooner, then lying in Provincetown harbor, and bring her to the port of Barnstable, and there secure her in the best manner possible. That the distance from Provincetown to Barnstable is about 30 miles by water. That on the voyage she accidentally ran on a point of land, and could not be got off until she was frozen up in the ice, and there remained until March following, when she was got off, and brought up to the wharf and her cargo unladen and safely stored. That about 70 quintals of cod-fish were damaged, but the residue was in good order. That when she was so detained she had nine barrels of water on board, but no bread. That her sails were on shore. That on the 24th of December, 1808, the collector wrote to the Secretary of the Treasury that he had detained the schooner Friendship, loaded with dry cod-fish and evidently intended for a foreign port, as she had an unusual quantity of small stores on board sufficient for such a voyage. and fully watered; that their plea was that she was intended for a store ship, and a neighboring market, both of which it was sufficiently evident were without foundation. That on the 3d of January the secretary answered that the detention of the schooner was approved and confirmed by the President. That the collector had used due care and diligence in the preservation of the vessel and cargo. That on the 30th of January, 1809, the Secretary of the Treasury wrote to the collector, authorizing him to release all vessels detained by him under the *said 11th section of the act afore- [***341** said, on bond being given, in the manner and to the amount provided by the 2d section of the act of January 9th, 1809. That on the 15th of February, 1809, the collector sent the following written notice to the plaintiff, Watkins, dated at the custom-house: "Sir, I hereby re- "quest of you as the owner of the schooner "Friendship, of Provincetown, detained by or- "der under the 11th section of the embargo "law of the 25th of April, 1808, at Barnstable, "to give bond here, within three days after "giving this notification, agreeable to the sec- "ond section of the act to enforce the embargo "passed on the 9th ultimo.

"I am, sir, your humble servant,

"JOSEPH OTIS, *Collector.*"

But that Watkins wholly refused to give such bond. That on the 21st of March, 1808, the collector wrote to the comptroller of the treasury, stating that on the 24th of December he had detained the schooner Friendship under the embargo law for loading with cod-fish without a permit, which detention was approved

and confirmed by the President. That on the passage of the act of the 9th of January, 1809, he notified the owner that if he would give bond agreeably to the second section of the same, he would give her up to him, which he utterly refused to do, or to unload his vessel, for more than a fortnight. That he wished to know whether she ought not to be libeled.

To this letter the comptroller replied, referring the collector to the attorney of the district. That the vessel was afterwards libeled in the District Court, for having taken her cargo on board in the night, without a license, and without the inspection of the proper inspecting officers of the port. Upon trial she was acquitted.

The plaintiff also produced a laborer who stowed the fish on board the schooner, who testified that the vessel "was destined to Boston for a market," and that the vessel and cargo were much injured in consequence of the detention. He also produced testimony that it was usual for vessels going from Provincetown to take water enough on board to last them to **342*** Boston and for two *or three weeks, because the people did not like the Boston water. That it was usual to take eight or ten barrels on such a voyage. Whereupon the judge who tried the cause (Chief Justice Parsons) charged the jury "that the several matters and things "so given in evidence by the defendant, Otis, "did not in law maintain the issue on his part; "and also that it was the duty of the collector, "as collector, to have used reasonable care in "ascertaining the facts on which to form an "opinion; and to transmit to the President a "statement of those facts for his decision."

The verdict and judgment being against the defendant, he brought his writ of error.

The case was submitted to this court, by *J. Law* for the plaintiff in error, and by *J. Reid*, of Massachusetts, for the defendant, upon written notes of argument.

J. Law, for the plaintiff in error.

The question for consideration by this court on this appeal arises on the bill of exceptions taken to the opinion and instruction of the judge before whom the trial was held in the state court. It divides itself into two branches.

1. Whether the several matters, given in evidence by Otis and spread on the record, maintain the issue on his part.

2. Whether it was his duty to have used his reasonable care in ascertaining the facts on which to form an opinion; and to transmit a statement of those facts to the President for his decision.

1. On the first point it will be observed that the issue joined is, that at the time of the detention the vessel was ostensibly bound to some other port of the United States, in the opinion of the collector, with an intent to violate or evade the provisions of the act of April 25, 1808; that the vessel was removed from Provincetown to Barnstable that she might be securely kept until the decision of the President thereon; and that the President approved and confirmed the said detention.

343* *Is there any evidence to show that the collector did not entertain an opinion that the said vessel was ostensibly bound to some other port in violation of the embargo? The information he received came from an agent of the government, Isaac Cooper, who was inspector of customs. He stated to the collector, not merely his suspicions, but his belief. He also stated, as the grounds of his belief, that the vessel was fully watered, and contained a sufficient quantity of groceries, stores and provisions for a foreign voyage; information which is satisfactorily proved to have been correct, and which was sufficient to excite a just suspicion of the intention of the owners of the vessel. At any rate, these circumstances of suspicion were sufficiently strong to repel any implication of *mala fides* in the collector in forming his opinion.

It is, however, contended on the part of Watkins, that information, coming from such a source, is not to be respected, because Cooper was unacquainted with the course of trade from Provincetown to Boston; and the quantity of water on board the schooner was only such as is generally taken in such voyages. The fact whether Cooper was acquainted or not with the course of trade is immaterial. The only question is, did Otis believe that he was competent to give correct information on the point? He certainly did think so; at any rate there is no evidence to the contrary; and the circumstance of Cooper's being an inspector of the customs would be alone sufficient to accredit his information.

But even admitting the fact that the quantity of water on board the schooner is accounted for, no explanation is given of the quantity of groceries, small stores and provisions, on board. Although it may be contended that the water at Provincetown is better than that of Boston, it will not, I presume, be contended that the groceries and small stores would be better and cheaper at the former place than at the latter.

The circumstance of the sails belonging to the vessel not being on board at the time of the detention can have no weight against the collector, because it was not to be supposed he was to wait until the vessel was on the very point of sailing before he acted on his opinion.

*That the collector was justified in [**344** removing the vessel to Provincetown that she might be safely kept; and afterwards in unloading her when the owner refused to give bond, is settled by the decision of this court in the case of *Crowell & Hawes* v. *M'Fuddon*. "The "landing and storing the cargo, whether to "preserve it from injury or to secure it from "rescue was a necessary consequence of the "detention." The removal, therefore, of the vessel from Provincetown, which is at the very extremity of Cape Cod, to Barnstable, where the collector resided and had his office and his agents, was a necessary consequence of the detention, to guard against a rescue, and to save the expense of engaging an adequate guard to take care of the vessel. There is, in fact, no evidence to prove that such was not the real motive for causing the removal and for unloading the vessel.

2. The second branch of the judge's instruction and opinion is exceptionable in many respects. It implies that reasonable care had not been used by the collector in ascertaining the facts on which to form an opinion. He had sufficient evidence on which to form an honest opinion, and he was not bound to go beyond that evidence, if it was satisfactory to him.

This instruction of the judge also implies that the collector is answerable for the correct-

ness or incorrectness of his opinion. Such a position cannot be admitted. If public officers were to be answerable for error of judgment, few would be venturous enough to engage in so perilous a service; and it would be in vain to submit the performance of any duty to the exercise of a sound discretion. Such a doctrine would establish a new criterion of innocence and guilt; and judges would be engaged in measuring the mental capacities of men. Yet such would be the consequenee of punishiug an officer who had discretionary powers, if the examination was not into the purity of his intention, but into the correctness of the judgment which influenced his conduct.

But the principles of law and the obvious import of the embargo act refute such a doctrine. It is not the injury done to an individual, or error of judgment, but malice alone that is the gist of prosecutions against a public **345***] *officer at common law for malfeasance in office. Gross and flagrant misconduct may justify a presumption of malice; but even such misconduct, if it is proved to be the result of meutal imbecility or good intentioned ignorance, is pardonable. In the present case a collector, exercising the odious and unpopular duty imposed upon him by the act, ought surely to receive similar indulgence; and the words of the act, in authorizing him to detain vessels according to his opinion of their destination, give him this indulgence. In acting over an extensive district, he is not to be questioned whether he could have got better information, or ought to have acted on the information he received, if he acted honestly and conscientiously.

But this point is put at rest by the opinion of the court in the case of *Crowell & Hawes* v. *M'Faddon*, February term, 1814. It was there decided that the law placed a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly acts, as he must do in the execution of his duty, he cannot be punished for it. The instruction, therefore, of the judge was erroneous; as it was calculated to mislead the jury, and to establish another test of his conduct than the honesty of his opinion.

The last branch of the instruction excepted to is, that it was the duty of the collector to transmit to the Presideut, for his decision, a statement of the facts whieh had been thus ascertained with care. In this case it is contended by Otis that a sufficient statement was made to the President for his decision; although the iustruction implies that the judge was of a contrary opinion. In his letter to Mr. Gallatin of the 24th December, 1808, he states, as the ground of his opinion, that the schooner had an unusual quantity of small stores on board, sufficient for a foreign voyage, and was fully watered. This statement the President thought a sufficient foundatiou for his decision, and accordingly approved of the detention.

It has already been shown that the facts stated by the collector, as the foundation of his opinion, were true. Admitting, however, that the statement was incorrect, or the facts capable of explanation, was it uot the duty of Wat-**346***] kins *to address the President concerning the detention of his vessel, to correct auy misstatements, and explain any dubious facts? Did he do so, and can he now, after such supine or sullen negligence on his part, complain of the conduct of the collector, who stated fairly what he heard, or of the conduct of the President who decided upon it? It is his fault only if he made no defense, aud took no steps to recover his vessel. The small sullenness of conduct induced him to refuse to give boud for the release of his vessel, when such a proposition was made to him.

The case of *Bacon* v. *Otis* has nothing to do with this case.

J. Read, of Massachusetts, for the defendant in error.

It is understood that the Supreme Court of the United States has no authority under the law which authorizes this appeal, to notice any errors except such as appear on the face of the record, and immediately respect the questions of validity of construction of the constitution, treaties, statutes, commissions or authorities in dispute. This being the case, it is presumed the principal question for the decision of the court in the cause now under consideration is, was the charge given by Chief Justice Parsons, in the Supreme Court of Massachusetts on the final trial of the cause now under eonsideration, in conformity with a correct and valid construction of the laws of the United States?

He charged the jury "that it was the duty of "the collector, as collector, to have used rea-"sonable care in ascertaining the facts on which "to form an opinion, and to transmit to the "President a statement of those facts for his "decision."

Collectors of customs were authorized by the 11th section of the statute of April, 1808, to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the Uuited States be had thereupon.

*The collector of customs was bound [***347** to have some rational ground for his opinion. otherwise he might seize all vessels under any circumstances, and it would always be a complete justification, on his part, merely to say that, in his opinion, the vessels seized were ostensibly bound with a cargo to some other port of the United States, and were about to violate or evade some of the provisions of the embargo laws. Such a defense, it is apprehended, would not amount, in all cases, to a justification. The power and authority of a collector is confined to a vessel ostensibly bound, &c. The collector should have had rational ground to induce him to believe that the vessel was osteusibly bound, &c.; that there was an intention of violating the embargo laws. In the case of *Otis* v. *Bacon* (7 Cranch, 589), this court determined that Otis detained the vessel of Bacon unlawfully, because, in their opinion, there was no rational ground of suspicion of an intended violation of the embargo laws; and the court in that case went into an examination of the facts in order to determine whether Otis had rational ground of suspicion. The result of their investigation was, in their own words, "all rational grounds of suspicion of an intended violation of the embargo laws is then done away," &c.

If it then be admitted that a collector was bound, wheu acting under the authority of the

embargo laws, and especially of the 11th section of the law of 25th April, 1808, to have rational ground for his opinions and suspicions, it is confidently believed it was the duty of such collector to have used those means to ascertain facts without which there can be no rational ground of belief. "It was the duty of "the collector, as collector, to have used rea- "sonable care in ascertaining the facts on which "to form an opinion," as directed by the judge in the court of Massachusetts. It was his duty as an honest man; as an officer in whom the government had placed the highest confidence; on whose suspicions depended the property of hundreds.

It is also believed that it was the duty of the collector not only to have used reasonable care in ascertaining the facts on which to form an opinion, but to transmit to the President a statement of those facts for his decision.

348*] *Collectors were entrusted with great and unprecedented power under the embargo laws. They were under the highest obligations to execute the trust reposed in them honestly and faithfully. The power of collectors consisted principally in the influence their statement or representation must necessarily have on the mind of the President. Collectors were authorized in certain events to seize and detain; but could detain only until the will of the President could be known. His approbation was requisite to a continuation of the detention. The President was by law constituted the sole judge whether a vessel seized and detained by a collector should be restored or not. On what evidence was the opinion of the President in such cases to be founded? The opinion of the President must, from the necessity of the case, be founded almost universally on the statement or representation of the collector. The collector, under the embargo law, after he had seized a vessel, became a witness—and sole witness in the case; and a witness not in a situation to be cross-examined. On the statement or representation of the collector, the President founded his opinion, Then it follows irresistibly that it was the bounden duty of a collector so situated, to have transmitted to the President a statement of facts in the case on which the opinion of the President was asked. If the collector was bound to represent the facts in the case to the President, he must have been bound to have used reasonable care in ascertaining those facts, not only as the foundation of his own opinions or suspicions, but also as the foundation upon which the ultimate decision of the President must rest.

If the opinions of the judge, in the court below, were considered unsound and were not established, it is apprehended the greatest injustice might be practiced; and as no case can readily be imagined where the conduct of a collector could have been more reprehensible, than in the case now under consideration, we beg the court again to advert to some facts in the case now under consideration. From the decision of the District Court, when the schooner Friendship, &c., was libeled and tried before that court (here, perhaps, I ought again to note, that after Otis seized Watkins's vessel, &c., and was directed on certain conditions to deliver her up, and Watkins refused to accept her; Otis libeled her and pretended that *he had seized her for loading without [**349** a permit) the judge of that court certified that at the time Otis first seized the vessel (December 24th, 1808), Watkins was loading his vessel in bulk in the day-time with dried cod-fish avowedly for the Boston market. It also appears that some water and small stores were carried on board, not, however, so much as was usually put on board to go to Boston. Otis, it seems, obtained the information he possessed, from a stranger to the place and to their course of business. If he knew not what quantity of water and small stores were usual he could not know what was unusual. He immediately sent a number of men to seize and detain the vessel, and had he done no more, the injury would probably have been trifling. But he ordered them not only to seize and detain, but to bring away and remove the schooner from Provincetown, one of the safest and best harbors in the world, to Barnstable, a distance of more than thirty miles. In attempting to obey his commands, the vessel was run aground and much injured and the cargo nearly ruined. He afterwards got the vessel to the wharf and unloaded it. What statement did he make to the President? What information did he give? Did he say he had removed the vessel thirty miles? Did he say he had run the vessel aground and ruined the cargo? No! He studiously avoided saying one word on the subject. He stated to the President that the vessel was evidently intended for a foreign port, for, said he, she had an unusual quantity of small stores on board; sufficient for such a voyage; and was fully watered. He also stated that the plea of Watkins, that his vessel was intended for a store ship and a neighboring market, was without foundation. Did he represent things truly?

Afterwards, on the 30th day of January, 1809, Otis was directed by the Secretary of the Treasury to give up the vessel and cargo to Watkins. Here the affair would have ended, but the vessel and cargo had been ruined by running aground, and Watkins refused under all the circumstances to accept her. Otis then wrote to the comptroller of the treasury, on the 21st of March, a few days after he had unladen the vessel, and stated that he had detained the vessel on the 24th day of December (being the same day on which he originally seized and removed the said vessel), because she was loading without a *permit. He wrote to the [**350** President that he had seized and detained her because, in his opinion, she was intended for a foreign port. Thus it is evident that Otis made one statement to the President and a very different statement to the comptroller. Both statements could not be true; and he carefully avoided stating to either the removal of the vessel and the consequent ruin of the property.

Our attention is called to a case decided at the last term of this court—*Crowell et al.* v. *M'Faddon* (8 Cranch, 94). The court observed, "the law places a confidence in the opinion of "the officer, and he is bound to act according "to his opinion, and when he honestly exer- "cises it, as he must do in the execution of his "duty, he cannot be punished for it." It is believed the above opinion does not change the principle laid down in the case of *Bacon* v. *Otis*, nor is it believed to be against the charge of the judge in the court below in the present cause.

It is not contended that an officer is bound to be right and correct in his opinions and suspicions; but is not an officer bound to examine? Is he not bound to inquire? Is he not bound to have rational ground for his opinions? Was not a collector, in the execution of the embargo laws, bound to use reasonable care in ascertaining the facts on which his own opinion and that of the President must depend? If in the discharge of so important a trust he does not use reasonable care in ascertaining facts, can he be said honestly to exercise his opinion? We think not.

The original action against the collector is for taking, carrying away and destroying the vessel and cargo, &c., of Watkins. If the collector should be able to justify himself under the 11th section of the embargo act of April 25th, in seizing and detaining, still he has no justification in removing her, with her cargo, from a safe and secure port to a distant one, running her on shore and destroying the cargo and unlading her. It is not believed that the President himself had, under that act, any authority to remove the vessel and cargo as it was removed, much less had the collector any such authority. But the President gave no or-
351*] der for such removal, nor *did he approve or confirm such removal, for he was kept ignorant of it. The question then rests on the power of the collector, and is too plain to justify the detention of the court in attempting to elucidate it. An authority to detain is not an authority to remove or unload, especially if there be no necessity so to do for security and preservation. Congress thought proper in this section to vest collectors with power to detain vessels under certain circumstances, until the decision of the President could be had, but they gave them no power to remove or unload; and the court will not, by construction, give them power which Congress have withheld.

While acting fairly and with good faith within the limits of the power thus delegated to them, the collectors are to be protected, but when they transcend those limits they must be answerable for the consequences. The collector in the present case must of course be answerable for all the damages sustained by Watkins in consequence of the removal and unlading and destroying his vessel and cargo, by which he has been deprived of the earnings of many years devoted to industry and economy, and it is believed he has been so deprived wantonly and unjustly by the gross misconduct of Otis under color of authority vested in him as deputy-collector of customs. The charge and direction of the judge, therefore, to the jury in the court below, on the facts disclosed, was correct.

It is urged on the part of Otis, that admitting that Otis's statement to the President was incorrect, it was the duty of Watkins to have addressed the President on the subject, to correct any misstatement of facts, &c.; and because he neglected it he is accused of sullen silence.

1. It is probable the patient acquiescence (not sullen silence) of Watkins was owing to his ignorance of the provisions and details of the embargo laws.

2. If he had knowledge of the subject, ought he to presume that Otis would neglect to state all the facts to the President? And besides he had no opportunity. Otis wrote to the President on the 24th of December, and the President approved the detention on the 3d of January; ten days after. It is urged Otis lived in Barnstable, and it was *therefore prop- [***352**
er to remove the vessel to save expense; that he might have her under his own eye, &c. If it were necessary to rebut the statement, it is a fact that the town of Barnstable is twelve miles long, and Otis did not live or keep his office within four miles of the harbor.

It is also contended that the case of *Crowell & Hawes* v. *M'Faddon* does not support the point contended for in favor of Otis in the present case.

In the case of *M'Faddon*, the agent of M'Faddon consented to the landing and storing the cargo; but on the supposition that no such consent had been given, "the court in that case observe that the landing and storing the cargo, whether to preserve it from injury or secure it from rescue, was a necessary consequence of the detention. Has Otis, in the present case, produced any evidence to show that it was necessary to remove the vessel of Watkins to preserve or secure the property? In the case above mentioned of *Crowell & Hawes* v. *M'Faddon*, the vessel of M'Faddon was not removed from the harbor of Hyannis, where she was first detained; but was merely brought to a landing place or wharf about one-half mile from the place where first detained.

In the case now before the court, the vessel of Watkins was removed from Provincetown to Barnstable, a distance of more than thirty miles. The harbor of Provincetown is one of the safest in the world; that of Barnstable less secure. By the removal and running aground, the vessel and cargo of Watkins were principally lost. If necessary to unlade and store the cargo, it might have been better and easier done at Provincetown than at Barnstable.

It is confidently believed that this court will not, by construction, extend the authority of collectors under the embargo laws to distant removals. No removal will be permitted unless absolutely necessary to preserve or secure the property. Otis has not produced a tittle of evidence to show that any such necessity existed. On the other hand, it has been abundantly proved to have been unnecessary and ruinous.

*March 10th. *Absent*—TODD, *J.* [***353**

LIVINGSTON, *J.*, delivered the opinion of the court as follows:

This is an action of trespass, brought in the Supreme Judicial Court of the Commonwealth of Massachusetts, for taking, carrying away and destroying a certain schooner called the Friendship, with her cargo, belonging to the plaintiff below.

The declaration is in common form. The defendant pleaded that, as deputy-collector for the district of Barnstable, he detained and removed from the port and harbor of Provincetown, to the port and harbor of Barnstable, the said vessel and cargo, that they might be securely kept; the said schooner and cargo, at the time of such detention, lying in the said harbor of Provincetown, within the district aforesaid, ostensibly bound to some other port of the United States, with an intent, in the opinion of the defendant, to violate or evade the provisions of the embargo laws.

He further pleaded that he caused the said vessel to be detained so that the decision of the President of the United States might be had thereon, who, afterwards, upon his report and representation, did approve and confirm the said detention.

The plaintiff replies that the defendant committed the trespass of his own wrong, and without any such cause, &c. Issue being joined thereon.

On a bill of exceptions taken to the charge of the court, the following facts appear to have been given in evidence: That the schooner in question, in the month of December, 1808, was lying at Provincetown, wholly loaded with cod-fish. She had also a barrel of beef, a number of small stores and groceries, with three or four barrels of water, and a number of kegs of pickled lobsters. That an inspector of the customs, seeing the Friendship in this situation, and judging that the groceries were sufficient for the crew of such a vessel for thirty days, and having no doubt of her being bound to sea, gave information of such, his suspicions, to the collector, who gave a written order to [*354] one Ganett to detain *and to bring her into the port of Barnstable, and there secure her in the best manner possible. That Ganett proceeded to Provincetown with about thirty men, and removed the said vessel to Barnstable, about ten leagues, by water; but when attempting to come up to a wharf she accidentally ran onto a point of land which projected into the water, and there stuck fast. That she could not be got off during that tide, which soon left her; and the weather was very cold, and the harbor was frozen up for a long time, so that the schooner could not be removed. That the defendant gave notice, by letter, to the Secretary of the Treasury of the United States, of the detention of said vessel, stating, at the same time, his reasons for believing that "she was evidently intended for a foreign port;" which detention was approved of and confirmed by the President. That, as soon as the weather would permit, which was in the month of March following, the defendant caused the said schooner to be brought to a wharf, and unloaded and secured the cargo. That about 60 or 70 quintals of fish were damaged, and the rest in good order. There was, also, evidence on the part of the plaintiff to prove that the Friendship was actually bound to Boston, and the extent of the injury which his property had sustained.

The court charged the jury that the several matters and things so given in evidence by the defendant "did not, in law, maintain the issue "aforesaid on his part; and also that it was the "duty of the collector, as collector, to have "used reasonable care in ascertaining the "facts on which to form an opinion, and to "transmit to the President a statement of those "facts for his decision." On an exception to the charge, the cause now comes before us, it having been removed into this court under the 25th section of the judiciary act; and whether it were correct or not is the question which is now to be decided.

This seizure was made under the 11th section of the act of the 25th of April, 1808 (vol. 9, p. 150), which provides "That the collectors of "the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of "the United States, whenever, in their opinions, the *intention is to violate or [*355] "evade any of the provisions of the acts laying "an embargo, until the decision of the Presi- "dent of the United States be had thereupon."

The issue tendered by the defendant, and on which the parties went to trial, was whether the vessel and cargo were detained, because, in the opinion of the defendant, she intended, although ostensibly bound to a port in the United States, to violate or evade the provisions of the embargo laws; and whether the vessel was removed to Barnstable that she might be securely kept until the decision of the President was known.

If there were any evidence to prove this issue, it should have been left to the jury to draw their own conclusions. If the defendant had taken upon himself to say that the vessel did intend to violate the embargo laws, and that such removal was absolutely necessary for her secure detention, such charge would have been less exceptionable; but that it was the opinion of the collector that such violation was in contemplation, and that such removal was for the purpose of securing the vessel, which were the facts in issue, might very well have been inferred by the jury from the evidence before them. Indeed, it would have been difficult for them to have come to a different conclusion; for the collector, from the information which he received, could scarcely fail to form the opinion he did; and there was no evidence whatever to induce them to believe that she could have been removed to Barnstable, considering the care which was taken of her during her removal and after her arrival there, for any other purpose but for that alleged in the plea. In this particular, then, it is the opinion of a majority of the court that the charge was erroneous.

The charge is deemed incorrect in another respect. The jury are told that it was the collector's duty to have used reasonable care in ascertaining the facts on which to form an opinion.

This instruction implies that the collector is liable if he form an incorrect opinion, or if, in the opinion of the jury, it shall have been made unadvisedly or without reasonable care and diligence. But the law exposes *his con- [*356] duct to no such scrutiny. If it did, no public officer would be hardy enough to act under it. If the jury believed that he honestly entertained the opinion under which he acted, although they might think it incorrect and formed hastily or without sufficient grounds, he would be entitled to their protection. Such was the opinion of this court in the case of *Crowell & Hawes* v. *M'Fuddon*, decided at the last term. This does not preclude proof on the part of the plaintiffs, showing malice or other circumstances which may impeach the integrity of the transaction. The jury, then, were misled when their attention was drawn from the fact whether the defendant really entertained such opinion, and were directed to inquire into the reasonable care with which it was formed, which left them at liberty to find a verdict against the defendant, however honestly and fairly he may have acted.

It is the opinion of the court that the judg-

ment of the Supreme Judicial Court of Massachusetts must, for the reasons assigned, be reversed, and the cause be remanded for further proceedings.

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered his separate opinion as follows:

As this court can notice no other error than such as may be founded on a misconstruction of the act of Congress under which the defendant justified the taking and carrying away charged in the declaration, the charge of the judge can be considered so far only as it respects that act.

The section to which the plea refers is in these words: "Be it enacted," &c.

In construing this law it has already been decided in this court that the collector is not liable for the detention of a vessel, "ostensibly "bound, with a cargo, to some other port of "the United States whenever, in his opinion, "the intention is to violate or evade any of the "provisions of the acts laying an embargo, un- "til the decision of the President of the United "States be had thereon." For the correctness of this opinion he is not responsible. If, in **357***] truth, he has formed it, his duty *obliges him to act upon it; and when the law affords him no other guide than his own judgment, and declares that judgment to be conclusive in the case, it must constitute his protection, although it be erroneous. The legislature did not intend to expose the collector to the hazard of being obliged to show that he had probable cause for the opinion he had formed. If, in reality, he had formed it, the law justifies him for acting upon it. If it can be proved, either from the gross oppression of the case or from other proper testimony, that the collector did not in fact entertain the opinion under which he professed to act, some doubt may be entertained of his being justified by the law; but if the opinion avowed was real, though mistaken, a detention under that opinion is lawful.

But the act of Congress authorizes only a detention of the vessel, not its removal. The collector did remove the vessel from one harbor into another, a distance of about thirty miles by water, and in this removal the injury was sustained. As an independent act this proceeding is not justified by the law. It was the duty of the collector to detain the vessel; and all acts which were necessary, as means to the end, were lawful; but unless this removal was necessary for the purpose of detention, it is not protected by the law.

The charge of the judge will now be examined.

He instructed the jury "that the several mat- "ters and things so given in evidence by the "said William Otis did not in law maintain "the issue on his part."

If this instruction could be understood as conveying to the jury an opinion that Otis had not justified the detention of the vessel, the court would feel no hesitation in pronouncing it erroneous. But it was necessary for Otis to justify the removal as well as the detention and he could only justify the removal by showing that it was necessary to a secure detention. Had he offered any testimony whatever to this point, it might have been incumbent on the judge to submit that testimony to the jury. But he has offered no testimony whatever to it. This court, therefore, cannot say that the judge of the state court has erred in saying that the matters and things *given in evidence [***358** by the said William Otis, did not in law support his plea. Certainly they did not make out a justification under the act of Congress.

The judge further instructed the jury "that "it was the duty of the collector, as collector, "to have used reasonable care in ascertaining "the facts on which to form an opinion, and "to transmit to the President a statement of "those facts for his decision."

The act authorizes the collector to detain a vessel on his own mere suspicion, "until the decision of the President of the United States be had thereupon."

On what is the decision of the President to be had? Clearly on the further detention of the vessel, and on the future proceedings of the collector respecting her. Whenever the President acts, he is expected to act upon information; and from whom, in this instance, is his information to be derived? Unquestionably from the collector. The law does not, indeed, say in terms that the collector "shall take reasonable care in ascertaining the facts," or that he shall afterwards communicate those facts correctly to the President; and if this be not a fair and necessary construction of the act, the judge has misconstrued the law, and his judgment ought to be reversed. But it seems to be an inference which must be drawn from the words of the law. It follows necessarily from the duties of forming an opinion and of communicating that opinion to the President for his decision in the case, that reasonable care ought to be used in collecting the facts to be stated to the President, and that the statement ought to be made.

I cannot say that the court of Massachusetts has erred in its construction of the act of Congress under which the defendant justifies the trespass alleged in the declaration.

Cited—McAl. 237.

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*THE BRIG ALERTA AND CARGO, [*359

(BROSQUET, CLAIMANT,)

v.

BLAS MORAN, LIBELANT.

Absent—TODD, *J.*

The district courts of the United States (being neutral) have jurisdiction to restore to the original Spanish owner (in amity with the United States) his property captured by a French vessel whose force has been increased in the United States, if the prize be brought *infra præsidia*.

THIS was an appeal from the sentence of the District Court for the District of New Orleans (which has the jurisdiction also of a circuit court).

The facts of the case were stated by WASHINGTON, *J.*, in delivering the opinion of the court, as follows:

This is the case of a libel filed in the District Court of New Orleans, by Blas Moran, a sub-

ject of the King of Spain, and a native and resident of the island of Cuba, setting forth that he is the owuer of the brig Alerta and cargo, consisting of 170 slaves, which, on a voyage from the coast of Africa to the Havanna, was, some time in the month of Junc, 1810. when within a few leagues of Havanna, captured on the high seas by the L'Epine, bearing French colors; that a prize-master was put on board the Alerta, and 17 of the slaves taken out, after which the prize was ordered to steer for the Balize, and was finally bronght to the port of New Orleans, with the remainder of her cargo, consisting of 153 slaves. The libel alleges that the L'Epine was not duly commissioned to capture the property of Spanish subjects, or, if so commissioned, that she was armed and equipped for war in the port of New Orleans, and manned by sundry American citizens and inhabitants of the territory of New Orleans, contrary to the law of nations. The prayer of the libel is for restitution and damages.

The claim of the prize-master admits the capture of the Alerta as lawfnl prize of war; and asserts that the L'Epine, at the time of the capture, was and still is legally authorized to capture all vessels and their cargoes belonging to the snbjects of Spain, as enemies of France. He further states, that after the capture he was compelled to enter the port of New Orleans by **360***] stress of weather, *want of provisions, and the inability of the Alerta to keep the sea, and prays to be dismissed.

The evidence in the canse establishes the following facts: That some time in April, 1810, this privateer, commanded by Captain Batigne, and bearing a commission from the French goverument to make prizes on the high seas, entered the port of New Orleans. The captain had with him a letter of instructious from his owner, directing him to deposit what money he might take as prize in the Bank of New Orleans; to put into one of the ports as being in distress, and, in case he should hear of the capture of Guadaloupe, he was to renew his crew for the purpose of conveying his prizes to France. Some time in the course of the snceeding month Batigne presented two petitions to the collector of the port of New Orleans, stating that the L'Epine had been compelled by stress of weather to put into that port, and that he had necessarily incnrred expenses for refitting and victualing the privateer, and for defending himself against a criminal prosecntion for piracy to an amount exceeding $5,000, and praying for permission to enter and sell snch part of his cargo as would enable him to discharge that sum. He also applied to the collector, about the same time, for permission to purchase provisions for his crew, amonnting to thirty persons, on his iutended voyage to France, and intimated that he should take with him about ten passeugers, if permitted to do so; bnt this permission being refused, he professed to relinquish his inteutiou of taking passengers on board.

Having obtained permission to pnrchase provisions, and to dispose of a part of his cargo, it appears that he paid off his crew, and sailed from New Orleans soon afterwards with a crew of from fifty to sixty men composed partly of persons obtained at New Orleans, and partly of those who had entered that port with him. With this force on board he went to sea, and soon afterwards fell in with the Alerta, bound from Africa to the Havanna, which, together with her cargo consisting of 170 slaves, he captured as prize of war, put a prize-master on board, and ordered her to steer towards the Balize. On her passage the Alerta suffered very considerably in a gale; and her crew, together with the slaves on board, were much distressed for want of provisions, when she was, *at the [***361** request of Captain Batigne, visited and relieved by Captain Allen, and condncted safely to New Orleans, where he libeled the vessel and cargo for salvage.

The court below, upon the libel of the Spanish owner, decreed restitution to the libelant of the ship and the 154 slaves left on board of her by the privateer, subject to all expenses for the support of the negroes, and such salvage as shonld be decreed by the court, together with costs of snit, and snch damages as the court shonld thereafter decree.

J. Woodward, for the appellant, contended for the following points:

1. That the authority to capture is complete and the capture in all respects legal and operative.

2. That it does not appear that the equipment of the L'Epine was in violation of any law of the United States, or in such manner as to affect the prize in question.

3. That there is error in the decree of the conrt below in decreeing restoration to the libelant, Blas Moran.

4. That should it be the opiniou of this conrt that the Alerta and cargo are not prize of war, the restoration should be subject to a salvage to the captors;

And submitted the case to the conrt, npon the following written argument:

In this case the appellant will not controvert the jnrisdiction of the court to inquire as to the commission or authority under which the privateer acted, but will content himself with showing that for all the purposes of this case the commission is regular.

There are no appearances which justify a presumption of fraud on the face of the commission. The court will inspect it.

The District Court agrees that if the case stood on this point aloue it would be left to the foreign tribunal. The official signatures are proven. The commission being *thus [***362** established, this conrt will not go iuto a question of regularity which may or may not be material according to the local usage in the French ports as to issuing or using those commissions.

It appears by the captain's petition to the collector, which is sworn to, that he, the captain of the L'Epine, was tried at New Orleans on this trausaction as a pirate, aud I think the presumption must be that he was acqnitted. The validity of his commissiou must have been passed upon, on this trial, for if he acted without commission he was a pirate. He cannot be looked npon as a pirate, because he has acted openly nnder the authority of at least a regularly-executed commission, and in full communion with the consul of his own nation at New Orleans. If not a pirate he was a legal captor as far as respects the commission. But it

is said that the equipment of the L'Epine, by force of which she made the capture in question, was contrary to the laws of the United States, and that therefore our courts have a right to restore the prize. The inference of law may be true, but the fact is not established. Indeed, it might not be indecorous to suppose, from a comparison of the testimony with the result in the court below, that by possibility, clamor or prejudice, which too often insensibly intervene in such cases, had not been without their effect. The acting consul at New Orleans swears that the additional number of men went on board as passengers, that no money was paid to them, and that if they were to have formed an augmentation of the crew, he must have cooperated. The circumstances corroborate this fact; they were foreigners; they were emigrants. It does not appear in any instance that a person was taken on board as an addition to the crew. There might have been a difference between the number reported and the number on board, but it is also true that there were some secreted on board unknown to the captain until he got to sea. This is not an unusual case with respect to such vessels. But the testimony shows the conduct of the captain to have been honorable on this point. If after leaving the jurisdiction on the United States any of those Frenchmen had entered into the service as foreigners, this is a crime personal to themselves and which cannot affect the privateer or her prize, unless by the captain's original procurement, he knowing them to be American **363***] citizens. Would the evidence, *which the court will of course read, be sufficient to establish the penalties under the act of Congress? If not, it will not be sufficient to establish the forfeiture of vessel and cargo as against the captors, whose possession I consider firm under the capture. The whole conduct of the captain has been in open day and under the express view of the collector. It must be presumed fair.

But it is said that the last entrance into the port of New Orleans was not in good faith. It is said that by the letter of instructions, &c., the L'Epine had an original intent to go into New Orleans to deposit cash in the banks there. This intent was contingent and remote, and it does not appear that the contingency of getting cash had happened. But this original intent is immaterial, provided the distress were the true and immediate cause. I need not refer the court to authorities under the navigation laws of England to decide this point, but if desired they can be produced. This intent might have been effected without the violation of our laws, as the money might have been sent in without the vessel. But this charge of original intent is contradicted by the fact, as the L'Epine passed frequently with a fair wind when she might have entered, and did not, but kept at broad capturing distance, 80 miles from the Balize, although there were no enemy ships to prevent her entering the port.

If the court should be of opinion, contrary to the crude reasoning now submitted, that the Alerta and cargo ought of right to be restored, then it appears to me that the captors are entitled to salvage, and not Mr. Allen, the pilot, as a condition precedent to the restoration. The deposition of Allen himself will show that when he, for the first time, boarded the Alerta, she was within a day of Barrataria, had weathered the storm of the 26th, was riding in a calm sea at anchor, 12 feet water, and the crew amusing themselves in catching sea birds, and supplying themselves by salting them, of which they had several barrels. She had plenty of provisions at that time to carry her to Barrataria, and Allen states that she could have gotten there, but had a storm happened he should not have liked to have risked himself in her. But as to the L'Epine she overtook the Alerta in actual distress after she had been recently cast on shore and greatly injured, with but half a barrel of bread, half a barrel of pork, *for 150 [**364*** slaves and 12 other persons, and indeed the L'Epine was visited by Mr. Martinez from the Alerta on account of this distress. The testimony shows that she could not have reached a harbor but for the aid from the L'Epine. Then unless the act of bringing in the Alerta were piratical, the L'Epine acted as humanely and as beneficially to the owners in bringing in the Alerta as in any other case of salvage.

There was no argument on the part of the appellee.

March 10. *Absent*—TODD, *J.*

WASHINGTON, *J.*, delivered the opinion of the court as follows:

The only question for the consideration of this court is, whether the court below had jurisdiction of this cause for the purpose of restoring the property of the libelant? The jurisdiction is asserted upon two grounds.

1. That the force of the privateer, by means whereof this capture was made, had been increased at New Orleans, contrary to the laws and in violation of the neutrality of the United States.

2. That the commission of this privateer had expired before the capture was made.

As this court is satisfied with the sentence of the court below upon the first ground of jurisdiction, the opinion will be confined to that point. The general rule is undeniable, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. This is necessary to the vindication of their own neutrality.

A neutral nation may, if so disposed, [**365*** without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory. But without such permission the subjects of such belligerent powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such neutral nation. Such unauthorized acts violate her sovereignty and her rights as a neutral. All captures made by means of such equip-

ments are illegal in relation to such nation, and it is competent to her courts to punish the offenders, and, in case the prizes taken by her are brought *infra præsidia*, to order them to be restored.

These principles are believed to be fully warranted by the general law of nations, by the decisions of the courts of this country, and by the laws of the United States. By the act of June, 1794, the enlisting, within the territory of the United States, persons to serve as soldiers and marines on board of any vessel of war or privateer in the service of any foreign state, with the exception of the subjects of such foreign state transiently within the United States; the fitting out and arming any vessel in the service of a foreign prince or state at war with any other nation which is at peace with the United States; and the increasing or augmenting the force of any armed vessel of war in such foreign service, by adding to the number of her guns, and the like, are declared to be offenses against the United States, and are punishable by fine and imprisonment; and the 7th section of the law provides for the detention of all such vessels as have been so fitted out, or as have so increased or augmented their force, together with such prizes as they may have made, in order to the execution of the prohibitions and penalties prescribed by that act, and to the restoring of such prizes in cases where restoration shall have been adjudged.

Thus, if there were any doubt as to the rule of the law of nations upon this subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the above law; and the power and duty of the proper courts of the United States, to restore the prizes made in violation of that law, is clearly recognized.

366* *But it is insisted for the claimant in this case, that the persons taken on board at New Orleans by the captain of the privateer, formed no part of the crew at the time the privateer left that port, but that they were received merely as passengers; that they were emigrants from other nations, and not citizens of the United States; and that their subsequent change of character from passengers to crew, cannot attach any crime to the captain of the privateer under the laws of the United States, or affect his right to the prizes which he might afterwards make on the high seas.

This argument is unsupported by the facts proved in the cause. It appears that Capt. Batigne proposed, in the first instance to the collector of the port of New Orleans, to take on board ten passengers for France, provided he should be permitted to do so, and that he afterwards stated to the collector that as there was some difficulty in obtaining such permission he should decline taking them. But what places this subject beyond all doubt is, that it appears from some of the ship's papers of the privateer that advances were made to these alleged passengers with a deduction of 3 per cent. for the marine invalids agreeably to the ordinances of France, and the *role d' equipage* contains the number of prize shares opposite to their names. These facts, being unexplained by any testimony in the cause, which deserves to be respected, leave no doubt that the persons taken on board at New Orleans were engaged originally as an addition to the crew of the privateer. Some of the persons so enlisted are proved to be native citizens; others were residents domiciled in New Orleans, some with and others without families; and others again were slaves belonging to the citizens of that place, who appear to have been seduced from the service of their masters. It is quite immaterial whether the persons so enlisted were native American citizens or foreigners domiciled within the United States; since neither the law of nations nor the act of Congress recognizes any distinction except in respect to subjects of the state in whose service they are so enlisted, transiently within the United States; and it may well be doubted whether this exception in the act of Congress was not virtually repealed by the non-intercourse law. But it appears that some of these persons *were [***367** emigrants from Cuba, and were, at that time, residing and domiciled in New Orleans.

It is next contended on behalf of the claimant, that, in case the court should affirm the decree directing restitution, it ought to be done upon the condition of the libelant paying salvage, not to the captain of the gun-boat who furnished the Alerta with provisions and conducted her to New Orleans, but to the privateer.

This claim is entirely inadmissible. Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved. What are the pretensions of Captain Batigne to the reward he claims? He fits out his vessel at New Orleans in contravention of the law of nations and of the United States; and finding on the high seas a vessel and cargo, belonging to the subjects of a nation at peace with the United States, within a short distance of the Havanna, her port of destination, he employs the force thus illegally taken on board to make prize of both vessel and cargo, and taking her out of her course, he conducts her towards the Balize, near to which she is found by Captain Allen in distress in consequence of a severe gale, to which she had been exposed, and of the want of provisions. Her wants being relieved by that officer, he conducted her in safety to New Orleans. Nothing could be more remote from the intentions of the captain of the privateer than to render a service to this ship and her cargo. So far from it, he committed an unwarrantable spoliation of the cargo by selling fourteen of the slaves, part thereof, to an American whom he met at sea; and he most certainly intended to have smuggled the residue of the slaves into Grand Terre or some other part of the coast, and there to have disposed of them. It would ill become any court of justice, and much less an American court, to bestow a reward on a person who had thus violated the laws of the United States in one instance, and meditated a violation of them in another; and it would be still worse to give such reward at the expense of the injured Spaniard.

Upon the whole, it is the opinion of this court that the sentence appealed from ought to be affirmed with costs.

Cited—4 Wheat. 71; 5 Mason, 471; 2 Paine, 670, 677, 681; 4 Wash. 657.

368*] *THE GROTIUS, SHEAFE, MASTER.

Absent—TODD, *J.*

In order to constitute a capture, some act should be done indicative of an intention to seize and to retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor.

THIS case was continued from last term, for further proof (see ante, vol. 8, p. 456), and was now submitted, upon the further proof produced, without argument.

WASHINGTON, *J.*, delivered the opinion of the court as follows:

This case comes before the court upon an order for further proof, made at the last session, in relation to the validity of the alleged capture of this vessel. The master, the mate and two of the seamen of the Grotius, in answer to some of the standing interrogatories, swore that they did not consider the ship to have been seized as prize, and that the young man who was put on board by Odiorne, the captain of the privateer, was received and considered as a passenger during the residue of the voyage. The deposition of Very, the alleged prize-master, was taken and read in the court below, in which he swore that he was present at the capture; that Sheafe, the master of the Grotius, was ordered to go on board the privateer with his papers, and that he, Very, was directed by Captain Odiorne, in the presence of Sheafe, to go with the prize, as prize-master, and to permit the captain of the Grotius to keep possession of the ship's papers and to navigate her into port. That he accordingly went on board as prize-master, taking with him a copy of the privateer's commission and also written instructions from Captain Odiorne for his own conduct.

The deposition of Very, though irregularly taken in that stage of the cause, was nevertheless calculated to weaken the preparatory evidence in relation to this contested fact, and to point out the propriety of a further investigation. The evidence of this witness lost much of its weight from the circumstance that his letter of instructions was not annexed to his deposition, or made an exhibit in the cause. It was proper that this omission should be supplied by the captors, if it could be done, and that they should have an opportunity to fortify the **369***] *evidence of Very, if in their power to do so. For these reasons the order for further proof was extended as well to the captors as to the claimants. Under this order the captors have exhibited an attested copy of the written instructions to Very, bearing date the 29th of July, 1813. They inform him that he is put on board the Grotius and direct him to proceed in the ship, and, on his arrival, to report himself to the agent of the privateer, who would take such measures as he might deem necessary; that he is not to take charge of the vessel, but is to allow the captain to take her into any port in the United States he might see fit. The authenticity of this paper is ascertained by the affidavit of the prize agent of the privateer, in which he swears that the original was delivered to him by Very, on his arrival, as containing his orders, and that it has remained ever since in his possession. The deposition of Very has not been taken under the order for further proof, but the omission is accounted for by the prize-agent, who, in his affidavit, swears that Very was captured on a subsequent voyage, and had not since returned to the United States. Under these circumstances the court feels no difficulty in receiving his deposition originally taken in the court below. In addition to the letter of instructions to Very, the collector of the port of Portsmouth has furnished an extract from the journal of the privateer, kept on that cruise, which states "that on the 30th of "July, 1813, the Grotius was boarded, and "after an examination of her papers, a prize-"master was put on board of her, and she was "ordered to the first port in the United States."

This documentary evidence is further supported by the deposition of Mr. Wardwell, the surgeon of the privateer, who swears that Captain Odiorne informed the master of the Grotius, after he had come on board, that he should make out a copy of his commission and should put a prize-master on board, to whom he should give orders to suffer Captain Sheafe to conduct his ship into any port of the United States he should think fit; that he would be further instructed to report to the custom-house on his arrival, and to inform the agent of the privateer of his arrival. That a prize-master, named Very, was accordingly placed on board, with instructions and a copy of the commission. This witness being examined *as touching his interest in this cause, [***370** swears that he has none, having for a valuable consideration assigned all his interest in the prize to the owners of the privateer. The only evidence given by the claimants under the order for further proof is the deposition of John De Forest and the affidavit of Captain Sheafe, which corresponds with his answers to the standing interrogatories; and in addition thereto he contradicts the material parts of Wardwell's testimony. De Forest was a passenger on board of the Grotius, and he swears that Very exercised no authority whatsoever on board that ship, but was considered and treated as a passenger.

Upon this evidence and the answers to the standing interrogatories, the cause is now to be decided; and the only question is whether the Grotius was in fact seized as prize of war. When the facts are ascertained there can be very little doubt what constitutes in law a valid seizure as prize. It is clear that some act should be done indicative of an intention to seize and to retain as prize; and it is always sufficient if such intention is fairly to be inferred from the conduct of the captor. Now, in this case, the evidence of Very and of Wardwell, proving that Captain Sheafe was distinctly informed that his ship would be sent in as prize, is corroborated by the written instructions to the former, which he delivered, on his arrival, to the prize agent, and by the journal of the privateer, both of which documents correspond with the evidence of those witnesses. The former of these documents, written at the time when Very was appointed the prize-master as he states, imports a clear declaration of the intention of Captain Odiorne, and having been deposited with the prize agent immediately on the arrival of the Grotius, it cannot be presumed to have been fabricated to serve the purpose for which it is now used.

Although the instructions do not call Very prize-master by name, yet they contain other equivalent expressions; for if he was put on board merely as a passenger, what had he to do with reporting the vessel, on her arrival, to the collector, and particularly to the prize agent? **371***] *The evidence, then, on the part of the captor would be quite sufficient to establish the fact of a valid capture if it stood uncontradicted. The only positive evidence against it is the deposition of Sheafe, which is in direct opposition to that of Wardwell and Very. He swears that Odiorne represented himself in the first instance as the commander of a British privateer, and as such threatened to put a prize-master on board and send him into Halifax. That he afterwards avowed his real character, after which he never spoke of putting a prize-master on board, but merely requested him to receive Very as a passenger. He says that the first conversation when Odiorne spoke of putting a prize-master on board took place in the cabin when Wardwell was present; that the latter conversation was on deck when he was not present.

Wardwell is equally positive. He swears that after Captain Odiorne had disclosed his real character, he told Sheafe that he should put a prize-master on board, and send him into any port in the United States he might choose, adding that he might as well be prize to the privateer as be seized by the government of the United States on his arrival; to which captain Sheafe assented. He further swears that Captain Odiorne informed the captain of the Grotius, that he should direct the prize-master to report himself to the custom-house, and to the prize-agent. In point of credit these witnesses appear to be equal, neither of them having any personal interest in the dispute. But Wardwell is fully supported by Very, and their united testimony receives considerable aid from the instructions, and from the journal of the privateer. They are also supported in some degree by the answer of Chambers, one of the crew of the Grotius, to one of the standing interrogatories, in which he states that Very, the day after his coming on board of that ship, declared that he was put on board as prize-master.

The evidence of the mate, of De Forest, and of Prince, is entitled to very little weight, because the two former did not go on board of the privateer, and the latter, although he did accompany Captain Sheafe to the privateer, does not pretend that he heard any conversation between him and Captain Odiorne; and being a common seaman it is unlikely that he should have been admitted into their company. **372***] The evidence of these persons as *to the unassuming conduct of Very whilst on board the Grotius, from which they inferred that he was there merely as a passenger, is entirely consistent with the arrangement proved to have been made on board of the privateer that he was not to interfere in the navigation of the vessel.

Upon the whole it is the opinion of a majority of the court that the validity of the capture of the Grotius as prize of war is sufficiently established by the evidence, and the captain having acquiesced in the subsequent arrangement as to the mode of sending in the vessel, she ought to have been condemned to the use of the captors.

The decree of the Circuit Court condemning the ship Grotius, &c., to the United States, is reversed; and the court, proceeding to give such decree as the said Circuit Court ought to have given, it is further decreed and ordered that the said ship be condemned as lawful prize to the captors.

S. C. 1 Gall. 503. See 8 Cranch, 456.
Cited—20 Wall. 225; Gilp. 38, 40; 2 Wood. & M. 540.

GETTINGS *v.* BURCH'S ADMINISTRATRIX.

Absent—TODD, *J.*

It is an error in the Orphan's Court for the county of Washington in the District of Columbia, to decide a cause against the answer of a defendant, if the answer had not been denied by a replication; and if there be no evidence in the record contradicting that answer.

THIS was an appeal from the sentence of the Circuit Court for the District of Columbia, affirming that of the Orphan's Court for the county of Washington.

On the 13th of February, 1813, the appellee, Jane Burch, filed in the Orphan's Court a petition or libel setting forth that by an order of that court on the 11th of June, 1805, the property of the deceased in her hands was delivered to the appellant, who had become one of her sureties in the administration bond in the year 1803, and who obtained an order of that court to sell the same. That he had made no return of sales, nor rendered any account of his proceedings, but still has the property in his possession, consisting of a negro woman and her four children; and praying that the property may be redelivered to her, she having been appointed guardian of the infant children of the deceased, and being *ready to give good [***373** security to indemnify the appellant against his responsibility on her administration bond, and to pay him any moneys he may have paid on her account as administratrix.

A citation having been issued, the appellant appeared and filed his answer, in which he says that in pursuance of the order of the court he duly sold the property, and is ready to account for the proceeds.

It does not appear by the record that any formal replication in writing was filed to this answer; and that circumstance seems to have passed unnoticed in the courts below, and the cause was tried without any objection having been made on that ground.

Upon the trial of the cause in the Orphan's Court the judge ordered and decreed that the appellant should deliver up the property to the appellee, upon her paying him certain sums of money which he had paid for her as administratrix. The record does not show what evidence was before the Orphan's Court respecting the sale of the property by Gettings.

Upon the appeal to the Circuit Court, the sentence of the Orphan's Court was affirmed.

The case was argued by *Jones* for the appellant, and by *F. S. Key* for the appellee, in the absence of the reporter.

February 23d. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, ordered the following decree to be enrolled:

This cause came on to be heard on the transcript of the record of the proceedings of the Orphan's Court for the county of Washington, and of the Circuit Court for the said county, and was argued by counsel. On consideration whereof it is the opinion of this court that the decree of the Orphan's Court for the county of Washington, ordering the said Kenzy Gettings to deliver to the said Jane Burch, as administratrix of Jesse Burch, deceased, the slaves in **374***] the said decree mentioned, *when the petitioner had not by replication denied the answer of the defendant, in which he states a sale of the said slaves in pursuance of an order of the said Orphan's Court, and without receiving any evidence that the said slaves were not sold, or that they remain still in possession of the said defendant is erroneous; and that the decree of the Circuit Court, affirming the same, is also erroneous; and that the said decree of affirmance ought to be reversed and annulled, and the cause remanded to the said Circuit Court with directions to reverse the said decree of the said Orphan's Court, and to remand the cause of the said court, that further proceedings may be had therein according to law. All which is ordered and decreed accordingly.

Cited—Crabbe, 193; 3 Cliff. 542.

THE UNITED STATES
v.
BRYAN & WOODCOCK,
(*Garnishees of Hendrickson.*)

Absent—TODD, *J.*

The 5th section of the act of the 3d of March, 1797, giving a priority of payment to the United States out of the effects of their debtors, did not apply to a debt due before the passing of that act, although the balance was not adjusted at the treasury until after the act was passed.

ERROR to the Circuit Court for the District of Delaware.

This was an attachment of the effects of Hendrickson, a bankrupt, in the hands of his assignees, Bryan & Woodcock.

Hendrickson was surety for George Bush, late collector of the customs at Wilmington, in an official bond dated in 1791. Bush died on the 2d of February, 1797. By an adjustment of his accounts at the treasury in 1801, it appeared that the balance against him was $3,453.06.

In the court below it was agreed that the case should depend on the question, "Whether, un- "der the 5th section of the act of Congress of "March the 3d, 1797, the United States are "entitled to satisfaction of their demand **375***] *"out of the effects of the bankrupt "Hendrickson in the hands of the garnishees, "as assignees of the bankrupt, prior to the "claims, or any part of them, of other credit- "ors of the said bankrupt being satisfied?"

The judgment in the court below was against the United States, and they brought their writ of error.

Wells, for the defendants in error.

In respect to the priority supposed to be established by this act, if it be considered as applying to this case, it will be a priority set up, if not by an "*ex post facto* law," by a retrospective law.

Two questions here present themselves for consideration:

1. Was Congress competent to enact such a retrospective law?

2. Has such a law been enacted? Is the act of the 3d of March, 1797, retrospective?

First inquiry. Was Congress competent to enact such a retrospective law?

It has never yet been contended that these priorities rest, for support, upon any ancient and royal ground of prerogative. Our constitution is a government of definite, delegated authority; and the powers not given belong to the people, not only by clear and unavoidable inference, but by positive and express reservation. No attempt has yet been made in any of the courts of the United States to set up this claim, upon the ground of prerogative. Congress have considered it as not resting upon that ground; or they would have deemed it unnecessary to make statutory provisions upon the subject. It has been decided that they have the power to establish a fair priority in behalf of the government. They have the power to impose and collect taxes; and it is certainly their duty to provide for their faithful collection and payment into the public treasury. A fair priority has been considered, if not absolutely "necessary," at least "conducive" to this end; and the power *to establish it conse- [***376** quently given expressly by the clause in the constitution emphatically termed the "sweeping clause."

Had the constitution omitted this clause, still it would seem, for the fair and legitimate execution of the powers expressly delegated, that there would be, from necessity, conferred the right to exercise any means for that purpose that were "proper and necessary." To give body and substance to this abstract right; to bring this latent power into light, and to demonstrate its existence, as well as its proper form and proportion; to show it, in the constitution, to the eye, what it is in perfect reason, it is declared that Congress shall have power "to make all laws," not that they, in their good pleasure, with a discretion that acknowledges neither guide nor restraint, not to make any and every sort of law they may choose, in furtherance of any special power, but only those "which shall be necessary and proper for carrying into execution the foregoing powers vested, by this constitution, in the government of the United States, or in any department or officer thereof."

An act which cannot be traced up to any original, nor yet to this secondary power, in the constitution, proceeds not from it and, of course, partakes not of the character of law. An act declaring itself to have proceeded from the secondary power, which shall be manifestly improper and unnecessary, or either, cannot have emanated from that power; and is both a stranger and an enemy to the constitution.

The limitation upon the secondary power

was, originally, of a more striking and imposing character than it now appears, since the adoption of the amendments to the constitution. Most, if not all, of the high and important privileges, fenced about by those amendments, owed their security and protection, previous to the adoption of these amendments, to these two talismanic words, if I may use the term. Without some restraint imposed upon this secondary power, most probably the means to effect a lawful purpose would have been what Congress pleased to make them. An unlimited power over the means of accomplishing a proper end would have been as terribly pernicious in poli- **377***] ties as in morals. *It would have been not even a new mode of despotism. Nothing in the constitution could have stayed its monstrous course. It might and probably would have crushed beneath it, in its destructive progress, every atom of civil and religious liberty.

And further, it cannot escape our observation that the people, in their provident care of themselves, have established certain criterions, by which the propriety and necessity of measures shall be tested. I refer to the preamble of the constitution, where the moving causes—the great motives of establishing this government—are set out, and placed, as it were, for guards and sentinels at its very threshold.

As there was, originally, no express provision in the constitution destined to protect the privileges which are now so sedulously guarded by the amendments, so is there still none to be found to forbid the enactment, by Congress, of laws impairing the obligation of contracts, or those that are retrospective. To pass the former would not be "proper," because it would be to travel a path of error, which the people have positively forbidden their own state governments to use. It would not be "proper," because it would overturn instead of "establish justice;" it would be to frustrate in place of promoting one of the first great objects of the people in forming this government.

As to retrospective laws we learn, in our reports, from an authority which has always been, and I trust will long continue to be, respected in this court and in this country, that an earnest but unsuccessful attempt was made in the convention to prohibit, expressly, to Congress the exercise of the power to pass retrospective laws, as well as *ex post facto* laws. We are not, however, to conclude, from the failure of the attempt to expressly inhibit the exercise of this power, that it was delegated to Congress by letter or implication. The convention evidently departed with reluctance from the great and noble theory of government which they kept so steadily before them. The whole stock of power they knew was in the hands of the people—it all belonged to them. Their business was not to specify what they kept for themselves, **378***] but to particularize what *they surrender in trust, for their benefit, to the government. It is true they sometimes departed from this rule; as they did when they prohibited the enactment, by Congress of *ex post facto* laws. They stepped out of the course which, with such wisdom, they prescribed to themselves, not so much to guard against the exercise of a power which they then expressly (as they would without it, have almost as clearly) withheld, as to obviate, upon a point of the highest interest and feeling, the misconceptions of ignorance, and to quiet the apprehensions and suspicions of fear and jealousy. The power to pass retrospective laws, then, is neither expressly given nor expressly withheld. When such acts are, therefore, passed by Congress, they must derive their authority from being "proper and necessary" means to the exercise of some other power expressly given. Some such laws, in given cases, it is not denied, may be comprised by this definition, and be fairly regarded as entirely constitutional. It is, notwithstanding, contended that these must always be considered as cases of exception, proving the general rule, that retrospective acts are not "necessary and proper" means to give due effect to the powers vested "in the government, or in any department or officer thereof." If Congress, thus clothed with every power that ought to be desired, with abundant means for a wise and provident government, should fall into the mistakes of short-sighted man, they must, like him, pay the forfeit of error and the price of experience. It cannot be "necessary and proper," nor will it "establish justice," to transfer to others the consequences of their own improvidence. Such the defendants in this case contend would virtually be the effect of retrospective liens and priorities in favor of the government and at the expense of the citizen. The exercise of such a power would overturn all the rules by which men are governed in calculating the chances of safety, and in estimating the risks of danger, when they give credit to each other. To set up such liens and priorities would not be "proper," because it would impair the obligation of contracts between citizen and citizen, by rendering unavailing the means of ensuring their execution. It would not be "proper," because it would be lessening the security for private "property," if not taking it away by undue "process" of law. It is true that the creditor who does not obtain security for the *pay- [***379** ment of his debt cannot escape the lawful consequence of a subsequent act of his debtor. His dependance for safety, in this respect, is placed upon his knowledge of the character of his debtor, and upon his own vigilance. But, most assuredly, he ought to have full reason to rely that the character of any concern in which his debtor has been already engaged, will not be changed by matter of subsequent enactment, so as to enhance his risk of danger beyond what it was when the debt was contracted. Such a mode of legislation, I repeat, would *violate* and not "*establish* justice;" by enfeebling confidence between man and man, it would *retard* instead of "*promoting* the general welfare;" it would "impair the obligation of contracts;" it would be virtually taking away private "property" without "due process of law." An act, then, producing any of these effects could not have been "necessary and proper;" and is not warranted by the constitution; and, of course, the plaintiffs in this case are not "entitled" (to use the expression in the stated case) to the satisfaction they claim under it.

2. The defendants are next to inquire whether such a law has been passed; whether the 5th section of the act of the 3d of March, 1797, is retrospective?

If there be any doubt whether it was the in-

tention of Cougress to give to this act a retrospective effect, evcry objection which cau be fairly urged against its constitutionality will incline the court to such a construction as will rescue it from that imputation. The defendants iusist that it was uot intended to have this effect.

Until this law was passed there was no other in force securing to the United States priority of payment, except iu cases of custom-house bonds for duties.

The first act giving this priority was passed on the 31st of July, 1789 (1 vol., p. 47), and is confined to the case of custom-house bonds. The 21st section of that act provides that, "In all cases "of insolveucy, or where any estate in the "hands of executors or administrators shall be "insufficient to pay all the debts due from the "deceased, the debt due to the United States "on auy such bond (*i. e.* for the payment of "duties) shall be first satisfied."

380*] *The next law, giving priority to the United States, is that of the 4th of August, 1790 (1 vol., p. 221). The 45th section is in these words: "That where any bond for the "payment of duties shall not be satisfied on "the day it became due, the collector shall "forthwith cause a prosecution to be com-"menced for the recovery of the money thereon, "by action or suit at law, in the proper court "having cognizance thereof; and in all cases of "insolvency, or where any estate in the hands "of executors or administrators shall be insuf-"ficient to pay all the debts due from the de-"ceased, the debt due to the United States, on "any such bond" (*i.e.* for the payment of duties, "shall be first satisfied."

Nor does the act of the 2d of May, 1792 (2 vol., p. 78), create this priority. The 18th section refers to bonds given "for duties on goods, wares and merchandise imported." It transfers the priority of the United States to the surety, or his representatives, upon payment of the debt on such bond. The extension, by this section, of the cases of iusolvency mentioned in the 45th section of the act of 4th August, 1790, applies only to the subject-matter of that section, which were bonds for duties. The same was the subject-matter of this section.

If, upon any other bonds than custom-house bonds, a priority had been secured to the United States, why was not a transfer of that priority provided for in behalf of the surety, or his representatives, who paid the bond, as well as in the case of bonds for duties?

After the law of 3d of March, 1797, establishing a general priority in cases of subsequently contracted debts, the provisions on this head in subsequent acts assume a corresponding character. Thus in the act of the 2d of March, 1799 (§ 65, 4 vol., p. 316), the provisions are co-extensive with the then established priority. The first member of this sectiou continues the priority in respect to bonds for duties. It re-enacts in the same words the 45th section of the act of 1790 (1 vol., p. 221), giving that priority. The next member of this section is general, and declares the liability of the representatives of a debtor if they pay auy debt in preference "to the debt or debts due to **381***] the United States." *Here are uo words like those used in the acts of 1789 and 1790, above referred to, to limit and restrain the meaning to any particular "bond" or debts. Their liability commences upon the payment of auy debt in preference "to the debt or debts due to the United States." The first proviso of this section respects bail. The second proviso makes a general regulation in behalf of sureties, or their represeutatives, who pay the debt due to the United States upon auy bond "for duties on goods, wares or merchandise imported, or other penalty;" and the cases of insolvency, in this act mentioned, are declared to extend to the cases of assignmeut, attachment and bankruptcy.

That there was not given to the United States the priority, except in cases of custom-house bonds, until the act of 1797 was passed, was conceded by their counsel in the case of *Fisher & Blight* (2 Cranch, 362).

The 5th section of the act of the 3d of March, 1797, referred to by the agreemeut of the parties in this suit, as before mentioned, is in the following words: "That where any "revenue officer, or other person hereafter be-"coming indebted to the United States by bond "or otherwise, shall become insolvent; or "where the estate of any deceased debtor, in "the hands of executors or administrators, "shall be insufficient to pay all the debts due "from the deceased, the debt due to the United "States shall be first satisfied; aud the priority "hereby established shall be deemed to extend "as well to cases in which a debtor, not "having sufficient property to pay all his "debts, shall make a voluntary assignment "thereof, or iu which the estate and effects of "au absconding, concealed, or absent debtor "shall be attached by process of law, as to "cases in which an act of legal bankruptcy "shall be committed."

The defendants insist that there is error in the punctuation of this sectiou; and that it ought to be read with a comma at the end of the second line (of the printed section) between the words "person" and "hereafter." It would theu read: "That when any revenue officer, or other person, hereafter becoming indebted," &c. The section thus pointed will establish for the United States a priority in case of subsequently created debts, where, 1. The debtor is insolvent. 2. Where he makes *a voluntary assignment of his effects, [**382** not haviug sufficieut to pay all his debts. 3. Where au attachment shall issue against the effects of an absent, absconding, or concealed debtor. 4. Whcre the debtor shall comuit an act of legal bankruptcy. 5. Where his effects, in the hands of executors or administrators, shall not be sufficient for the payment of all his debts. Without this latter provision, it has always been apprehended that the declared priority in cases of insolvency would not bind executors and administrators; and it has uniformly been introduced to create in that case, not a greater, but only an equal priority. There can be no reason for supposing (notwithstauding the general words of this member of the section, respecting executors and administrators) that it was intended to extend the priority in this case to debts previously, as well as subsequently created. The subject-matter of the section, with the punctuation we contend for, must be considered a provision for debts subsequently contracted. To understand

its subject-matter, other than is here insisted upon, is to suppose the establishment of different prioritics, without any reasonable motive or inducement for discrimination. In such case the general (retrospective, as well as prospective) priority would apply to the case of a revenue officer, to the case of a deceased debtor, and to the cases of voluntary assignment, attachment and bankruptcy. The limited (or prospective) priority would extend only to cases of persons (other than revenue officers) becoming insolvent. Why this distinction between the insolvent and the other debtors? And, in this view of the subject, what meaning is to be attached to these words, "and the priority hereby established, shall be deemed to extend," &c.? According to the construction, which we oppose, the priority established by the previous part of the section was general as it respects revenue officers, and executors and administrators; and limited as it respects other persons. If it had been the intention of the legislature to establish different priorities, they would have negatived, by their expressions, the individuality of the priority; most probably they would have said, in place of the words they have used, "and the priorities hereby respectively established." Then, if a "revenue officer" assigned, if his effects were attached as those of "an absent, concealed or absconding debtor," or if he committed "a legal act of **383***] bankruptcy," *a general priority would attach. If any "other person" came within this description, a limited priority would attach.

But there is a still greater obstacle to remove before the construction of the plaintiffs can prevail. It would make a distinction, without reason, between "revenue officers" and custom-house officers; and, indeed, between "revenue officers" and all other nominal agents of the government, whether accountable by bond or otherwise. A general priority would attach in case of a "revenue officer" only; and a limited priority in case of other receivers of the public money.

It cannot be said that "revenue officers" comprise custom-house officers. It is very true that money arising from customs constitutes part of the public revenue. Nor is it intended to be denied that, in strict propriety, the collectors of those customs might be termed "revenue officers." But it is insisted that the terms used were not intended to have that meaning, but a limited, appropriated and technical meaning. It is believed that in no other sense have they ever been used in any act of Congress. Had it been the design of the legislature to use this definition in its enlarged, and not its accustomed sense, they would have taken care to have marked their departure from former observances in a manner that would have admitted of no doubt; in a way, too, that would have denoted, with precision, as occasion might require, the generic and specific signification of the terms. And, besides, the legislature, after passing this law have themselves clearly disaffirmed the construction to which we object, by resorting again to these expressions, and undeviatingly using them in their former limited and specific sense.

If the defendant's interpretation of the words "revenue officer" is correct, then the fifth section will not, whatever may be its proper punctuation, establish a retrospective priority in the case of custom-house officers. For if the court adheres to the existing punctuation of the statute, then custom-house officers will be embraced by that part of the section which refers to persons becoming indebted to the United States after the passing of this law; and the extension of the priority, in the *cases [**384** mentioned in the latter part of the section, will adapt itself necessarily, and even in the absence of the usual technical words of discrimination, to that which, as occasion serves, will become its proper subject-matter. Thus, if the extension is to apply to a revenue officer, the priority will be general—retrospective, as well as prospective; but if the extension is to apply to "any other person" (and, of course, including custom-house officers), the priority will only be prospective.

If either of the general views here taken of this subject is correct, the United States, in this case, are not "entitled, under the 5th section "of the act of Congress, passed the 3d of "March, 1797, to satisfaction of their demands "out of the effects of Isaac Hendrickson, the "bankrupt, in the hands of the garnishees, as "assignees of the bankrupt, prior to the claims, "or any part of them, of the other creditors of "said bankrupt being satisfied;" because the debt due to the United States was created prior to the enactment of that law.

Rush, Attorney-General for the United States.

The reasons in support of the claim of the United States do not rest upon the rights of prerogative, but upon the terms of the legislative grant. It must be admitted that the legislature had power to grant the priority which is claimed in the case of public officers; and the judgment of this court, in opposition to all objections however well stated, has recognized and established the legitimacy of the grant in every case of a public debtor, whatever might be the origin or nature of the debt. The existence of the power is, therefore, no longer open to dispute, whatever speculative doubts may be cherished as to its propriety; or whatever controversy may arise upon the case proper for its application.

But the legislative power is limited in its exercise by the positive provisions of the constitution, and it is provided, among other things, that Congress shall not pass an *ex post facto* law. The act of the 3d of March, 1797, having been passed subsequent to the death of the collector; and, of course, subsequent to the period of the debt's being contracted, the question is made, whether the act would not assume the character of an *ex post *facto* law if it were to [**385** be applied to the present case. The answer in the negative is maintained by the following general reasons:

1. In ascertaining the true import of the terms *ex post facto*, this court has decided that they only apply to criminal cases. The present is a case of debt.

2. Laws having a retrospective effect in civil cases, both as to rights and remedies, have never been, on that account alone, deemed unconstitutional. Theoretically, retrospective laws may sometimes be condemned; but, practically, they are common to every system of jurisprudence. A member of the convention who

framed the constitution of the United States "had an ardent desire to have extended the provision respecting *ex post facto* laws to retrospective laws in general;" but, having failed in accomplishing that desire in the convention, when he became one of the ornaments of the bench of the Supreme Court of the United States, he concurred in the judgment that Congress possessed the power to pass retrospective acts in relation to civil, though not *ex post facto* laws in relation to criminal cases. (See 3 Dall., 397.)

If, therefore, Congress has passed an act which must have a retrospective effect, the court will not, merely for that cause, declare it unconstitutional and inoperative. Before the act of the 3d of March, 1797, was passed, Congress had provided in favor of the United States, for a priority as to the payment of debts upon bonds for duties. But no similar priority was made applicable to the cases of revenue officers; of accountable agents; of debts on bonds other than bonds for duties, or on contracts. These presumed defects in the law produced the act of the 3d of March, 1797, and it must be expounded most liberally to remove the defects, and advance the remedy in contemplation. With respect to revenue officers, it was the policy, and must be taken to be the meaning of the law, that when they prove insolvent the priority shall attach in favor of the United States, with a full retrospective effect. But when a debtor, not a revenue officer, proves insolvent, he must have become indebted to the United States after the passing of the act in order to establish the claim of priority. Such, **386***] *I have been informed,[1] has been the coustruction in the Supreme Court of Pennsylvania in a case of the commonwealth, for the use of the United States, against Lewis, the surety of the administrators of Delany, who was collector for the port of Philadelphia, and died indebted to the United States, before the act of the 3d of March, 1797, was passed. The provision of the 5th section of the act respecting the priority of payment, and of the estate of a deceased debtor in the hands of executors or administrators, was considered, in the same case, as a substantive provision, analogous to the provisions in most codes by which, upon the decease of a debtor, the law undertakes to class his debts and prescribe the order of payment; as, for instance, specialties before simple contract debts, and debts due to the state before those due to individuals.

It has been suggested, however, that a collector of the customs is not a revenue officer within the meaning of the act of the 3d of March, 1797. But, the fact is, that the collector has, peculiarly, been deemed such an officer, as well by practical experience as under the terms of the act itself. If the court should decide otherwise, it is to be feared that the security given would be far short of the intention and policy of the act of 1797. The government had, obviously, more at risk upon the fidelity of the collectors of the customs than upon any other class of revenue officers. That they are embraced under the designation of revenue officers in the act, it is believed has been taken for granted in the different district and circuit courts of the United States.

March 11th. *Absent*—TODD, *J.*

LIVINGSTON, *J.*, delivered the opinion of the court as follows:

The United States claim a priority in payment out of the estate of Hendrickson in the hands of the defendants. Hendrickson, it appears, was one of the sureties of George Bush, late collector at Wilmington, who died on the 2d of February, 1797, in debt to the United *States, as appears by a subsequent ad- [***387** justment of his accounts at the treasury, in the sum of $3,453.06. By the 5th sectiou of the act of the 3d of March, 1797, under which this priority is claimed, it is declared that where any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, &c., the debt due to the United States shall be first satisfied.

The court is of opinion that Hendrickson was indebted to the United States before this act passed; that is, at the time of the death of the collector, although the accounts of the latter were not settled until after its passage; and that, therefore, the law which secures a priority against the estates of persons who shall thereafter become indebted, does not apply to this case.

The judgment of the Circuit Court is affirmed.

THE BRIG CONCORD, TAYLOR, MASTER.

Absent—TODD, *J.*

If captured goods, claimed by a neutral owner, be by consent sold under an order of the court, and afterwards by the final sentence of the court, the proceeds are ordered to be restored to such owner, the amount of the duties due to the United States upon the importation of the goods must be paid.

THIS was an appeal from the sentence of the Circuit Court, affirming that of the District Court, which restored to the claimants, neutral Spanish merchants at Teneriffe, 20 pipes of wine, part of the cargo of the British brig Concord, captured by the American privateer Marengo, in August, 1812, without payment of duties; although the same had been, by consent of the proctors for the parties, sold under an order of the court.

The cause being submitted without argument,

STORY, *J.*, delivered the opinion of the court as follows:

This is the case of a shipment made by a neutral house on board of a British ship which was captured on a voyage from Teneriffe to London, by the private armed ship Marengo, and brought into the port of New *York [***388** for adjudication. Pending the prize proceedings, the goods were sold by an interlocutory order of the District Court, and the proceeds brought into the registry. Upon the hearing, the property was decreed to be restored to the claimants without payment of duties; and this decree was afterwards affirmed in the Circuit Court. The cause has been brought, by appeal, to this court for a final decision.

1.—Mr. Dallas, who argued the case, has been kind enough to favor me with the information.

We are all of opinion that the proprietary interest of the claimants is completely proved, and therefore the decree of restoration must be affirmed.

With respect to the duties, we are all of opinion that the decree of the courts below was erroneous. Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempt from duties. But having been sold, by order of the court, for the general benefit, the duties indissolubly attached, and ought to have been deducted from the proceeds by the court below.

The decree in this respect must be reversed.

Cited—2 Gall. 209; 4 Mason, 190; 1 Blatchf. & H. 121.

THE NEREIDE, BENNETT, MASTER.

Absent—TODD, *J.*

The stipulation in a treaty, "that free ships shall "make free goods," does not imply the converse proposition that "enemy ships shall make enemy "goods."

The treaty with Spain does not contain, either expressly or by implication, a stipulation that enemy ships shall make enemy goods.

The principle of retaliation or reciprocity is no rule of decision in the judicial tribunals of the United States.

A neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance.

THIS was an appeal by Manuel Pinto from the sentence of the Circuit Court for the District of New York, affirming (*pro forma*) the sentence of the District Court, which condemned that part of the cargo which was claimed by him.

The facts of the case are thus stated by the Chief Justice in delivering the opinion of the court:

389*] *Manuel Pinto, a native of Buenos Ayres, being in London on the 26th of August, 1813, entered into a contract with John Drinkald, owner of the ship Nereide, whereof William Bennett was master, whereby the said Drinkald let to the said Pinto the said vessel to freight for a voyage to Buenos Ayres and back again to London, on the conditions mentioned in the charter-party. The owner covenanted that the said vessel, being in all respects seaworthy, well manned, victualed, equipped, provided, and furnished with all things needful for such a vessel, should take on board a cargo to be provided for her, that the master should sign the customary bills of lading, and that the said ship being laden and dispatched, should join and sail with the first convoy that should depart from Great Britain for Buenos Ayres; that on his arrival the master should give notice thereof to the agents or assigns of the said freighter, and make delivery of the cargo according to bills of lading; and that the said ship, being in all respects seaworthy, manned, &c., as before mentioned, should take and receive on board at Buenos Ayres all such lawful cargo as they should tender for that purpose, for which the master should sign the customary bills of lading; and the ship being laden and dispatched, should sail and make the best of her way back to London, and on her arrival deliver her cargo according to the bills of lading. For unloading the outward and taking in the homeward cargo, the owner agreed to allow 90 running days, and for unloading the return cargo 15 running days. The owner also agreed that the freighter and one other person whom he might appoint should have their passage without being chargeable therefor. In consideration of the premises the freighter agreed to send, or cause to be sent, alongside of the ship, such lawful goods as he might have to ship, or could procure from others, and dispatch her therewith in time to join and sail with the first convoy, and on her arrival at Buenos Ayres to receive the cargo according to bills of lading, and afterwards to send along-side of the ship a return cargo and dispatch her to London, and on her arrival receive the cargo according to bills of lading, and to pay freight as follows, viz., for the outward cargo £700 together with five per cent. primage, to be paid on signing the bills of lading, and for the homeward, or return cargo, at the rate mentioned in the charter-party. He was also to advance the master at *Buenos [**390** Ayres, such money as might be necessary for disbursements on the ship. It was provided that all the freight of the outward cargo, except on the goods belonging to the freighter, which should not exceed £400 should be received by the owner on the bills of lading being signed; and in case of the loss of the ship such freight should be his property; but if she arrived safe back with a full cargo, then the freighter should be credited for the excess of the said freight over and above the sum of £700. A delay of 10 running days over and above the time stipulated is allowed the freighter, he paying for such demurrage at the rate of £10 10 per day.

Under this contract a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres, and in part to British subjects, was taken on board the Nereide, and she sailed under convoy some time in November, 1813.

Her license, or passport, dated the 16th of November, states her to mount 10 guns and to be manned by 16 men.

The letter of instructions from the owner to the master is dated on the 24th of November, and contains this passage: "Mr. Pinto is to "advance you what money you require for "ship's use at River Platte, and you will con- "sider yourself as under his directions so far "as the charter-party requires."

On the voyage the Nereide was separated from her convoy, and on the 19th of December, 1813, when in sight of Maderia, fell in with, and after an action of about fifteen minutes, was captured by the American privateer

The Governor Tompkins. She was brought into the port of New York, where vessel and cargo were libeled; and the vessel and that part of cargo which belonged to British subjects were condemned without a claim. That part of the cargo which belonged to Spaniards was claimed by Manuel Pinto, partly for himself and partners, residing in Buenos Ayres, and partly for the other owners residing in the same place. On the hearing this part of the cargo was also condemned. An appeal was taken to the Circuit Court, where the sentence **391***] *of the District Court was affirmed, *pro forma*, and from that sentence an appeal has been prayed to this court.

Hoffman, of New York, for the appellant.

It is true this vessel was armed, but Pinto had no agency in arming her. She was an armed vessel as early at least as May, 1811, before the war between the United States and Great Britain. It is true she sailed with convoy, but this she was obliged by law to do. It is true also that she resisted the capturing vessel; but neither Pinto, who was a passenger on board, nor any other neutral passenger, gave any aid in the engagement.

The claim of Pinto in behalf of himself, his father and sister, who were jointly interested with him in the business which he carried on in his own name, was of three descriptions of goods:

1st. Of goods of which they were the sole owners.

2d. Of goods of which they owned one undivided moiety, the other being owned by British merchants.

3d. Of goods in which they claimed an interest of one-fourth, the residue being British property.

As to this last claim he is charged with *mala fides*, because in his examination *in preparatorio* he stated without qualification that he was the owner of one-fourth part of those goods, whereas in his claim and test affidavit he states the fact to be that he had agreed with certain British merchants, that if they would give him 10 per cent. upon the sales, he would select for them such goods as would sell at Buenos Ayres at an advance of 150 per cent. upon their cost and charges; that he selected these goods under that contract; that his commissions would have amounted to one-fourth of the original cost, and to that extent he believed himself interested therein.

There was no attempt to impose upon the court; he voluntarily explained the nature of his interest; if he was mistaken as to the legal effect of such a contract, yet no improper motive can be attributed to him.

392*] *Neither Pinto, nor any person connected with him, joined in the battle. If he had done so he might have been considered as taking part in the war, and thereby excluded himself from the protection to which he is now entitled by the law of nations. He remained in the cabin during the whole engagement, and had no concern whatever in the defense of the ship. It is true that he states upon his examination *in preparatorio*, "that he "belonged to the ship at the time of her capt- "ure, and had control of said ship and cargo." But his answers were written by the commissioner, and he being a foreigner, probably did not observe the force of the expression. The nature of his control is explained by all the other circumstances of the case to be a control within the limits of the charter-party. It is evident he could have no lawful control over the management of the ship from the time of her sailing from London until her arrival at Buenos Ayres. The letter of instructions from the owner of the ship to the master shows that the master was under the direction of Pinto so far only as the charter-party required.

It has been heretofore said that Pinto had acquired a hostile character arising from domicile. There is, however, no ground for such a pretense. It is true that in the charter-party he is said to be "of Buenos Ayres, but now residing in the city of London;" and in his examination *in preparatorio*, he states "that for seven years last "past he has lived and resided in England and "Buenos Ayres." But he at the same time states that he is a native of Buenos Ayres, that he now lives there, and has generally lived there for 35 years, and has been admitted a freeman under the new government of Buenos Ayres. Even if he had acquired a domicile in England, which is not true, yet he had turned his back on that country and was on his voyage home. (5 Ves., Jun., 787, *Somerville* v. *Somerville*.) Pinto's test affidavit shows particularly that his birth, residence and commercial establishment had always been at Buenos Ayres, except during his occasional temporary absences in hit commercial pursuits. The test affidavit is always good evidence in prize causes. The party is obliged to put in his claim upon oath, and it is to be taken as true until contradicted by better evidence.

*The court is now for the first time [***393** called upon to decide the question whether neutral property forfeits its character of neutrality by being put on board an armed ship of the enemy.

The general rule is that the property of a friend in a hostile vessel is not liable to condemnation.

There are but two exceptions to the neutral right of trade:

1. He shall not carry contraband of war.
2. He shall not violate a blockade.

If the sailing in an armed vessel of the enemy had been also an exception, it would unquestionably have been noticed by some writer upon the law of nations. But no such exception is to be found in the books.

If such be the doctrine, what degree of force will be sufficient to forfeit the neutral character of the goods? If she carried a single musket, the principle must be the same as if she mounted fifty cannon. And sailing under convoy would be still more clearly within the rule.

Vattel (b. 3. c. 5, § 75) lays down the general principle thus: "Since it is not the place where "a thing is which determines the nature of "that thing, but the quality of the person to "whom it belongs; things belonging to neutral "persons which happen to be in an enemy's "country, or the enemy's ships, are to be dis- "tinguished from those belonging to the "enemy."

No hint is given that a distinction is to be taken between the armed and unarmed ships of the enemy. Again, in b. 3, c. 7, § 116, he says, "the effects of neutrals found in an enemy's

" ship are to be restored to the owners, against " whom there is no right of confiscation." (See also Duponceau's Bynkershoek, 102, 108; 2 Azuni, 194; Chitty, 111; Ward, 21; Mr. Jefferson's letter to M. Genet, 24th January, 1793, among our own state papers, in the department of state.)

This court will not, in contradiction to all **394***] these authorities *make a new exception to the rights of neutral commerce. The policy of this country is to extend, not to impair them. A neutral aids the belligerent much more by carrying belligerant property than by employing a belligerent vessel to carry neutral goods; yet the neutral vessel carrying the belligerent goods is always restored, and with freight, unless she forfeit her neutral character by her hostile conduct. The neutral character may be forfeited by fraudulent conduct of the master; by violation of blockade; by carrying contraband goods; by false destination and by resisting search. These are the only exceptions to the general rule that the property of a friend must be restored. But there must be an actual or an implied connivance between the master of a vessel and the neutral owner of the goods in order to subject the neutral cargo to condemnation for the act of the master. (1 Rob., 67, Am. Ed., *The Mercurius;* Id., 130, *The Columbia;* Id., 277, *The Jonge Tobias;* 5 Rob., 234, *The Shepherdess.*) In the case of *The Maria* (the Swedish convoy) the merchant vessels had received orders from the convoy to resist search.

The unneutral character of a master shall not forfeit neutral property on board a neutral vessel. Can you then punish the innocent neutral for the legal exercise, by the hostile master of a belligerent vessel, of his rights of war?

If this property is to be condemned, it must be on the ground of resistance; for it is understood that it has been decided by this court that shipping neutral property on board an armed neutral vessel even, will not subject it to condemnation. If resistance be not the ground on which condemnation is claimed, then in a case where no resistance is made, if neutral property be found on board an enemy's ship armed merely for resisting the piratical boats of South America, it is liable to condemnation.

It is true that a neutral cannot lawfully rescue his ship captured by a belligerent, because he has redress by the law of nations if he has been improperly captured. (3 Rob., 227, Am. Ed., *The Dispatch;* 1 Rob., 287, *The Maria.*) But here the force was not used by a neutral. The ship-owner and the master were open and avowed enemies, and as such had a perfect **395***] right to defend their *ship by force. It was a lawful force. (5 Rob., 206, *Catharina Elizabeth.*)

But it will be said that the right to search is impaired.

The right of search is applicable only to a neutral ship. In case of a belligerent ship, the right of search is superseded by the right of capture. The privateer had a right to capture the Nereide, but, strictly speaking, had no right to search her. Pinto, by placing his goods on board a hostile ship, made them certainly liable to capture, although not to condemnation. He gave us the right of capture in lieu of the right of search.

The putting of neutral goods on board an armed vessel of the enemy is analogous to the placing them in a fortified town. If they are placed there before investment, they are not liable to condemnation, if captured; but if placed there after investment they are liable.

But it will be contended that the fifteenth article of the treaty of 1795, between Spain and the United States (Laws of the United States, vol. 2, p. 526), has altered the rule of the law of nations on this subject, and that neutral Spanish goods found on board an enemy's ship are liable to condemnation as enemy's goods.

The words of the article are: " And it is here- " by stipulated that free ships shall also give " freedom to goods; and that everything shall " be deemed free and exempt which shall be " found on board the ships belonging to the " subjects of either of the contracting parties, " although the whole lading, or any part there- " of, should appertain to the enemies of either; " contraband goods being always excepted."

It will be contended, that if free ships make free goods, enemy's ships must make enemy's goods.

But we contend, that although by the treaty free ships make free goods, yet the rule of the law of nations still remains in full force, that free goods found in an enemy's ship are also free. Nothing but an express stipulation in a treaty can deprive the Spanish subject of his rights under the law of nations. The treaty contains no such express stipulation. The article stipulated does *not necessarily [***396** imply its converse. The two rules are not inconsistent with each other. The neutral nation is entitled to the benefit of both. (Ward, 145.)

In some of our treaties will be found express stipulations as to both points; in others as to one of the points only; which fact shows that the two propositions are not considered as inseparable. The treaty of 1782, with Holland, adopts both rules—free ships are to make free goods, and hostile ships, hostile goods. So also does the convention of 1800 with France. (Vol. 6, appendix, p. 22.)

As to the Spanish ordinance of Spain, cited in 2 Azuni, 139, which declares even the goods of Spanish subjects to be good prize if found on board an enemy's ship, it is a mere municipal regulation and does not appear to have been adopted in practice against the citizens of the United States, even if it were in its terms applicable to them.

It is said that Spain would condemn our goods found on board her enemy's ships, and therefore, upon the principle of reciprocity, we ought to condemn her goods found on board the ships of our enemy. But the principle of reciprocity applies only to the case of salvage. It is not a rule of the law of nations as to prize of war.

The proprietary interest of Pinto, his father and sister, and of the other merchants of Buenos Ayres in whose behalf he has interposed a claim, cannot be disputed. Their national character is clearly made out. The goods are not liable to forfeiture, either on account of his residence in London or the character of the ship, or the opposition which she made, or by the treaty of Spain, or the principle of reciprocity. They ought therefore to be restored;

and without payment of the duties, inasmuch as it was not a voluntary importation.

Dallas, contra, for the captors,

Contended, that there was evidence tending to show that Pinto had caused the ship to be armed, and had caused sundry British passengers to be taken on board, some of whom fought **397***] in the battle. That he had *acquired a British character by domicile; and that he had not renounced that character by turning his back on England, inasmuch as he meant to return.

That Pinto must be considered as the owner of the vessel for the voyage, and as having a control over her in regard to her resistance.

He admitted that neutrals have a right to carry on their accustomed trade in the usual manner, and to employ the merchant vessels of the enemy for that purpose; but not to arm a hostile vessel, nor to hire a hostile vessel already armed.

He divided his argument into three points:

1. That the property cannot be restored without further proof, both on the subject of domicile and on that of proprietary interest. And that, under the circumstances of this case, Pinto is not entitled to time for further proof.

2. That by force of the treaty between Spain and the United States, taken in connection with the existing law of Spain, the property is liable to condemnation.

3. That a neutral cannot lawfully hire an armed vessel of our enemy, and in the course of that trade engage in battle with the United States.

1. As to further proof respecting his domicile.

In his examination *in preparatorio* he states, that for the last seven years he resided in England and Buenos Ayres. This fact stood unexplained upon the record for nearly a month. He then states in his test affidavit that he was then a resident of Buenos Ayres, where he had generally resided for 35 years; but says nothing in explanation of his former assertion, that he had resided the last seven years in England and Buenos Ayres. Why did he not state how long he had resided in each place? This leaves a doubt, which the court would permit him to explain, if he stood fair in court. The charter-party also states him to be then a resident in England.

398*] *Then as to his proprietary interest, he first swears that he is the sole owner; but afterwards contradicts himself, and says he made a mistake, and that his father and sister are jointly interested with him in the property. Again, he first states the printing apparatus to be his property, and afterwards admits that it belonged to British subjects.

With regard to the one-fourth which he claimed of sundry parcels of goods, he first swears that it belongs to him absolutely, and afterwards states that he was only entitled to a commission upon the sales of them. So also with regard to an invoice of buttons, he first claimed them as his own, and afterwards disclaimed them as British property.

Again his testimony is contradicted by Puzey, his confidential clerk, who testifies that part of the property claimed by Pinto belonged to the government of Buenos Ayres.

It is certain, then, that the evidence is not clear in his favor, as to his domicile, and as to his proprietary interest.

Is he entitled to further proof?

He has hired an armed vessel of the enemy which has fought an American vessel, and would have captured her if she had been able. There is no case in which restitution has been awarded under such circumstances. Suppose an American frigate had captured a British frigate laden with specie belonging to the Spanish government, would it have been restored? How was it in the case of *The Peacock* and *The Epervier?*

Pinto chartered the whole ship. He permitted everything to be put on board; the hostile property as well as the neutral. He was to receive freight for the hostile property, and a higher freight on account of the armament. He knew that if this armament was employed to protect the neutral property it would protect the hostile also. He impliedly undertook that the enemy's property should be protected. He was therefore interested in so doing, and identified his interest with that of the belligerent. The armament was clearly intended to be used against the Americans, as all the cruisers of France *had been driven from the [**399** ocean, and never appeared in those southern latitudes.

He says in his examination that he was interested in the vessel and cargo and freight; and in a subsequent answer he states that he had the control of the ship and cargo. It is clear, therefore, that he participated in the belligerent character, and is not entitled to further proof. (See 6 Rob., 460, *The Atlantic.*)

2. As to the effect of the Spanish treaty in connection with the existing law of Spain.

The treaty says that "free ships shall make free goods." This implies the converse proposition that hostile ships shall make hostile goods.

This treaty followed the memorable discussion which took place between this government and Genet in 1793. At that time we had a treaty with Prussia (2 Vol. Laws U. S., 308, art. 12), which contains the same stipulation that free ships shall make free goods; but is silent as to the converse proposition. The two treaties are to be construed alike. Genet complained that we permitted the British to take French goods out of our vessels. Mr. Jefferson was one of the negotiators of that treaty, and it is clear that he understood it as implying that enemy ships should make enemy goods. (See his letters as Secretary of State to Mr. Genet, of 24th July, 1793, and to Mr. Morris of the 16th of August, 1793.) The administration of our government constituted, at that time, perhaps as wise a cabinet as ever existed. This treaty was their act. The proper construction must be that the converse rule is implied. (Ward, 144, 145.)

But when the treaty is taken in connection with the existing law of Spain at the time of making the treaty, there can be no doubt. By that law enemy ships make enemy goods. (2 Azuni, 139.) The Mr. Debron there mentioned was a Spaniard. There were two ordinances, one in 1704, the other in 1718. They are referred to in 2 Valin, 252, b. 3, tit. 9, art. 7. As to these ordinances, it is singular that they do not say that the goods of a friend in an enemy's ship shall be liable to confiscation; but that the goods of a Spanish subject in an enemy's ship *shall be so liable. This, however, im-[**400**

plies the other proposition; for if the goods of their own subjects were so liable, the goods of a friend would, *a fortiori*, be liable.

It is said that these ordinances have not been enforced against us. But we are not bound to show that fact. It is sufficient for us that the law exists.

Reciprocity is the permanent basis of the law of nations.

3. If a neutral hire an armed vessel of our enemy, and with armed force resist our belligerent rights, he forfeits his neutral character.

A neutral may pursue his accustomed trade in his usual manner; but the law of nations allows nothing further.

It has been said that the only test of neutrality is impartiality to the belligerents. This is true only in a national point of view. But when individuals are concerned, a very different test applies. (See the case of *The Tulip*.) A neutral cannot justify furnishing one belligerent with transports, by furnishing them to the other also. (See Vattel, b. 3, ch. 7, § 109, 110, where will be found the whole doctrine of the law of nations on this subject.)

The general rule is that nothing shall be done by a neutral to invigorate the belligerent.

A right of peaceful commerce is not a right to set forth a warlike expedition. On that principle a government might be neutral and all its subjects belligerent. The words of the elementary writers are to be construed according to the subject upon which they treat. They all speak of a peaceable merchant vessel, not an armed vessel.

Neutrals, says Sir W. Scott, may trade in the same manner as before the war, provided they take no direct part in the contest. It is not necessary to show that the party actually put a match to the guns. This vessel was forced into **401***] action by Pinto; at all events she *was brought into action by means of Pinto. He had a direct part in the contest.

The authority cited from Bynkershoek is in our favor, if we interpret the words according to the subject-matter. He says a neutral may let as well as hire a vessel, but it must be a lawful letting and hiring. He did not mean to say that a neutral may carry on a peaceful trade in a hostile manner. In the next sentence he says you may employ the vessel and the labor of the belligerent.

It is clear that he means an unarmed vessel.

What are the rights of a belligerent in regard to the neutral?

He may search the vessel, the cargo and the papers. We have reason to complain of a neutral who puts a cargo like this (a great part being belligerent) on board a belligerent armed vessel, whereby our right of search is eluded without a battle. A neutral may, indeed, if he can, elude the right of search by superior sailing, but he can not lawfully prevent it by force.

In the case cited from 5 Rob., 206, there is not evidence that the vessel was armed. If the fact had been so it would undoubtedly have been mentioned by the reporter, or the judge. Their silence shows that it was not armed.

The slightest recourse to belligerent force in support of neutral rights is fatal. A neutral vessel may arm, but she cannot resist belligerent rights. A neutral must not, directly nor indirectly, contribute to the force of an enemy. In 1 Rob., 287, *The Maria*, it is decided that resistance of the convoy ship is the resistance of the whole convoy; and that the resistance of the ship affects the cargo. In the case of *The Elsebe* (5 Rob., 174, Eng. Ed.), one of the questions was whether the cargoes, belonging to subjects of the Hans Towns, laden on board Swedish vessels, and sailing under Swedish convoy, were liable to condemnation, the convoying ships having resisted search by the British fleet. It was contended on their behalf that they were not involved in the penalties of Swedish resistance, *which was an act of the Swedish [***402** government, and did not bind the subjects of other powers; that the proprietors of these cargoes were not privy to this fact; and that the masters of the vessels were not the agents of the cargoes, so as to bind them. Sir William Scott, after stating that there was in the charter party an express stipulation that the ship should sail with convoy, says: "But I will take the "case on the supposition that there was no "such engagement. The master associates him- "self with a convoy, the instructions of which "he must be supposed to know; he puts the "goods under unlawful protection, and it must "be presumed that this is done with due au- "thority from the owners, and for their bene- "fit. It is not the case of an unforeseen emer- "gency happening to the ship at sea, where the "fact itself proves the owners to be ignorant "and innocent; and where the court has held "that, being proved innocent by the very cir- "cumstances of the case, they shall not be "bound by the mere principle of law which "imposes on the employer a responsibil- "ity for the acts of his agent. On the contrary, "it is a matter done antecedently to the voyage, "and must therefore be presumed to be done "on communication with the owners and with "their consent; and the effect of this presump- "tion is such that it cannot be permitted to be "averred against, inasmuch as all the evidence "must come from the suspected parties them- "selves, without affording a possibility of meet- "ing it, however prepared. The court has, "therefore, thought it not unreasonable to ap- "ply the strict principle of law, in a case not "entitled to any favor, and holds, as it does in "blockade cases of that description, that the "master must be taken to be the authorized "agent of the cargo, that he has acted under "powers from his employer, and that if he has "exceeded his authority it is barratry, for which "he is personally answerable, and for which "the owner must look to him for indemnifica- "tion. I pass over many considerations "which have been properly pressed in argu- "ment, but I cannot omit to observe that this "is not merely a question arising on a single "fact of limited consequence; it is a pretension "of infinite importance, and of great extent, be- "ing nothing less than an opposition to the gen- "eral law of search, by which, if it could in one "instance be admitted, the whole provisions of "the law of nations on that head might be "effectually defied; *for if this prin- [***403** "ciple could be maintained, by an interchange "of convoys the whole unlawful business "might be carried on with security. To put "the goods of one country on board the ships "of another, would be a complete recipe for "the safety of the goods with a trifling alter-

"ation, easily understood, and easily practiced, "while the mischief itself would exist in full "force."

The same principle was afterwards advanced by the Danish government in relation to American ships sailing under British convoy, and acquiesced in by the American government. (See the letter from our minister, Mr. Irvin, to the Secretary of State, of 23d June, 1811, and the letter from the Swedish minister, Rosencrantz, to Mr. Irvin, of the 28th of June, 1811. State papers, p. 224, 235.)

A neutral cannot employ the force of his own government, nor that of another neutral, much less that of a belligerent, to protect himself from search. If you cannot make use of the convoy, you cannot take the guns of that convoy and protect yourself. It is not the modification of the force, but the force itself that is unlawful. If a neutral, insured as such, range himself under convoy, the policy is vacated.

This case is not like that of neutral goods put into a fortified town before investment: it is more like that of goods placed there after investment. They were put on board with a full knowledge that the vessel would be invested (if a land term may be permitted in speaking of a naval transaction); that is, that she would be liable to search.

Pinkney, on the same side,

Contended that this property ought to be condemned upon three grounds:

1. The treaty with Spain.
2. The principle of reciprocity; and,
3. The conduct of Pinto in hiring an armed vessel of the enemy, which made resistance.

404*] *1. As to the Spanish treaty. It contains the stipulation that "free ships shall make free goods," and it does not negative the converse proposition that enemy ships shall make enemy goods. Hence we are at liberty to give the stipulation its full extent and scope.

This principle was first attempted to be established by Holland immediately after the treaty of Munster. They sought to establish by treaty that the flag should communicate its character to the cargo. This was the original form of the proposition. It necessarily involved the principle that hostile ships should make hostile goods. How preposterous would it be to say that neutral ships should make neutral goods, but enemy's ships should not make enemy's goods.

It is the universal understanding among nations that the two propositions are mutually connected, and the one implies the other. It might have been necessary in the outset to express both, but when the principle was generally understood, that necessity ceased. The United States had no interest in extending the range of the principle; and in all her treaties, except those with Spain and Prussia, she has stipulated for both parts of the rule. There is no reason, either in the commercial or belligerent policy of the United States, which should induce her to stop short with the proposition that free ships should make free goods, and not go on to adopt the converse.

Spain had no motive to adopt the principle with the limitation under consideration. In her treaties with France, Holland and England, she adopts the principle in its whole extent. She took it with the qualification that neutrals should not put their goods on board a belligerent vessel. In her treaty with England she expresses only the converse, viz., that "enemy ships shall make enemy goods."

It has been said that she limited the principle by acceding to the armed neutrality; but that was a mere ephemeral act, and its validity depended upon an event which never happened—the accession of England.

2. As to the law of Spain and the principle of reciprocity. *In the ordinance of [**405** 1702 it appears to be her favorite principle that "enemy ships shall make enemy goods." In the ordinance of 1718 the same principle is adopted and ordered to be carried into execution. These ordinances were re-enacted in 1739, 1756, 1779, 1794 and 1796. The treaty now under consideration was wedged in between two of these ordinances—those of 1794 and 1796. Is it possible that Spain, the declared enemy of neutral rights, meant to recognize a principle like this, which had never before been taken under the protection of any nation? Are we to suppose that Spain, by this treaty, meant to abandon her own local law? Spain has had this principle in abhorrence. By her ordinance of 1718 she says that if any part of the cargo is hostile it shall communicate its character to the ship and all the residue of the cargo. This principle cannot be understood but in the manner for which we contend.

By the law of Spain, therefore, this property would be liable to condemnation.

By the rule of reciprocity it ought to be condemned here.

But it is objected that the Spanish law has never been enforced against us. It is sufficient for us to show that it exists. In the absence of contrary proof the presumption is that it has been executed.

It is said also that the rule of reciprocity applies only to the case of recapture and salvage. But Sir W. Scott, in *The Santa Cruz* (1 Rob., 53, Am. Ed.), says that "this principle of re-"ciprocity is by no means peculiar to cases of "recapture; it is found also to operate in other "cases of maritime law. At the breaking out of "a war it is the constant practice of this coun-"try to condemn property seized before the "war, if the enemy condemns, and to restore "if the enemy restores. It is a principle sanc-"tioned by the great foundation of the law of "England—*Magna Charta* itself; which pre-"scribes that at the commencement of a war "the enemy's merchants shall be kept and "treated as our own merchants are treated in "their country."

*The principle of reciprocity has been [**406** distinctly recognized and adopted by the law of Spain. Holland remonstrated, but Spain answered that Holland had not resisted the maritime principles of England. The same answer was received from France when we complained of the Berlin and Milan decrees. The British orders in council also were founded upon the same principle. Great Britain attempted to justify them by the assertion that we acquiesced in the Berlin and Milan decrees. The assertion was not true; but it shows that Great Britain acknowledged the rule of reciprocity as a rule of the law of nations.

3. As to the armament and resistance.

The undisputed facts are that Pinto hired the

whole vessel, and took in goods on freight for his own benefit. That the vessel was armed, sailed, resisted, and was captured.

It is contended that he could lawfully do all this. If he could he was "a chartered libertine." Can a neutral surround himself "with all the pomp and circumstance of war?" The idea of our opponents exhibits a *discordia rerum*—an incongruous mixture of discordant attributes; a centaur-like figure—half man, half ship; a fantastic form, bearing in one hand the spear of Achilles, in the other the olive branch of Minerva, the frown of defiance on her brow, and the smile of conciliation on her lip, entwining the olive branch of peace around the thunderbolt of Jupiter, and hurling it, thus disguised, indiscriminately at friends and foes.

From the authorities cited on the other side, an inference is attempted to be drawn that a neutral may lawfully employ an armed merchant vessel of the enemy to transport his goods. But none of those authorities speak of an armed vessel. Such a vessel unquestionably has power to make captures. If she has a commission the captures are for her own benefit; if she has no commission she captures for the crown. Her prizes are droits of admiralty. It is true that if she sails without a pass, or some document to show her national character, she would be considered as a pirate; but this vessel had a **407***] British pass. If all neutrals may *lawfully hire such vessels the ocean may be covered with them, and they might more effectually aid the enemy than his own navy.

Bynkershoek says the neutral must do nothing to the prejudice of the belligerent. It is incumbent, therefore, upon Pinto to show that he did us no prejudice by chartering such an armed vessel. We say he thereby infringed our right of search. It is said that the right of search is a right to search the ship only. But why search the ship? To see what sort of a cargo she has. The cargo, therefore, must be searched as well as the ship. A neutral cannot carry contraband goods, nor violate blockade, nor carry his own property if it be the produce of his estate in the enemy's country. To prevent this the belligerent has a right to stop and search his cargo. In this case it is the hostile character of the vessel which constitutes the offense, inasmuch as it prevented our right of search.

In the case of *The Elsebe* the cargo was forfeited by sailing under convoy which resisted search. Pinto falls by the fate of war. He identified himself with a hostile armament; he knew the necessary consequence of his act; he knew it would be the duty of the ship to resist; and that resistance would be made if there should be any chance of escape thereby. He must be either at peace or war. He cannot claim the advantages of both conditions at the same time.

Emmett, in reply,

After removing the objections which had been raised as to the British domicile of Pinto, and as to some variations between his testimony *in preparatorio* and his test affidavit, &c., observed,

As to the treaty with Spain, that the maxim "free ships shall make free goods" does not imply the converse, that hostile ships shall make hostile goods. There is certainly no necessary connection between the two maxims, nor have they ever been supposed to be necessarily connected. The one is the claim of a neutral, the other of a belligerent. What is the rule of justice? That free ships should make free goods, and that free *goods, in belliger- [***408** ent ships, should be free also. Whenever the two maxims have been connected in a treaty, it has been where one of the maxims was important to one of the parties as a neutral nation, and the other to the other party as a belligerent nation.

In the treaty of the armed neutrality in 1780, the interest of the Dutch was to have the benefit of both maxims. The Dutch idea, however, was discarded by the northern confederacy, and the two maxims completely separated. The Empress of Russia in her manifesto of the 26th of February, 1780, declaring the principles which she intended to follow, states this principle in the following words: "That the effects "belonging to the subjects of the said warring "powers shall be free in all neutral vessels, "except contraband merchandise." But she says nothing respecting neutral goods found on board belligerent vessels. It cannot be supposed that she meant to surrender her neutral rights by mere implication. The principle is expressed in nearly the same words in the treaty of armed neutrality of 1780; nothing is there said respecting neutral goods in belligerent vessels. The King of Prussia, however, in his answer to the Russian manifesto, explicitly claims the freedom of neutral goods on board belligerent ships, as well as of belligerent goods on board of neutral ships. These facts show that in the general understanding of all Europe, the two maxims were entirely distinct and independent. (See also Martens's Law of Nations, translated by Cobbet, 318.) The United States did not exist as a nation until after the two maxims were thus completely separated.

Only three of the treaties by the United States have been produced on the other side. There are in fact eight in which the principle is mentioned: 1. The treaty with France of the 6th of February, 1778, (vol. 1, p. 398), which expressly adopts both maxims; the United States having in that instance yielded to the belligerent claim of France. 2. The treaty with Holland of the 8th of October, 1782 (vol. 1, p. 436). 3. The treaty with Sweden of 3d April, 1783 (vol. 2, p. 256), adopts only the maxim that free ships shall make free goods. 4. The treaty with Prussia of 1785 (vol. 2, p. 320), which adopts the principle free ships, &c., only. 5. The treaty *with Morocco, [***409** 1787 (vol. 2, p. 369), which stipulates that free ships shall make free goods, and that neutral goods on board of belligerent vessels shall also be free. This latter stipulation was necessary, inasmuch as the Barbary powers pay little respect in practice to the law of nations. 6. The treaty of 1795, with the Dey of Algiers (vol. 2, p. 500), which adopts the maxim, free ships, free goods. 7. The treaty with Spain of 1795 (vol. 2, p. 526), adopts the same maxim. 8. The treaty with Tripoli, of 1796 (vol. 4, p. 41), adopts the same maxim, and further stipulates that neutral goods shall be free in belligerent vessels. It was not necessary that such a stipulation should be inserted in the treaty with

Spain, because Spain knew the law of nations and professed to respect it.

If there be no doubt, then, as to the construction to be given by the Spanish treaty, there is no necessity to dismiss the ordinance which is supposed to be connected with it. The principle which they call the rule of reciprocity ought more properly to be called the rule of retaliation.

But there is no such ordinance of Spain as is pretended. The ordinance applies only to Spanish goods found on board the vessels of the enemy, and was a mere temporary provision to continue only during the war. It appears by the extract from D'Habreu, found in 2 Azuni, 139, that the liability of the goods of neutrals found on board the vessels of the enemy depended upon treaties and not upon that ordinance.

The rule of retaliation is not a rule of the law of nations. The violation of the law of nations by one nation does not make it lawful for the offended nation to violate the law in the same way. It is true that states may resort to retaliation as a means of coercing justice from the other party. But this is always done as an act of state, and not as the mere result of a judicial execution of the law of nations. It is the effect of policy, not of law. Such were the measures adopted by the orders in council of Great Britain, and the offensive decrees of France, and of other nations under the control of France, which have been mentioned on the other side. The government of a state always undertakes **410*]** to punish the violation *of its rights, and it chooses its own means. But the tribunals of justice must decide according to law.

The cases alluded to by Sir W. Scott in *The Santa Cruz* are cases in which the government could lawfully exercise its discretion in receding from its acknowledged rights. Thus in the case of property seized at the breaking out of a war, the government would have an unquestioned right to condemn or to release it. It was not the right to condemn which depended upon the rule of reciprocity, but the inexpediency. It was not a question of law, but of policy.

As to the armament, and the resistance.

It is difficult to say in what fact the opposite party consider the criminality to exist. Is it that Pinto took unarmed passengers on board? This was lawful. Was it the taking on board enemy goods? This was innocent. Was it in chartering an armed vessel? There is no rule of the law of nations against it. Was it in arming the vessel? The fact is not proved. Was it in joining in the combat? It is fully proved that he took no part in the contest.

But it is said that chartering the vessel makes him owner for the voyage. This is not the rule in a court of admiralty. Even if an enemy charter a neutral vessel he is not owner for the voyage. The vessel is always restored. Bynkershoek says it is not unlawful for a neutral to hire a vessel from the enemy for commercial purposes. But it is said that he means an unarmed vessel. There is nothing to support that idea. The natural presumption is that an enemy's ship would be armed.

It is said also that a neutral may deposit his goods in an armed belligerent vessel under a bill of lading, but not under a charter-party. That is, that several neutral merchants may severally occupy the whole ship, but that one cannot. A distinction founded upon no difference of principle cannot alter the case. How does he call the belligerent faculties of the ship into action more in one case than in the other? Does the neutral add to her belligereut faculty by lading her deeply and giving her a destination from which she dare not depart in quest of her enemy?

*This is not a commissioned vessel. [***411** That case might be different. The Epervier was a commissioned vessel, and it is said was coming from Bermuda with bullion for the British troops in Canada; otherwise probably a claim for the bullion would have been interposed. In the case of the British packets captured during the present war, was the property of the neutral passengers confiscated? These vessels were armed and commissioned But there is no distinction taken in the books between commissioned and uncommissioned vessels, except that the latter cannot make captures, under the penalty of being treated as pirates. (2 Azuni, 233.)

If the doctrine be true in regard to an armed vessel, it must be equally true with regard to convoy: yet they do not pretend that this vessel is liable to condemnation because she sailed with convoy. The law of England is now that no vessel shall sail without convoy. Such a doctrine would go to prevent neutral property from being laden on board an English merchantman. Did England suppose, when she was passing the law requiring all vessels to sail with convoy, that she was cutting herself off from all neutral freight?

When writers on the law of nations speak of a belligerent vessel, what do they mean? They speak of it as of a wolf which you can only hold by the ears—*Lupum auribus tenere.* They mean a vessel carrying on war. But can a vessel carry on war without arms? What degree of armament is sufficient to make it unlawful for a neutral to employ her? One musket, or two, or twenty?

The *Consolato del Mare*, was written long before the knowledge of fire-arms, and does not speak of the distinction between armed and unarmed. In all the battles in which England has been engaged, and in all her commercial transactions, has such a case never occurred before? If it has, why are the books silent upon the subject. Why has not a single writer in the world mentioned the difference between neutral goods found in an armed and in an unarmed vessel of the enemy? (See 2 Azuni, 194, 195, 196, 197, and the authorities there cited.)

The owner of the ship was an enemy. He had a perfect right to arm and defend his ship. The master for *this purpose was his [***412** exclusive agent. His act in defending the ship cannot be attributed to the innocent owner of the cargo, who also had a perfect right to put his goods on board such a ship; and who did not interfere in the combat. But it is said that a neutral has only a right to carry on his accustomed trade in his accustomed manner. Where is it said that it must be carried on in his accustomed manner? There is no authority for such a restriction, nor any principle to justify it.

But this trade from London to Buenos Ayres was always carried on in British ships, and

often if not generally armed. This was a voyage carried on in the accustomed way.

It is said also that by putting these neutral goods on board an armed vessel our right of search, as a belligerent nation, was impaired.

But how is the right of search applicable to this case? This is a secondary right, auxiliary to the belligerent right of capturing the enemy's goods on board a neutral vessel. It is applicable only to a vessel bearing a neutral flag. The belligerent has a right to know whether the cargo be really neutral, and for that purpose must examine it at sea. But if the vessel bears the flag of an enemy there is no necessity to search the nature of the cargo at sea. You have the right to capture at once, and bring her in, when the cargo may be examined; the neutral must make out his claim, and is never entitled to damages for the delay or the detention.

Why does neutral resistance of search forfeit the cargo as well as the vessel, although the owner of the cargo had no concern in the vessel nor in the resistance? It is because the act of resistance was wholly unlawful; and the owner of the cargo can recover damages from the owner of the vessel or the master. But here the resistance was lawful; Pinto could never recover damages against the master for defending his ship.

March 11. *Absent*—TODD, *J.*

MARSHALL, *Ch. J.*, after stating the facts of the case, delivered the opinion of the court as follows:

413*] *In support of the sentence of condemnation in this case, the captors contend,

1. That the claimant, Manuel Pinto, has neither made sufficient proof of his neutral character nor of his property in the goods he claims.

2. That by the treaty between Spain and the United States the property of a Spanish subject in an enemy's vessel is prize of war.

3. That on the principles of reciprocity this property should be condemned.

4. That the conduct of Manuel Pinto and of the vessel has impressed a hostile character on his property and on that of other Spaniards laden on board of the Nereide.

1. Manuel Pinto is admitted to be a native of Buenos Ayres, and to carry on trade at that place in connection with his father and sister, who are his partners, and who also reside at Buenos Ayres; but it is contended that he has acquired a domicile in England, and with that domicile the English commercial character.

Is the evidence in any degree doubtful on this point? Baltaza Ximenes, Antonio Lynch, and Felix Lynch, three Spaniards, returning with Pinto in the Nereide, all depose that Buenos Ayres is the place of his nativity and of his permanent residence, and that he carries on trade at that place.

In his test affidavit Manuel Pinto swears in the most explicit terms to the fact that Buenos Ayres is, and always has been, the place of his permanent residence; that he carries on business there on account of himself, his father and sister, and that he has been absent for temporary purposes only. His voyage to London, where he arrived in June, 1813, was for the purpose of purchasing a cargo for his trade at Buenos Ayres, and of establishing connections in London for the purposes of his future trade at Buenos Ayres.

This plain and direct testimony is opposed,

*1. By his examination *in preparatorio*. [**414**

In this answer to the first interrogatory he says that he was born at Buenos Ayres, that for seven years last past he has lived and resided in England and Buenos Ayres, that he now lives at Buenos Ayres, that he has generally lived there for thirty-five years last past, and has been admitted a freeman of the new government.

Whatever facility may be given to the acquisition of a commercial domicile, it has never heretofore been contended that a merchant having a fixed residence, and carrying on business at the place of his birth, acquires a foreign commercial character by occasional visits to a foreign country. Had the introduction of the words "seven years last past" even not been fully accounted for by reference to the interrogatory, those words could not have implied such a residence as would give a domicile. But they are fully accounted for.

In his answer to the 12th interrogatory he repeats that he is a Spanish American; now lives and carries on trade at Buenos Ayres, and has generally resided there.

2. The second piece of testimony relied on by the counsel for the captors is the charter-party. That instrument states Manuel Pinto to be of Buenos Ayres, now residing in London.

The charter-party does not state him to have been formerly of Buenos Ayres, but to be, at its date, of Buenos Ayres. Nothing can be more obvious than that the expression, "now residing in London," could be intended to convey no other idea than that he was then personally in London.

As little importance is attached to the covenant to receive the return cargo at the wharf in London. The performance of this duty by the consignee of the cargo as the agent of Pinto, would be a complete execution of it.

Had the English character been friendly and the Spanish hostile, it would have been a hardy attempt indeed in *Mr. Pinto to found, [***415** on these circumstances, a claim to a domicile in England.

The question respecting ownership of the goods is not so perfectly clear.

The evidence of actual ownership, so far as the claim asserts property existing at the time in himself and partners, is involved in no uncertainty. The test affidavit annexed to the claim is full, explicit, and direct. It goes as far as a test affidavit can go in establishing the right which the claim asserts. All the documentary evidence relating to this subject corroborates this affidavit. The charter-party shows an expectation that, of a freight of £700 the goods of Mr. Pinto would pay £400. The very circumstance that he chartered the whole vessel furnishes strong inducement to the opinion that a great part of her cargo would be his own.

The witnesses examined *in preparatorio*, so far as they know anything on the subject, all depose to his interest. William Pnzey was clerk to Pinto, and he deposes to the interest of his employer, on the knowledge acquired in making out invoices and other papers belonging

to the cargo. His belief, too, is in some degree founded on the character of Pinto in London, where he was spoken of as a man of great respectability and property; and from the anxiety he discovered for the safety of the property after the Nereide was separated from her convoy.

The bills of lading for that part of the cargo which is claimed by Pinto are filled up, many of them with his name, some to order, and the marginal letters in the manifest would also denote the property to be his. Where he claims a part of a parcel of goods the invoice is sometimes to order, and the marginal letters would indicate the goods to be the property of Pinto and some other person.

This testimony proves, very satisfactorily, the interest of Pinto's house in the property he claims. There is no counter testimony in the cause, except the belief expressed by Mr. Puzey, that for a part of the goods, Pinto was agent for the government of Buenos Ayres. **416***] This *belief of Mr. Puzey is supposed to derive much weight from his character as the clerk of Mr. Pinto. The importance of that circumstance, however, is much diminished by the fact that he had seen Pinto only a week before the sailing of the Nereide, and that he does not declare his belief to be founded on any papers he had copied or seen; or on any communication made to him by his employer. There are other and obvious grounds for his suspicion. A part of the cargo consisted of arms and military accoutrements; and it was not very surprising that Puzey should conjecture that they were purchased for a government about to sustain itself by the sword. But this suspicion is opposed by considerations of decisive influence, which have been stated at the bar. The demand for these articles in Buenos Ayres by the government would furnish sufficient motives to a merchant for making them a part of his cargo. In a considerable part of this warlike apparatus, British subjects were jointly concerned. It is extremely improbable that, if acting for his government, he would have associated its interests with those of British merchants. Nor can a motive be assigned for claiming those goods for himself instead of claiming them for his government. They would not by such claim become his if restored. He would still remain accountable to his government, and the truth would have protected the property as effectually as a falsehood, should it remain undetected. By claiming these goods for himself, instead of his government, he would commit a perjury from which he could derive no possible advantage, and which would expose to imminent hazard, not only those goods but his whole interest in the cargo. The court, therefore, must consider this belief of Mr. Puzey as a suspicion, which a full knowledge of the facts ought entirely to dissipate. If there was nothing in the cause but this suspicion, or this belief of Mr. Puzey, the court would not attach any importance to it. But Mr. Pinto himself has, in his examination *in præparatorio*, been at least indiscreet in asserting claims not to be sustained; and in terms which do not exhibit the real fact in its true shape. In his answer to the 12th interrogatory he says: "And this "deponent also has one-fourth interest as owner "of the following goods, &c., viz., 15 bales of "merchandise," &c. In his claim he thus states the transaction under which his title to the one-fourth of these goods accrued. He had *agreed with certain persons in England [**417** to select for them a parcel of goods for the market of Buenos Ayres, of which he was to be the consignee, and which he would sell on a commission of 10 per cent. on the amount of sales at Buenos Ayres. These goods were selected, purchased, and consigned to Manuel Pinto. The bills of lading were in his possession, and he considered his interest under this contract as equal to one-fourth of the value of the goods, "wherefore," he says, "he did suppose that he was interested in the said goods and merchandise for himself, his father, and sister, and well entitled, as the owner thereof, or otherwise, to an equal fourth part of the said goods, inasmuch as his commissions as aforesaid would have been equal to such fourth."

It is impossible to justify this representation of the fact. The reasoning might convince the witness, but the language he used was undoubtedly calculated to mislead the court, and to extricate property to which the captors were clearly entitled, although the witness might think otherwise. Such misrepresentations must be frowned on in a prize court, and must involve a claim, otherwise unexceptionable, in doubt and danger. A witness ought never to swear to inferences without stating the train of reasoning by which his mind has been conducted to them. Prize courts are necessarily watchful over subjects of this kind, and demand the utmost fairness in the conduct of claimants. Yet prize courts must distinguish between misrepresentations which may be ascribed to error of judgment, and which are, as soon as possible, corrected by the party who has made them, and wilful falsehoods which are detected by the testimony of others, or confessed by the party when detection becomes inevitable. In the first case there may be cause for a critical and perhaps suspicious examination of the claim and of the testimony by which it is supported; but it would be harsh indeed to condemn neutral property, in a case in which it was clearly proved to be neutral, for one false step, in some degree equivocal in its character, which was so soon corrected by the party making it.

The case of Mr. Paul's printing press is still less dubious in its appearance. It would require a very critical *investigation of [**418** the evidence to decide whether this press is stated in his answer to the 12th interrogatory to be his property or not. Four presses are said in that answer to belong to him; but he also says in his answer to another interrogatory, perhaps the 26th, that Mr. Paul had one printing press on board. Whether there were five presses in the cargo, or only four, has not been decided, because the declaration made in his examination *in preparatorio* that one of the presses belonged to Mr. Paul proves unequivocally that the mistake, if he made one, was not fraudulent.

That he should state as his the property which belonged to a house in Buenos Ayres, whose members all resided at the same place, and of which he was the acting and managing partner, was a circumstance which could not appear important to himself, and which was of

no importance in the cause. These trivial and accidental inaccuracies are corrected in his claim and in his test affidavit. The court does not think them of sufficient importance to work a confiscation of goods of the real neutrality of which no serious doubt is entertained.

2. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy property, if found by the other in a vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors that the two principles are so completely identified that the stipulation of the one necessarily includes the other.

Let this proposition be examined.

The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the **419***] *goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule which renders its parts unsusceptible of division, nations must be capable of dividing it by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods in the bottoms of one of the parties being neutral does not imply a surrender of the goods of that party being neutral, if found in the vessel of an enemy, is the proposition of the counsel for the claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom of an enemy, to condemnation as prize of *war, is a con- [***420** cession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties to stipulate the one without the other; and if it be their interest, or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other the surrender of any right as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other or to the world so properly as by the compact itself?

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.

For a considerable length of time they were the companions of each other—not as one maxim consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact termed the armed neutrality, attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the claimants. Its object was to enlarge, and not in anything to diminish the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The King of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion *was not common to [***421** those powers who acceded to the principles of the armed neutrality.

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject and consequently leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

This review, which was taken with minute accuracy at the bar, certainly demonstrates that in public opinion no two principles are more distinct and independent of each other than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the Secretary of State of the United States and the minister of the French republic in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo should be determined by the character of the flag.

Not being in possession of this correspondence the court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy at that time was the obligation imposed on the United States to protect belligerent *property in their vessels, not the liability of their property to capture if found in the vessel of a belligerent. To this point the whole attention of the writer was directed, and it is not wonderful that in mentioning incidentally the treaty with Prussia, which contains the principle that free bottoms make free goods, it should have escaped his recollection that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this court does not concur. But this respectful defference may well comport with the opinion that an argument incidentally brought forward by way of illustration, is not such full authority as a decision directly on the point might have been. [*422]

3. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore the property claimed by Spanish subjects in this case ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the court received such information respecting them as would enable it to decide certainly either on their permanent existence or on their application to the United States. But be this as it may, the court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track *prescribed for us, and to tread the devious and intricate path of politics. [*423] Even in the case of salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, Congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations, which is a part of the law of the land.

Thus far the opinion of the court has been formed without much difficulty. Although the principles asserted by the counsel have been sustained on both sides with great strength of argument, they have been found on examination to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer and arguments which it is not easy to refute. The court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart were further time allowed for deliberation.

4. Has the conduct of Manuel Pinto and of the Nereide been such as to impress the hostile character on that part of the cargo which was in fact neutral?

In considering this question the court has examined separately the parts which compose it.

The vessel was armed, was the property of an enemy, *and made resistance. How [*424] do these facts affect the claim?

Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the court can see no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially; but there is no reason

to believe that he was instrumental in arming her. The owner stipulates that the Nereide "well manned, victualed, equipped, provided "and furnished with all things needful for "such a vessel," shall be ready to take on board a cargo to be provided for her. The Nereide, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance.

It has been argued that he had the whole ship, and that therefore the resistance was his resistance.

The whole evidence upon this point is to be found in the charter-party, in the letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in preparatorio*.

The charter-party evinces throughout that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master and stipulates for every act to be performed by the ship, from the date of the charter-party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her.

The letter of instructions to the master contains full directions for the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That ref-
425*] erence shows a positive limitation of *his power by the terms of the charter-party. Consequently he had no share in the government of the ship.

But Pinto says in his answer to the 6th interrogatory that "he had control of the said ship and cargo."

Nothing can be more obvious than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo so far as respected her lading. A part of the cargo did not belong to him, and was not consigned to him. His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any during the battle, he went into the cabin, where he remained till the conflict was over. It is, then, most apparent that when Pinto said he had the control of the ship and cargo, he used those terms in a limited sense. He used them in reference to the power of lading her, given him by the charter-party.

If in this the court be correct, this cause is to be governed by the principles which would apply to it had the Nereide been a general ship.

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has been already stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. "Since it is not," says Vattel, "the place "where a thing is, which determines the nature "of that thing, but the character of the person "to whom it belongs, things belonging to neu-"tral persons which happen to be in an enemy's "country, or on board an enemy's ships, are to "be distinguished from those which belong to "the enemy."

Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration because he enters into the inquiry whether a *knowledge [***426** of the hostile character of the vessel can effect the owner of the goods.

The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defense, and the implements of war were so light and so cheap that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defense; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm; ought he to be accountable for the exercise of it?

*By placing neutral property in a [***427** belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the court

has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerçe, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be le-**428***] gally exercised *without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search. In so doing there is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious proceedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy and assumes the hostile character, it is answered that no such connection exists.

The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods *or their own- [***429** er, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of *The Katharina Elizabeth* approaches more nearly to that of *The Nereide*, because in that case as in this there were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge, and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same *cause? The [***430** master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

It cannot escape observation, that in argument the neutral freighter has been continually represented as arming the Nereide and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The court does not so understand the case. The Nereide was armed, governed, and conducted by belligerents. With her force or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel, and

stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter-party and of her duty.

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance.

The Nereide has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transporation, and which en-**431***] counters the hazard incident *to its situation; the hazard of being taken into port, and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property be dismissed.

JOHNSON, *J.* Circumstances known to this court have imposed upon me, in a great measure, the responsibility of this decision. I approach the case with all the hesitation which respect for the opinion of others and a conviction of the novelty and importance of some of the questions are calculated to inspire. The same respect imposes upon me an obligation briefly to state the course of reasoning by which I am led to my conclusion.

On the minor points I feel no difficulty. There is nothing to support the charge of English domiciliation; the charges of prevarication are satisfactorily explained; and on the question of national character, we must yet awhile reluctantly yield to the acknowledgement that Buenos Ayres is not free.

On the construction of the Spanish treaty, I feel as little hesitation. That a stipulation calculated solely to produce an extension of neutral rights should involve in itself a restriction of neutral rights; that a mutual and gratuitous concession of a belligerent right should draw after it a necessary relinquishment of a neutral right, which has never yielded but to express and (generally) extorted stipulation; are conclusions wholly irreconcilable to any principle of logical deduction.

Nor does the argument founded on reciprocity stand on any better ground. There is a principle of reciprocity known to courts administering international law; but I trust it is a reciprocity of beuevolence, and that the angry passions which produce reveuge and retaliation will never exert their influence on the administration of *justice. Dismal would be [***432** the state of the world, and melancholy the office of a judge, if all the evils which the perfidy and injustice of power inflict on individual man were to be reflected from the tribunals which profess peace and good will to all mankind. Nor is it easy to see how this principle of reciprocity, on the broad scale by which it has been protracted in this case, can be reconciled to the distribution of power made in our constitution among the three great departments of government. To the legislative power alone it must belong to determine when the violence of other nations is to be met by violence; to the judiciary to administer law and justice as it is, not as it is made to be by the folly or caprice of other nations.

The last question in the case is the only one ou which I feel the slightest difficulty.

The general rule, the iucontestible principle is, that a neutral has a right to employ a belligerent carrier. He exposes himself thereby to capture and detention, but not to condemnation.

To support the condemnation in this case, it is necessary to establish an exception to this rule; and it is important to lay down the exceptions contended for with truth and precision.

Iu the first place, it is contended that a ueutral has not a right to transport his goods on board of an armed belligerent.

Secondly, that if this right be couceded, Pinto, iu this case, has carried the exercise of it beyond the duties of fair neutrality:

1. By laying the vessel under the obligation of a contract to sail with convoy.

2. By chartering an entire armed vessel of the enemy, and thus expediting an armed hostile force.

3. By taking in enemy goods on freight, and thereby laying himself under an implied contract that the armament of the vessel should be used in its defense.

*4. It was also contended that he had, [***433** in fact, armed the vessel after chartering her, and increased her force by admitting passengers.

5. That the correspondence found on board shows that the armament was immediately directed against capture by Americans.

On the first and principal ground much may be said, but nothing added to the ingenious discussion which it has received from counsel.

The question is, why may not a neutral transport his goods on board an armed belligerent? No writer on the law of nations has suggested this restriction on his rights; and it can only be sustained on the ground of its obstructing the exercise of some belligerent right. What belligerent right does it interfere with? Not the right of search, for that has relation to the converse case; it is a right resulting from the right

of capturing enemy's goods in a neutral bottom. It must be then the right, which every nation asserts, of being the sole arbiter of its own conduct towards other nations, and deciding for itself whether property claimed as neutral be owned as claimed. The question is thus fairly stated between the neutral and belligerent. On the one hand, the neutral claims the right of transporting his goods in the hostile bottom. On the other, the belligerent objects to his doing it under such circumstances as to impair his right of judging between himself and the neutral on the neutrality of his property and conduct. The evidence of authority, the practice of the world, and the reason and nature of things must decide between them.

All these are, in my opinion, in favor of the neutral claim.

Every writer on international law acknowledges the right of the neutral to transport his goods in a hostile bottom. No writer has restricted the exercise of that right to unarmed ships.

Every civilized nation (with the exception of Spain) has unequivocally acknowledged the existence of this right, unless it be relinquished **434***] by express stipulation; *and, even with regard to Spain, the evidence is wholly unsatisfactory to prove that she maintains a different doctrine. My present belief is that she does not; but, admit that she does; and surely the practice of one nation, and that one not the most enlightened or commercial, ought not to be permitted to control the law of the world.

And what is the decision of reason on the merits of these conflicting pretensions?

Her first and favorite answer would be, that were the scales equally suspended between the parties, the decision ought to be given in favor of humanity.

Already is the aspect of the world sufficiently darkened by the horrors of war. It is time to listen to the desponding claims of man engaged in the peaceful pursuits of life.

But there are considerations in favor of the neutral to which the heart need not assent; they are addressed to the judgment alone.

Admit the claim of a belligerent, and you fritter away the right of a neutral until it is attenuated to a vision.

Admit the claim of the neutral and it is attended with a very immaterial change in the rights and interests of the belligerent.

Where are we to draw the line? If a vessel is not to be armed, what is to amount to an exceptionable armament? It extends to an absolute and total privation of the right of arming a hostile ship. Resistance, and even capture, is lawful to any belligerent that is attacked.

On the other hand, what injury is done to the belligerent by recognizing the right of the neutral? The cargo of a belligerent neither adds to nor diminishes his right to resist. If empty he must be subdued before he can be possessed; and, if laden, the right or faculty of resistance is in no wise increased. It is inherent in her national character, and can be exercised by strict right, without any reference to **435***] the cargo that she contains. *Suppose the case of a vessel and cargo wholly neutral; even she possesses a natural right to resist seizure; but her resistance must be effectual, or international law pronounces her forfeited. What injury results to the belligerent cruiser? If the cargo be really neutral, the exercise of his right of judging becomes immaterial; and if it be contraband, or otherwise subject to condemnation, what reason in nature can be assigned why the neutral owner should not throw himself upon the fortune of war, and rely upon the protection of your enemy? You treat* him as an enemy if captured, and why should not he regard you as an enemy, and provide for his defense against you? I can very well conceive that a case may occur in which it may become the policy of this country to throw down the gauntlet to the world and assert a different principle. But the policy of these States is submitted to the wisdom of the legislature, and I shall feel myself bound by other reasons until the constitutional power shall decide what modifications it will prescribe to the exercise of any acknowledged neutral right.

The second ground of exception resolves itself into several points, and presents to my mind the greatest difficulties in the case.

1. There is a stipulation contained in the charter-party that the vessel shall sail with convoy.

2. Pinto chartered the whole vessel.

3. He took in sub-affreightment of hostile goods.

4. It is contended he had contributed to the arming and manning of the vessel after chartering her.

5. And that her equipment was pointedly against American capture.

With regard to the two latter points I am of opinion that the evidence does not prove that Pinto contributed to the armament of the vessel; and if she was armed by the owners, that it was against American capture is immaterial. As to the passengers, Pinto had no control over the reception of them into the vessel. He had *taken the hold and two berths in the [***436** cabin; as to the residue it remained subject to the disposal of the captain or owner.

With regard to the three other points, after the best consideration that I have been able to give the subject, I satisfy my mind by two considerations:

1. I will not now give an opinion upon the abstract case of an individual neutral to all the world. It is known that Pinto was liable to capture both by the French and Carthagenians. This justified him in placing himself under British protection; and if, in the exercise of this unquestionable right, he has incidently impaired the exercise of our right of seizure for adjudication, we have nothing to complain of. The case occurs daily; and nothing but candor and fairness can be exacted of a neutral under such circumstances.

2. There appears to prevail much misconception with regard to the control acquired by Pinto, in this vessel, under the charter-party. His contract gave him the occupation of the hold of the vessel and two berths in the cabin; but went no further. Over the conduct of the master and crew, in navigating or defending the vessel, it communicated to him no power. It is true that by the conduct of the master and the fate of the vessel he might be incidentally affected as a sub-freighter, and so far he had an interest in her defense; still, however, it is reducible to the general interest which he had in

the performance of the voyage, and it does not appear that he ever acted under an idea of being authorized to control the conduct of the captain, or took any part in the conflict which preceded the capture.

I am of opinion that the judgment should be reversed and the property restored.

STORY, J. My opinion will be confined to the point last argued because it definitively disposes of the cause against the claim of Mr. Pinto.

The facts material to this point are that Mr. Pinto chartered the Nereide, an uncommissioned armed ship belonging to British subjects, for **437***] a voyage from London *to Buenos Ayres, and back to London at a stipulated freight. The ship was to be navigated during the voyage at the expense of the general owner, who expressly covenanted, in the charter-party with Mr. Pinto, that she should sail on the voyage under British convoy. Mr. Pinto, having thus hired the whole ship, took on board sundry shipments, partly on his own or Spanish account, and partly on account of British merchants from whom he was to receive, in lieu of freight, a portion of the profits and commissions. The Nereide sailed with her cargo under British convoy, and with instructions from the owner to the master to govern himself, in relation to the objects of the charter-party, according to the direction of Mr. Pinto, who accompanied the ship in the voyage. During the passage to Buenos Ayres the Nereide was accidentally separated from the convoy, and, while endeavoring to regain it, was, after a vigorous but unsuccessful resistance, captured by the privateer Governor Tompkins, and brought into New York for adjudication.

It is explicitly asserted in the testimony that Mr. Pinto took no part in the resistance at the time of the capture.

The question is, whether, upon these facts, Mr. Pinto, assuming him to be a neutral, has so incorporated himself with the enemy interests as to forfeit that protection which the neutral character would otherwise afford him.

The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established, that neutral goods may be lawfully put on board of an enemy ship without being prize of war. As this doctrine is asserted in the most broad and unqualified manner in publicists, it is thence attempted to be inferred by the counsel for the claimant that no distinction can exist whether the ship be armed or unarmed, or be captured with or without resistance. Arguments of this sort are liable to many objections, and are in general wholly unsatisfactory. Elementary writers rarely explain the principles of public law with the minute distinctions which legal precision requires. Many of the most important doctrines of the prize courts will not be found to be treated of, or even glanced at, in the elaborate treatises of Grotius, or Puffendorf, or Vattel. A striking illustration is their total silence **438***] as to the illegality and penal *consequences of a trade with the public enemy. Even Bynkershoek, who writes professedly on prize law, is deficient in many important doctrines which every day regulate the decrees of prize tribunals. And the complexity of modern commerce has added incalculably to the number as well as the intricacy of questions of national law. In what publicist are to be found the doctrine as to the illegality of carrying enemy dispatches, and of engaging in the coasting, fishing or other privileged trade of the enemy? Where are transfers *in transitu* pronounced to be illegal? Where are accurately and systematically stated all the circumstances which impress upon the neutral a general, or a limited, hostile character, either by reason of his domicile, his territorial possessions, or his connection in a house of trade, in the enemy country? The search would be nearly in vain in the celebrated jurists whose authority has been quoted to silence the present inquiry. Yet the argument would be no less forcible that these doctrines have not a legal existence because not found in systematic treatises on the law of nations than that which has been so earnestly pressed upon us by the counsel for the claimants. The assumed inference is then utterly inadmissible. The question before the court must be settled upon other grounds; upon a just application of the principles which regulate neutral, as well as belligerent, rights and duties. Let us then proceed to consider them:

It is a clear maxim of national law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character; nor is this all. In relation to his commerce he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search without the application on the part of the belligerent of superior force. If he resist this exercise of lawful right, or if, with a view to resist it, he take the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any *distinction whether [***439** the convoy belong to the same or to a foreign neutral sovereign, for upon the principles of natural justice, a neutral is justly chargeable with the acts of the party which he voluntarily adopts, or of which he seeks the shelter and protection. *Qui sentit commodum sentire debet et onus*—these principles are recognized in the memorable cases of *The Maria* (1 Rob., 340), and *The Elsebe* (5 Rob 173), and can never be shaken without delivering over to endless controversy and conflict the maritime rights of the world.

It has, however, been supposed by the counsel of the claimants that a distinction exists between taking the protection of a neutral and of a belligerent convoy. That in the former case all armament for resistance is unlawful; but in the latter case it is not only lawful but in the highest degree commendable. That although an unlawful act, as resistance by a neutral convoy, may justly affect the whole associated ships; yet it is otherwise of a lawful act, as resistance of a belligerent ship, for no forfeiture can reasonably grow out of such an act which is strictly justifiable.

The fallacy of the argument consists in assuming the very ground in controversy; and in

confounding things in their own nature entirely distinct. An act perfectly lawful in a belligerent may be flagrantly wrongful in a neutral. A belligerent may lawfully resist search; a neutral is bound to submit to it. A belligerent may carry on his commerce by force; a neutral cannot. A belligerent may capture the property of his enemy on the ocean; a neutral has no authority whatever to make captures. The same act, therefore, that, with reference to the rights and duties of the one may be tortious, may, with reference to the rights and duties of the other, be perfectly justifiable. The act, then, as to its character, is to be judged of, not merely by that of the parties through whose immediate instrumentality it is done, but also by the character of those who, having co-operated in, assented to, or sought protection from it, would yet withdraw themselves from the penalties of the act. It is analogous to the case at common law where an act, justifiable in one party does not, from that fact alone, shelter his co-adjutor. They must stand or fall upon their **440***] *own merits. It would be strange indeed, if, because a belligerent may kill his enemy, a neutral may aid in the act; or because a belligerent may resist search, a neutral may co-operate to make it effectual. It is therefore an assumption, utterly inadmissible, that a neutral can avail himself of the lawful act of an enemy to protect himself in an evasion of a clear belligerent right.

And what reason can there be for the distinction contended for? Why is the resistance of the convoy deemed the resistance of the whole neutral associated ships, let them belong to whom they may? It is not that there is a direct and immediate co-operation in the resistance, because the case supposes the contrary. It is not that the resistance of the convoy of the sovereign is deemed an act to which all his own subjects consent, because the ships of foreign subjects would then be exempted. It is because there is a constructive resistance resulting in law from the common association and voluntary protection against search under a full knowledge of the intentions of the convoy? Then the principle applies as well to a belligerent as to a neutral convoy? For it is manifest that the belligerent will at all events resist search; and it is quite as manifest that the neutral seeks belligerent protection with an intent to evade it. Is it that an evasion of search, by the employment, protection, or terror of force, is inconsistent with neutral duties? Then *a fortiori* the principle applies to a case of belligerent convoy, for the resistance must be presumed to be more obstinate and the search more perilous.

There can be but little doubt that it is upon the latter principles that the penalty of confiscation is applied to neutrals. The law proceeds yet farther and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance. In this respect it applies a rule analogous to that in cases of blockade, where the act of sailing with an intent to break a blockade is deemed a sufficient breach to authorize confiscation. And Sir W. Scott manifestly recognizes the correctness of this doctrine in *The Maria*, *although the [***441** circumstances of that case did not require its rigorous application.

Indeed, in relation to a neutral convoy, the evidence of an intent to resist, as well as of constructive resistance, is far more equivocal than in case of a belligerent convoy. In the latter case it is necessarily known to the convoyed ships that the belligerent is bound to resist and will resist until overcome by superior force. It is impossible, therefore, to join such convoy without an intention to receive the protection of belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. It is an adoption of his acts, and an assistance of his interests during the assumed voyage. To render the convoy an effectual protection, it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of every enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent and performs, as to him, a meritorious service—a service as little reconcilable with neutral duties as the agency of a spy, or the fraud of a bearer of hostile dispatches. In respect to a neutral convoy the inference of constructive co-operation and hostility is far less certain and direct. To condemn, in such case, is pushing the doctrine to a great extent, since it is acting upon the presumption, which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted the objects of the convoy, and intimately blended their own interests with hostile resistance.

There is not, then, the slightest reason for the favorable distinction, as to the belligerent convoy, assumed by counsel. On the contrary, every presumption of hostility is in such case more violent, and every suspicion of unneutral conduct more inflamed. And so in the argument of *The Maria* (1 Rob., 346), it was conceded by the counsel for the claimants, and recognized by the court. It was there said by counsel that it seemed admitted by the court on a former day that there was a just distinction to be made between the two cases of convoy, viz., between the convoy of an enemy's force and a neutral convoy; that the former (*i. e.*, enemy convoy) would stamp a primary character of hostility on all ships *sailing under [***442** its protection, and it would rest on the parties to take themselves out of the presumption raised against them; but that, even in that case, it would be nothing more than a presumption, which had been determined by a late case before the lords, *The Sampson, Barney*, an asserted American ship sailing with French cruisers at the time they engaged some English ships, and communicating with the French ships by signal for battle. That in that case, although there had been a condemnation in the court below, the lords sent it to further proof to ascertain whether there had been an actual resistance. Sir Wm. Scott emphatically observed: "I do not admit the authority of that case to "the extent to which you push it. That ques- "tion is still reserved, although the lords "might wish to know as much of the facts as "possible." It is clear, from this language, that the learned judge did not admit that the party could be legally permitted to contradict

the presumption of hostility attached to the sailing under an enemy convoy. On the contrary, he seemed to consider that the primary character of hostility, which it was conceded on all sides was stamped upon such conduct, could not be permitted to be rebutted, but was conclusive upon the party. The case of *The Sampson* was originally heard before the Court of Vice-Admiralty, and the decree of condemnation was never disapproved of, if not ultimately affirmed, by the Lords of Appeal. I have been assured by very respectable authority that no proof of actual resistance ever was, or could have been, made on the final hearing. The case, therefore, affords a strong inference of the law as understood and administered in the prize courts of Great Britain.

And it may be added, in corroboration, that in *Smart* v. *Wolff* (3 T. R., 323, 332), Sir W. Scott (then Advocate-General), asserted, without hesitation, that if the neutral refused search, or sailed under convoy of the enemy's ships of war, or conveyed intelligence to the enemy, they are waivers of the rights of neutrality. The very circumstance of his putting these three cases in connection to illustrate his general argument, affords the most cogent proof that he considered himself as stating a doctrine equally clear and well established as to all of them.[1]

443*] *And this doctrine seems conformable to the sense of other European sovereigns. In the recent cases of the American ships captured while under British convoy by the Danes, the right of condemnation was not only asserted and enforced by the highest tribunal of prize, but expressly affirmed by the Danish sovereign after an earnest appeal made by the government of the United States. On that occasion the Danish minister pressed the argument, "that "he who causes himself to be protected by that "act (*i. e.*, enemy convoy) ranges himself on the "side of the protector, and thus puts himself "in opposition to the enemy of the protector, "and evidently renounces the advantages at- "tached to the character of a friend to him "against whom he seeks the protection. If "Denmark should abandon this principle, the "navigators of all nations would find their ac- "count in carrying on the commerce of Great "Britain, under the protection of English ships "of war, without any risk;" and he further declared "that none of the powers in Europe "have called in question the justice of this "principle." (State papers, 1811, p. 527.)

It cannot be denied that our own government have acquiesced in the truth and correctness of this statement. And if to the general silence of the other European sovereigns we add the positive examples of Great Britain and Denmark (the latter of whom has not of late years been deficient in zeal for neutral rights), it seems difficult to avoid the conclusion that the doctrine is as well founded in national law as it seems to me to be in justice and sound policy.

Another argument which has been urged in favor of the assumed distinction ought not, however, to be omitted. It is that a party, neutral as to one power, may be *an enemy [**444** as to another power, and he may lawfully place himself under belligerent convoy to escape from his own enemy. In such a predicament it is, therefore, always open to the neutral to explain his conduct in taking convoy, and to show, by proofs, his innocent intentions as to all friendly belligerents. In my judgment this supposed state of things would not remove a single difficulty.

It is not in relation to enemies that the question as to taking convoy can ever arise. It has reference only to the rights of friendly belligerents; and these rights remain precisely the same whatever may be the peculiar situation of the neutral as to third parties. Was it ever heard of that a neutral might lawfully resist the right of search of one power, because he was at war with another? And is not the evasion of this right just as injurious whether the neutral be at peace with all the world or with a part only?

There would be extreme difficulty in establishing, by any disinterested testimony, the fact of any such special intentions as the argument supposes. Independent of this difficulty, it would, in effect, be an attempt to repel, by positive testimony, a conclusive inference of law flowing from the very act of taking convoy. The belligerent convoy is bound to resist all visitations by enemy ships, whether neutral to the convoyed ships or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under the convoy, he shows an intention to avail himself of its protection under all the chances and hazards of war. The abandonment of such intention cannot be otherwise evidenced than by the overt act of quitting convoy. And it is impossible to conceive that the mere secret wishes or private declarations of a party could prevail over his own deliberate act of continuing under convoy, unless courts of prize would surrender themselves to the most stale excuses and imbecile artifices. It would be in vain to administer justice in such courts, if mere statements of intention would outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is equally great whatever might be the special objects of the neutral. The right of search is effectually prevented by the presence of superior force, *or exercised only after the perils and in- [**445** juries of victorious warfare. And it is this very evasion of the right of search that constitutes the ground of condemnation in ordinary cases. The neutral, in effect, declares that he will not submit to search until the enemy convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral, then, could not, if proved, upon principle prevail, and it has not a shadow of authority to sustain it. The argument upon this point was

1.—Since this opinion was delivered I find, by an account of all the appeals and final decisions thereon before the Lords of Appeal, published by order of the House of Commons in 1801, that the judgment of condemnation in The Sampson was affirmed by the Lords of Appeal. The following is a transcript of the printed account: "Sampson, "Joshua Barney, master; cargo, sugar, coffee, cot- "ton, indigo and dry goods, and specie, taken by "His Majesty's ship of war Penelope, Bartholemew "Samuel Rowley, Esq., commander, claimed for "American subjects for ship, cargo and specie— "sentence appealed from—pronounced at Jamaica, "22d April, 1794—ship, cargo and specie condemn- "ed. Sentence in the Court of Appeals, viz.: 31st "of May, 1798, sentence affirmed; as to the specie "claimed on behalf of Wacksmuth and Dutilh; and "21st of June, further proof directed to be made of "the property of the ship, cargo, and rest of the "specie. 29th June, 1799, ship, cargo and specie "condemned."

urged in *The Maria* and *Elsebe*, and was instantly repelled by the court.

On the whole, on this point my judgment is, that the act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught in *delicto* are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offense, still that the resistance of the convoy is to all purposes the resistance of the associated fleet. It might, with as much propriety, be maintained that neutral goods, guarded by a hostile army in their passage through a country, or voluntarily lodged in a hostile fortress, for the avowed purpose of evading the municipal rights aud regulations of that country, should not in case of capture be lawful plunder (a pretension never yet asserted), as that neutral property on the ocean should enjoy the double protection of war and peace.

If these principles be correct, it remains to be considered how far the couduct of Mr. Pinto brings him within the range of their influence. It is clear that in the original concoction of the voyage it was his intentiou to avail himself of British convoy. The covenant in the charter-party demonstrates this intention; a covenant that, from its terms, being made by the ship-owner, must have been inserted for the benefit and at the instance of the charterer. Under the faith of this stipulation Mr. Pinto put his own property on board and received shipments from persons of an acknowledged hostile character. The ship sailed on the voyage, uuder British convoy, with Mr. Pinto on board, and though captured after a separation from the convoy, she was in the very attempt to rejoin it. There is no pretense, therefore, of an abandonment of **446***] the convoy, and the **corpus delicti*, the character of hostility, impressed by the sailing under convoy, if any attached, remained notwithstanding the separation. It is like the sailing for a blockaded port, where the offense continues, although at the moment of capture the ship be, by stress of weather, driven in a direction from the port of destination; for the hostile intention still remains unchanged.

Aud here, to avoid the effect of the general doctrine, we are met with another distinction founded upon the supposed difference between a belligerent and a neutral merchant ship as to the taking of convoy. It is argued that the belligerent ship has au undoubted right to take the protection of the convoy of the nation to which she belongs; and that this extends a perfect and lawful immunity to the neutral cargo on board.

It is certainly incumbent on the counsel for the claimant to support this exception to the general rule by precedent or analogy. Nothing has been offered which, in my judgment, affords it the slightest support. It is not true that a neutral can shelter his property from coufiscation behind an act lawful in a belligereut. The law imputes to the neutral the eonsequences of the act if he might have foreseen and guarded against it, or if he voluntarily adopts it. Was it ever supposed that a neutral cargo was protected from seizure by going in a belligerent ship to a blockaded port? or that contrabaud goods, belonging to a neutral, were exempted from confiscatiou because on board of such a ship bound on a voyage lawful to the belligerent, but not to the neutral? yet the pretensions in these cases seem scarcely more extravagant than that now urged. Why should a neutral be permitted to do that indirectly which he is prohibited from doing directly? Why should he aid the enemy by giving extraordinary freight for belligerent ships sailing under belligerent convoy with the avowed purpose of escaping from search, and often with the concealed intention of aiding belligerent commerce, and yet claim the benefits of the most impartial conduct? Until some more solid ground can be laid for the distinction than the ingenuity of counsel has yet suggested, it would seem fit to declare *ita lex non scripta est.*

But even if the distinction existed, it could not apply *to the case at bar. This is a [**447** case where the claimant becomes the charterer of the whole vessel for the voyage and stipulates for the express benefit of convoy. The ship, though navigated by a belligerent master and crew, was necessarily under the control and management of the charterer. He was the real effective *dux negotii.* Whatever may be the technical doctrine of the common or prize law as to the general property in the ship, the charterer was, to all purposes important in this inquiry, the owner for the voyage, and the master his agent. Can there be a doubt that, as to the shipments of the enemy freighters, Mr. Pinto was responsible for the acts of the master? Was he not materially interested in the safety and protection of these shipments in respect to freight, commissions and profits? If they had been lost by capture, from the negligence of Mr. Pinto or of the master, when by ordinary diligence and resistance the loss might have been avoided, would not Mr. Pinto have been responsible? How, then, it can be consistently held that the ship was not essentially governed and managed by Mr. Pinto, aud all her conduct incorporated with his iuterests, I profess to be unable to comprehend. For what purpose should he insist ou a covenant for convoy, if he never meant to derive aid and protection from it to the whole cargo on board, aud to range himself and his interests on the side of resistance? His private conduct at the time of the capture, when resistance was almost hopeless, affords no evidence to repel the irresistible presumptions from his deliberate acts.

And here again it has been argued that Mr. Pinto had no hostile iuteutions against the United States; but that the taking of convoy was simply to resist the French aud Carthagenians, who are the euemies of his owu country. If such special intention could, in point of law, uphold his claim, which, for the reasons already stated, I am entirely satisfied it could not, yet there is not, in the present case, withiu my recollection, auy proof of such special inteution. It rests upon the mere suggestions of counsel. How, iudeed, could Mr. Pinto show that he meant to yield his property to the search of the cruisers of the United States, when the deliberate act of assuming British convoy precluded the possibility of its exercise, unless acquired by victory after resistance?

*If this view of the case be correct, [**448** it must be pronounced that Mr. Pinto, by voluntarily sailing nnder couvoy, forfeited his neutrality, and bound his property to an indissolubly hostile character.

This, however, is not the only ground upon which the claim of Mr. Pinto ought to be repudiated. There was not merely the illegality of sailing under enemy convoy up to the very eve of capture, but the fact of actual resistance of the chartered ship, and submission to search only in consequence of superior force.

An attempt, however, is made to extract the case at bar from the penalty of confiscation attached to resistance of search, upon the ground that Mr. Pinto took no part in this resistance. It is asserted that a shipper in a general ship is not affected by the act of the enemy master; that the charterer of the whole ship is entitled to as favorable a consideration, and that there is no difference, in point of law, whether the ship have or have not a commission, or be or be not armed. It will be necessary to give to these positions a full examination.

In the first place, it is to be considered whether a neutral shipper has a right to put his property on board of an armed belligerent ship without violating his neutral duties. If the doctrine already advanced on the subject of convoy be correct, it is incontestible that he has no such right. If he cannot take belligerent convoy, *a fortiori* he cannot put his property on board of such convoy; or, what is equivalent, on board of an armed and commissioned ship of the belligerent. What would be the consequences if neutrals might lawfully carry on all their commerce in the frigates and ships of war of another belligerent sovereign? That there would be a perfect identity of interests and of objects, of assistance and of immunity, between the parties. The most gross frauds and hostile enterprises would be carried on under neutral disguises, and the right of search would become as utterly insignificant in practice as if it were extinguished by the common consent of nations. The extravagant premiums and freights which neutrals could well afford to pay for this extraordinary protection would enable the belligerent to keep up armaments of **449***] incalculable *size, to the dismay and ruin of inferior maritime powers. Such false and hollow neutrality would be infinitely more injurious than the most active warfare. It would strip from the conqueror all the fruits of victory, and lay them at the feet of those whose singular merit would consist in evading his rights, if not in collusively aiding his enemy.

It is not, therefore, to be admitted that a neutral may lawfully place his goods under armed protection, on board of an enemy ship. Nor can it be at all material whether such armed ship be commissioned or not; that is an affair exclusively between a sovereign and his own subjects, but is utterly unimportant to the neutral. For whether the armament be employed for offense, or for defense, in respect to third parties, the peril and the obstruction to the right of search are equally complete. Nor is it true, as has been asserted in argument, that a non-commissioned armed ship has no right to capture an enemy ship, except in her own defense. The act of capture without such pretext, so far from being piracy, would be strictly justifiable upon the law of nations, however it might stand upon the municipal law of the country of the capturing ship. Vattel has been quoted to the contrary; but on a careful examination it will be found that his text does not warrant the doctrine.

I have had occasion to consider this point in another cause, in this court, and to the opinion then delivered I refer for a more full discussion of it. If the subject capture without a commission, he can acquire no property to himself in the prize; and if the act be contrary to the regulations of his own sovereign, he may be liable to municipal penalties for his conduct. But as to the enemy he violates no rights by the capture. Such, on an accurate consideration, will be found to be the doctrine of Puffendorf, and Grotius, and Bynkershoek, and they stand confirmed by a memorable decision of the Lords of Appeal, in 1759. (2 Brown's Civil and Adm. App., 524; Grotius, lib. 3, ch. 6, s. 8, 9, 10, and Barbeyrac's note on s. 8; Puffendorf, lib. 8, ch. 6, s. 21, &c.; Bynk. 2, P. J. ch. 3, 4, 16, 17; 2 Woodes. Lect., 432; Consol. del. Mare, ch. 287, 288; 4 Inst., 152, 154; Zouch Adm., 101; Casaregis Disc., 24 [n.] 24; Com. Dig. Admiralty, E; 3 Buls., e. 27.)

Admitting, however (what to me seems utterly inadmissible). *that a neutral may [***450** lawfully ship his goods on board the armed ship of an enemy, it will be of little avail, unless he is exempted from the consequences of all the acts of such enemy. If the shipment be innocent, it will be of little avail in this case, if the resistance of the enemy master will compromit the neutral character of the cargo. To the establishment, therefore, of such an exemption, the exertions of counsel have been strenuously directed. It has been inferred from the silence of elementary writers, from the authority of analogous cases, and from the positive declarations of the court, in *The Katherina Elizabeth* (5 Rob., 206.)

The argument drawn from the silence of jurists has been already sufficiently answered. It remains to consider that which is urged upon the footing of authority. The reasoning from supposed analogous cases is quite as unsatisfactory. It is not true, as to neutrals, that the act of the master never binds the owner of the cargo unless the master is proved to be the actual agent of the owner. The act of the master may be, and very often is, conclusive upon the cargo, although no general agency is established. Suppose he violate a blockade, suppress and fraudulently destroy the ship's papers, or mix up under the same cover enemy interests, will not the cargo share the fate of the ship? The cases cited are mere exceptions to the general rule. They, in general, turn upon a settled distinction, that the act of the master shall not bind the cargo, where the act under the circumstances could not have been within the scope or contemplation of the shipper at the time of shipment; or where his ignorance of the voyage, and of the intended acts of the master, is placed beyond the possibility of doubt. (See *The Adonis*, 5 Rob., 256.) The very case of resistance is a strong illustration of the principle. The resistance of the neutral master has been deliberately held to be conclusive on the neutral cargo. (*The Elsebe*, 5 Rob., 173; *The Katharina Elizabeth* 5 Rob., 206.) What reason can there be for a different rule in respect to a belligerent master?

It must be admitted that the language of the court in the case of *The Katherina Elizabeth*

would at first view seem to support the position of the claimant's counsel. On a close examination, however, it will not be found to **451***] *assert so broad a doctrine. The case was of a rescue attempted by an enemy master having on board a neutral cargo; and this rescue attempted, not of the captured, but of the capturing, ship. It was argued that this resistance of the master exposed the whole cargo entrusted to his management to confiscation. The court held that no such penalty was incurred. That the resistance could only be the hostile act of a hostile person who was a prisoner of war, and who, unless under parol, had a perfect right to emancipate himself by seizing his own vessel. That the case of a neutral master differed from that of an enemy master. No duty was violated by such an act on the part of the latter; *lupum auribus teneo*, and if he could withdraw himself he had a right so to do. And that a material fact in the case was, that the master did not attempt to withdraw his property, but to rescue the ship of the captor and not his own vessel. Such was the decision of the court, upon which several observations arise. In the first place the resistance was not made previous to the capture; and therefore whatever may be the extent of the language, it must be restrained to the circumstances of the case in judgment, otherwise it would be extrajudicial. In the next place it would be impossible to conceive how the fact, as to what vessel was seized, could be material, if the argument of the present claimant be correct, for in all events the resistance as to the cargo would be without any legal effects. In the last place it is clear that the case is put by the court upon the ground that the master at the time of the act had been dispossessed of his vessel by capture, and was a prisoner of war. He was therefore no longer acting as master of the ship, and had no further management of her. His rights and duties, as master, had entirely ceased by the capture, and there could be no pretense to affect the ship or cargo with his subsequent acts any more than with the acts of any other stranger. The case would have been entirely different with a neutral master, whose relation to his ship continues notwithstanding a capture and carrying in for adjudication. The case therefore admits of sound distinctions from that at bar, and cannot be admitted to govern it.

There is another text, not cited in the argument, which may be thought to favor the doctrine of the claimant's counsel. It is the only pas-**452***] sage bearing on the subject in *controversy which has fallen under my notice in any elementary work. Casaregis, in his commercial discourses (Disc., 24, [n.] 22) has the following remarks: "*Verum tamen notandum est quod "si navis inimica onerata mercibus mercatorum "amicorum aggressa fuerit alteram inimicam et "mercatores aut domini mercium operam ac in-"dustriam dedissent pro ea aggredienda tunc "merces dominorum cadunt etiam sub præda, si "navis predicta onerata mercibus fuerit depræ-"data, &c., &c., et regulariter bona eorum qui "auxilium inimices nostris præstant vel confed-"erati cum iis sunt, prædari possunt."* It is obvious that Casaregis is here considering the case of an attack of an enemy merchant ship, laden with a neutral cargo, upon the ship of its enemy, in which the former is unsuccessful and is captured. Under such circumstances he holds, that if the neutral shippers, or the persons having the management of the cargo (*domini mercium*), have aided in the attack, the cargo is forfeited, upon the ground that all who assist or confederate with an enemy are liable to be plundered by the law of war. He does not touch the case, where an enemy merchant ship simply makes resistance in her own defense, or resists the right of search; nor how far the master of such ship is the *dominus mercium*, or can by his own acts bind the cargo. Much less has he discussed the question as to what acts amount to an incorporation into the objects and interests of the enemy, so as to affix a hostile character. It does not seem to me that his text can be an authority beyond the terms in which it is expressed. It pronounces affirmatively that a co-operation in an attack will induce confiscation of the cargo (which cannot be doubted); but it does not pronounce negatively that the resistance of an enemy master will not draw after it the same penalty. And if it were otherwise, it would deserve consideration whether the opinion of a mere elementary writer, respectable as he may be, delivered at a time when the prize law was not as well settled as it has been in the present age, should be permitted to regulate the maritime rights of belligerent nations.

The argument, then, on the footing of authority, fails, for none is produced which directly points at circumstances like those in the case at bar. And upon principle it seems quite as difficult to support it. I am unable *to [***453** perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master. The injury to the belligerent is in both cases equally great, for it equally withdraws the neutral property from the right of search, unless acquired by superior force. And until it is established that an enemy protection legally suspends the right of search, it cannot be that resistance to such right should not be equally penal in each party. I have, therefore, no difficulty in holding that the resistance of the ship is, in all cases, the resistance of the cargo, and that it makes no difference whether she be armed or unarmed, commissioned or uncommissioned. He who puts his property on the issue of battle must stand or fall by the event of the contest. The law of neutrality is silent when arms are appealed to in order to decide rights; and the captor is entitled to the whole prize won by his gallantry and valor. This opinion is not the mere inference, strong as it seems to me to be, of general reasoning. It is fortified by the consideration that in the earliest rudiments of prize law, in the great maritime countries of Great Britain and France, confiscation is applied by way of penalty for resistance of search to all vessels without any discrimination of the national character of the vessels or cargoes. The black book of the admiralty expressly articulates that any vessel making resistance may be attacked and seized as enemies; and this rule is enforced in the memorable prize instructions of Henry VIII. (Clerk's Praxis, 164, Rob. Collect. Marit., p. 10, and note, and p. 118.) The ordinance of France of 1584, is equally broad; and declares all such vessels

good prize; and this has ever since remained a settled rule in the prize code of that nation.

Valin informs us that it is also the rule of Spain; and that in France it is applied as well to French vessels and cargoes as to those of neutrals and allies. (Coll. Marit. 118, *Valin Traits des Prizes*, ch. 5, § 8, p. 80.) There is not to be found in the maritime code of any nation, or in any commentary thereon, the least glimmering of authority that distinguishes, in cases of resistance, the fate of the cargo from that of the ship. If such a distinction could have been sustained, it is almost incredible that not a single ray of light should have beamed upon it during the long lapse of ages, in which mari-

454*] time warfare *has engaged the world. And if any argument is to be drawn from the silence of authority, I know not under what circumstances it can be more forcibly applied than against the exception now contended for.

But even if it were conceded that a neutral shipper in a general ship might be protected, the concession would not assist the present claimant. His interests were so completely mixed up and combined with the interests of the enemy; the master was so entirely his agent under the charter-party, that it is impracticable to extract the case from the rule that stamps Mr. Pinto with a hostile character. The whole commercial enterprise was radically tainted with a hostile leaven. In its very essence it was a fraud upon belligerent rights. If for a moment it could be admitted that a neutral might lawfully ship goods in an armed ship of an enemy, or might charter such a ship, and navigate her with a neutral crew, these admissions would fall far short of succoring the claimant. He must successfully contend for broader doctrines, for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy. I cannot bring my mind to believe that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew (for though furnished directly by the owner they are in effect paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board hostile shipments on freight, commissions and profits; that he can stipulate expressly for the benefit and use of enemy convoy, and navigate during the voyage under its guns and protection; that he can be the entire projector and conductor of the voyage, and co-operate in all the plans of the owner to render resistance to search secure and effectual; and that yet, notwithstanding all this conduct, by the law of nations he may shelter his property from confiscation and claim the privileges of an inoffensive neutral. On the contrary, it seems to me that such conduct is utterly irreconcilable with the good faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality only when the sword and the armor of an enemy become

455*] *useless for defense. If it be, as it undoubtedly is, a violation of neutrality to engage in the transport service of the enemy, or to carry his dispatches even on a neutral voyage, how much more so must it be to enlist all our own interests in his service, and hire his arms and his crew in order to prevent the exercise of those rights which, as neutrals, we are bound to submit to? The doctrine is founded in most perfect justice, that those who adhere to an enemy connection shall share the fate of the enemy.

On the whole, in every view which I have been able to take of this subject, I am satisfied that the claim of Mr. Pinto must be rejected, and that his property is good prize to the captors. And in this opinion I am authorized to state that I have the concurrence of one of my brethren. It is matter of regret that in this conclusion I have the misfortune to differ from a majority of the court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty not to surrender my own judgment, because a great weight of opinion is against me—a weight which no one can feel more sensibly than myself. Had this been an ordinary case I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights suspended on it are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident indeed of its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles.

Cited—2 Wheat. 244, 248, notes; 3 Wheat. 415; Newb. 386.

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*PRATT AND OTHERS, ORIGINAL COMPLAINANTS, [***456**

v.

THOMAS LAW AND WILLIAM CAMPBELL, ORIGINAL DEFENDANTS.

THOMAS LAW, ORIGINAL COMPLAINANT,

v.

PRATT AND OTHERS, ORIGINAL DEFENDANTS.

PRATT AND OTHERS, ORIGINAL COMPLAINANTS,

v.

WM. M. DUNCANSON AND SAMUEL WARD, ORIGINAL DEFENDANTS,

AND

WILLIAM CAMPBELL, ORIGINAL COMPLAINANT,

v.

PRATT AND OTHERS, AND DUNCANSON AND WARD, ORIGINAL DEFENDANTS.

In the sales of lots, in the city of Washington, the lots are not chargeable for their proportion of the internal alley laid out for the common benefit of those lots; although the practice so to charge them has been heretofore universally acquiesced in by purchasers; and if a purchaser has acquiesced in that practice and has received a conveyance accordingly, without objection, yet he does not thereby acquire a fee-simple in such proportion of the alley, and may, in equity, recover back the purchase money which he has paid therefor.

If a purchaser of city lots stipulates to build with-

in a limited time, a house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots conveyed, he is not bound to build in proportion to the lots conveyed, unless the whole number be conveyed.

In a case where it would be difficult to ascertain the injury resulting from the breach of contract, or the sum in damages by which the injury might be compensated, this court will not themselves ascertain the injury nor the damages, nor direct an issue *quantum damnificatus*.

Where a contract for the sale of land has been in part executed by a conveyance of part of the land, and the vendor is unable the convey the residue, a court of equity will decree the repayment of a proportionate part of the purchase money with interest.

If three persons mortgage their joint property to indemnify the drawer of bills of exchange drawn for their accommodation, in case of protest; and if each of the mortgageors agrees to take up a third part of the bills upon their return under protest, and if two of them neglect to take up their two-thirds, whereby the other mortgageor is compelled to take up the whole of the bills, in consequence of which he requests the drawer not to release the mortgage but to hold it for his benefit, a lien in equity is thereby created upon the mortgaged property to the amount of two-thirds of the bills in favor of that mortgageor who took up the whole. *Quære*. Whether a subsequent incumbrancer can compel a prior incumbrancer to disclose the consideration which he gave for the notes of the debtor upon which his incumbrance was founded.

An equity of redemption of real estate in Maryland is liable to attachment.

THESE several suits in chancery in the Circuit Court for the County of Washington, in the District of Columbia, being involved in each other and relating to the same property, were heard and argued as one cause.

The first of these suits, in the order of time, was that of *Pratt and Others* v. *Duncanson and Ward*, which was instituted on the 24th of March, 1801. The bill prayed that Duncanson and Ward might be enjoined from selling certain squares in the city of Washington, which had been mortgaged by Morris, Nicholson & Greenleaf, to Duncanson, to indemnify him against the return of certain bills of exchange which he had drawn for their accommodation, to the amount of £12,000 sterling, a part whereof, viz., £7,600, it was alleged, had been taken up by Ward, who claimed payment from Duncanson, and persuaded him to advertise the mortgaged property for sale. The bill alleged that although the bills had been taken up by Ward, he had done it as the agent of Greenleaf, one of the mortgageors, and with his funds; and **457***] *prayed for general relief. The squares which were thus mortgaged to Duncanson were included in a previous mortgage to Thomas Law.

The next suit, in order of time, was that of *Pratt and Others* v. *Thomas Law and William Campbell*. The bill was filed on the 14th of December, 1804.

Its objects were to compel Law to release to the complainants, who were assignees of Morris, Nicholson & Greenleaf, certain squares in the city of Washington, which had been mortgaged by them to secure to him the conveyance of certain lots and squares in the same city, which they had contracted to convey to him, and which he was to select from a larger number which they had purchased of the commissioners of the city; to compel Law to complete his selection; and to vacate certain releases made by him, at the solicitation of Campbell, who had attached the equity of redemption of some of the squares, which were included in the mortgage to Law.

The third suit, in the order of time, was that of *Thomas Law* v. *Pratt and Others*. The bill was filed on the 4th of October, 1805, and its object was to foreclose the mortgage given to secure to Law the conveyance of 2,400,000 square feet of land in the city of Washington, agreeably to a certain contract between him and Morris, Nicholson & Greenleaf; because about 400,000 square feet, which Law contended he had selected agreeably to his contract, had not been conveyed to him.

The last of these suits, in the order of time, was that of *William Campbell* v. *Pratt and Others* (assignees of Morris, Nicholson & Greenleaf) *and W. M. Duncanson and Samuel Ward*. The bill was filed in June, 1806, and was in the nature of a bill of interpleader. Its object was to obtain a release from Duncanson of the mortgage given to him by Morris, Nicholson & Greenleaf, to indemnify him against the return of certain bills of exchange drawn by him for their accommodation, and which Campbell alleged had been taken up by them, or some of them; which release, if made, would enure to the benefit of Campbell, inasmuch as he had attached, and under the proceedings upon the attachment, had *purchased Morris & [***458** Nicholson's equity of redemption.

In order to understand the argument of counsel, and the opinion of the court, it may be necessary to state more minutely the allegations of the parties.

The bill of *Pratt and others against Law and Campbell* stated that Morris, Nicholson & Greenleaf, on the 3d of December, 1794, gave to the defendant, Thomas Law, their bond with condition to convey to him in fee-simple within 90 days from that date, "2,400,000 square "feet of land in the city of Washington, the "said Law having paid them the sum of five "pence Pennsylvania currency per square foot, "for the same."

That on the 4th of December, 1794 (the day after the date of the bond), a written agreement was executed between the same parties, by which (after reciting the bond) Morris, Nicholson & Greenleaf covenanted that if Law should, within 18 months, be displeased with his purchase, they would return him the purchase money, with interest, at the expiration of that term. And Law covenanted that if within the same term he should finally determine to keep the land, he would, within 4 years from the time of such determination, cause to be built on every third lot, or in that proportion, one brick dwelling-house, or other brick building, at least two stories high; the lots were supposed to average 5,265 square feet each. The bill further charges that Law did, within the limited time, elect to keep the land, and thereby became liable to build the houses mentioned in the agreement of the 4th of December, 1794, but had not built them. That on the 10th of March, 1795, the parties entered into another agreement, by which Law was "to have his "selection under his contract of the 4th of "December last, in all squares in which the "said Morris & Greenleaf have a right of selec-"tion, excepting water property, and except-"ing such squares as are now appropriated, or "respecting which the said Morris, Nicholson

" & Greenleaf have made arrangements, a list " of which squares is hereunto annexed." By the same agreement Morris, Nicholson & Greenleaf covenanted to mortgage to Law other squares and lots which were then in their pos-
459*] session, until they could give him *a good title to such property as he might select; Law agreed to give up his right to return the property, and thereby made the purchase absolute. He also agreed to select by squares and not by lots, and to close his selection within 90 days from the date of the agreement, and stipulated that the houses which he was to build should be such houses as Morris & Greenleaf were obliged to build by contract with the commissioners.

The bill further states that Morris, Nicholson & Greenleaf, agreeably to that contract, on the 4th of September, 1795, mortgaged to Law 857 lots, and 3,333 square feet of land, the condition of which mortgage was, that Morris, Nicholson & Greenleaf should pay the penalty of the bond, or, agreeably to its condition and to the contract of the 10th of March, 1795, convey to Law, in fee-simple, with general warranty, 2,400,000 square feet in the city of Washington.

That Law selected about 2,000,000 square feet, but in making his selections violated his agreement of the 10th of March, 1795, by selecting lots in squares from which he was excluded by that agreement, to the injury of Greenleaf, who never assented to such selection.

That Law had obtained titles to about 2,000,000 of square feet, and that there remain to be conveyed to him about 400,000 square feet, when he shall have complied with his contract of selection, and when he shall have built the stipulated number of houses.

That on the 13th of May, 1796, Greenleaf conveyed to Robert Morris and John Nicholson all his interest in the city of Washington, excepting three squares, "and excepting all " such lots, lands or tenements as were either " conveyed or sold, or agreed to be conveyed " by all or either of them, the said Greenleaf, " Morris and Nicholson, or any of their agents " or attorneys to any person prior to the 10th of " July, 1795."

That on the 26th of June, 1797, Morris, Nicholson & Greenleaf conveyed all their interest in the city of Washington to Pratt and others, the present complainants.

460*] *That Law, knowing the complainants' interest in the property, and with intent to injure the complainants, and to benefit the defendant, Campbell, on the 4th of September and 5th of October, 1797, executed two deeds releasing to Morris, Nicholson & Greenleaf part of the mortgaged property, which had been attached by Campbell; which releases were executed by Law with a full knowledge of the interest of the complainants in the mortgaged property; in defiance of their express prohibition; and with a fraudulent intent to vest the legal estate in Morris & Nicholson so as to give effect to the attachment of Campbell. That Campbell had engaged to indemnify Law for that act. That the releases were executed without the knowledge or consent of Morris, Nicholson & Greenleaf, or either of them, and were never delivered to them or either of them, but were put on record by Law. The complainants pray that those deeds of release may be vacated and annulled. They state that they are ready, able, and willing, to carry into effect the contracts between Law and Morris, Nicholson & Greenleaf, and to do everything that in justice and equity ought to be done on their part; but that Law has refused and neglected to build the houses, and to make his selection within the time limited, and out of the squares prescribed; has violated his contract in setting up a claim and keeping the property mortgaged as a collateral security for making him titles to property, which titles he has prevented by refusing to select the property, &c.

The bill requires Campbell to state when, from whom, and at what price he obtained the notes of Morris & Nicholson, upon which his attachment was issued; and prays for general relief.

The answer of Law admits that he had received conveyances for "about 2,000,000 of square feet of ground under the contract, but not within the time stipulated;" it states the number and kind of houses which he had built; denies that he was bound to receive conveyances with a condition to build, the building contract being independent of the contract to convey the land. It states that he was induced to enter into the building contract, by the contract which Morris, Nicholson & Greenleaf had entered into with the commissioners and others to build *a large number of [***461** houses, which contract it avers they never complied with.

It states, also, that Morris & Nicholson assigned Law's building contract to the commissioners of the city, and that the present complainants are not the assignees thereof, nor have any interest therein; and that if they had, their remedy is at law and not in equity.

With regard to the releases of September and October, 1797, he says that the mortgaged property was more than ample security; that Morris & Nicholson were in 1797 generally deemed bankrupts; that their creditors were suing out attachments, and he thought it unjust to keep covered, by his mortgage, from fair creditors, a property so much more than enough to secure his demands, and therefore executed those releases. He admits that Campbell gave him a bond of indemnity, but denies that he received any compensation. He admits also that one of the complainants desired him not to execute them; but he disregarded the request.

Exceptions having been taken to this answer, Mr. Law filed an amended answer, in which he insists that he was released from his building contract because he had not received titles for all the lots he had purchased; or that, as he had originally four years from the date of the contract to complete his buildings, and was to have had his titles in 90 days, he ought to be allowed four years from the time of receiving his titles. He affirms that he made his selection within the time limited by his contract, and exhibits a copy thereof. He avers that by the contract of March 10th, 1795, he had a right to select as well from the property which Greenleaf had contracted to purchase in his own name from D. Carroll as from that which Morris & Greenleaf had contracted to purchase from the commissioners of the city. That on the 14th of

March, 1796, after much trouble and vexation, he received his first conveyance of a part of his lots, amounting to 773,122¼ square feet, to obtain which he had to release to Morris, Nicholson & Greenleaf a part of the mortgaged property, viz., squares No. 465, 468, 469, 470, 495 and 498. He avers that any variation which may appear between his original selection and the squares afterwards conveyed to him, was **462***] *occasioned by the slow compliance on the part of Morris, Nicholson & Greenleaf with their contracts with Carroll and the commissioners. He states that they gave him full liberty to make another selection of any lots within their purchases or contracts, and refers to Morris & Nicholson's letter to him of the 17th of September, 1796, in which they say: "You may select by squares out of any "that within our selection, although not "chosen by you already, except water prop- "erty, or where we have since your selection or "before improved on or contracted for the sale "of that which you desire; and we wish you "now to name the squares, as the selection and "titles shall be completed for you without "delay."

That in consequence of that letter he made another selection including other squares, and on the 20th of July, 1797, received another conveyance of lots from the commissioners containing 1,142,068¾ square feet. That he also received a deed dated January 28th, 1797, directly from Morris & Nicholson, for 128,223 square feet, the title to which has since been decided by the chancellor of Maryland, not to have been in them but the commissioners of the city.

He also states that after receiving these three conveyances "he had selected to have the resi- "due of what was due conveyed to him out of "the half of square 743, square 699, and square "696, containing 314,829½ square feet, which, "if the deed of January 28th, 1797, had re- "mained good would have been near the *quota* "to which he was entitled; but the said "squares, or the proper portion thereof never "were conveyed, though the said Morris & "Nicholson frequently promised so to do. "That the said squares were a part of the "property which they had contracted to pur- "chase of the said Carroll according to their "contract of the 26th of September, 1793," (a copy of which is exhibited and appears to be a contract by Greenleaf alone, with Carroll.) He refers to a letter from Morris & Nicholson to him of the 19th of March, 1797, in which they say: "We are equally anxious with you to get "Mr. Carroll paid on his (Mr. Carroll's) ac- "count, upon our account, and upon your own "account; and yet with all this anxiety we do "not agree to sign the articles, which were **463***] *"handed us yesterday; our objections "thereto will be filed. But to make your "mind at ease on the subject of the property "to be conveyed to you by Mr. Carroll, and "ours at ease about getting our property re- "leased from your mortgage, which it then "ought to be, we propose to enter into a con- "tract, with penalty, with you, to fix a limited "time within which the money shall be tend- "ered to Mr. Carroll, say in six weeks, and on "your part to covenant therein, that upon so "doing you will release to us our mortgage "when Mr. Carroll makes the titles." He refers also to a letter from Mr. Morris to him of the 21st of June, 1797, in which Mr. Morris says: "I am in pursuit of money for Mr. Carroll "and expect success, but I hope, when it "comes, he will not plague himself, and em- "barrass us by a refusal of it. He ought to "have had his money, and I have always "lamented that we could not pay it when due, "but certainly we will pay as soon as we "can."

The answer then avers that Morris & Nicholson never paid the purchase money due to Mr. Carroll, nor in any other respect complied with the contract with him, whereby they forfeited all right to the purchase of the property therein mentioned, and disabled themselves from conveying to the defendant, Law, the property he had so selected. That one of the purposes of the deed of assignment under which the complainants claim title, was to pay Mr. Carroll $13,000 due upon that contract, whereby it became their duty to pay that sum so as to obtain titles for the defendant, Law; but they never did pay that sum to Mr. Carroll, and it is not now in their power to comply specifically with the contract between the defendant, Law, and Morris, Nicholson & Greenleaf.

To this answer exceptions were also taken, and the complainants, Pratt and others, filed an amended bill, in which they contend that the defendant, Law, had not made his selection in due time and manner according to the original contract; that, therefore, the complainants might now satisfy the balance of the contract by a conveyance of such lots as they should deem proper; and under that idea had tendered to Mr. Law a conveyance for the quantity of land which he had a right to claim.

*That by the original contract Mr. [***464** Law had a right to select only out of the property which Morris & Greenleaf had contracted to purchase from the commissioners; for that was the only contract which gave them a right of selection.

The complainants also contended that if, upon Mr. Law's failure to select his lots within the time limited, the right of selection did not revert to Morris, Nicholson & Greenleaf, yet he was bound to close his selection in a reasonable time, and before Morris & Nicholson had completed their selection under the contract of Morris & Greenleaf with the commissioners; and that, after closing their selection, they were not bound to convey to Mr. Law any lots not selected by them, or not before that time selected by him and notified to them. They admit that although Mr. Law had forfeited his right of selection, yet Morris & Nicholson, being desirous of gratifying him, and of stimulating him to make the stipulated improvements, caused to be conveyed to him, by deeds dated the 14th of March, 1796, and the 20th of July, 1797, 1,935,008 square feet of land, without annexing thereto the condition of building which they had a right to insist upon, including therein sundry lots not within his right of selection, whereby he obtained more valuable lots, and on better terms than he was entitled to under his contracts.

They aver that they are the *bona fide* purchasers, for a valuable consideration, of Morris, Nicholson & Greenleaf's equity of redemption

in the mortgaged property, without notice of any agreements or transactions between them and the said Law, other than those which appear on the face of the bond of the 3d of December, 1794, the agreement of the 4th of December, 1794, that of March 10th, 1795, and the mortgage of the 4th of September, 1795; and are not in equity bound by any other agreement, if any such exist.

They further state that the legal estate of the mortgaged premises never was in Morris & Nicholson, or either of them, but was in Greenleaf alone. That after Greenleaf had sold to Morris & Nicholson his interest in the Washington lots, being largely their creditor, he caused all their property in the city to be attached by process, **465***] *issued under the laws of Maryland, on the 21st of April, 1797, which attachment was for the benefit of the complainants, and was laid on the same property which on the following day was attached at the suit of the defendant, Campbell, which attachment, in favor of Greenleaf, was continued until and after the 26th of June, 1797, when Morris & Nicholson assigned and transferred to the complainants, for a valuable consideration, all the attached property; whereupon Greenleaf's attachment was dismissed by consent of the parties, inasmuch as the complainants had, by the assignment, obtained all the benefit which they could have obtained by prosecuting the attachment to judgment of condemnation. They aver, therefore, that if the defendant, Campbell, had any equitable claim to the property by virtue of his attachment, the complainants have a prior equitable claim by virtue of their prior attachment.

But they aver also that neither Morris nor Nicholson ever had such an estate in the mortgaged premises as could be the subject of an attachment at law, or as could be condemned at law, or as could be seized and sold under a *fieri facias;* and that the defendant, Campbell, had notice of the complainants' legal and equitable title when he purchased the property.

That if Morris & Nicholson had any equitable interest therein, it was subject to the duty of doing justice to Greenleaf, the legal proprietor, by paying all they owed him, before the trust as to them would be decreed to be performed; and if they had an equity of redemption in the mortgaged lots, and if anything was seized, condemned and sold, under the said Campbell's attachment, it could be only the right which Morris & Nicholson had to redeem the said lots, by conveying to Mr. Law the balance of property due to him, and by satisfying all equitable claims which Greenleaf had upon them. And that if the complainants should be compelled to convey to Mr. Law the balance of property which he claims, the defendant, Campbell, can have no right to the lots as against the complainants until he shall have satisfied them for all the property which they shall have been so **466***] compelled to convey to the *defendant, Law, and shall also have satisfied all equitable claims of Greenleaf upon Morris & Nicholson.

The claimants further state that they have been informed and believe that the attachments of the defendant, Campbell, were founded upon notes of Morris & Nicholson, purchased upon speculation at market, and at a price far below their nominal value; and they contend that Campbell could not, in equity, recover, even if he had a prior lien upon the lots, more than the *bona fide* actual value which he gave for the notes, with legal interest thereon. They call upon him to state what consideration he gave for the notes; and at what price he purchased in the mortgaged lots at the sale under the *fi. fa.* issued upon the judgment on his attachments.

The answer of the defendant, Campbell, disclaims all benefit and title under or by virtue of the releases executed by the defendant, Law, at his request; but claims to hold entirely under the judgment of the Court of Appeals of Maryland upon his attachments; and refers to his bill of interpleader (as he terms it), and the transcript of the record of the Court of Appeals of Maryland exhibited therewith; by which transcript it appears that the attachments were issued on the 21st of April, 1797, by virtue of the act of assembly of Maryland, of 1795, ch. 56, entitled "a supplement to the act entitled an act directing the manner of suing out attachments in this province and limiting the extent of them;" and commanded the sheriff "to attach, seize, take and safe keep all the lands, "tenements, goods, chattels and credits," of Robert Morris, which should be found in his bailiwick, "to the value of, as well the damages aforesaid, as," &c.; and to have the same before the judges of the General Court, &c.; then and there to be condemned, according to the act of assembly aforesaid, to the use of the said W. Campbell, unless the said Robert Morris should appear and answer to the said William Campbell in a plea of trespass on the case, &c., according to law. The sheriff was also commanded to make known to the garnishees that they appear, &c., to show cause why the lands, tenements, &c., should not be condemned, and execution thereof had and made as in other cases of recoveries and judgments given in courts of record according to the directions of the act of assembly *aforesaid, &c. The [***467** like process was issued against the property of Mr. Nicholson.

On the 22d of April, 1797, the sheriff levied these attachments on part of the property included in the mortgage to Law, and particularly set forth in the sheriff's return.

On the return of these attachments, Morris & Nicholson appeared by attorney, and upon argument, the General Court quashed the sheriff's return; whereupon Campbell took a bill of exceptions, which stated that the plaintiff, Campbell, offered in evidence the deed of the 13th of May, 1796, from Greenleaf to Morris & Nicholson, whereby Greenleaf conveyed to them all his property in the city of Washington, excepting 3 squares, "and excepting all such squares, "lots, lands and tenements as were either con-"veyed or sold, or agreed to be conveyed either "by all or either of them, the said Morris, Ni-"cholson & Greenleaf, or any of their agents "prior to the 10th of July, 1795." That Campbell prayed condemnation of one moiety of certain squares, particularly described, as the property of Morris, and the other moiety as the property of Mr. Nicholson. That Morris & Nicholson offered in evidence the mortgage to Mr. Law of the 4th of September, 1795, which included those squares; and that Campbell offered in evidence one of the releases of Mr. Law,

dated the 5th of October, 1797, to Morris, Nicholson & Greenleaf, which are mentioned in the bill of *Pratt and others* v. *Law and Campbell*, Morris & Nicholson then offered in evidence the deed of trust from Morris, Nicholson & Greenleaf to the complainants, Pratt and others, of the 26th of June, 1797, conveying to them all the right and interest of Morris, Nicholson & Greenleaf in the city of Washington; and proved that the aforesaid deed of release from Mr. Law to Morris, Nicholson & Greenleaf was lodged by Mr. Law alone, in the proper office to be recorded; and that it was executed by Mr. Law with a knowledge of the aforesaid deed of trust to the complainants, against their will and express prohibition, and without the knowledge or assent of Morris, Nicholson & Greenleaf, or either of them; whereupon the **468***] General Court of Maryland was *of opinion that neither Morris & Nicholson, nor either of them, had "such an estate in those "squares, whereof the plaintiff could have "judgment of condemnation."

Upon this bill of exceptions the cause was carried to the Court of Appeals of Maryland, who reversed the judgment of the General Court "as to the land contained in the return "of the sheriff of Prince George's County;" and adjudged "that the lands and tenements so "as aforesaid attached, that is to say," (&c., describing them), "be condemned towards sat- "isfying unto the said William Campbell, as "well the said sum of;" &c., "and that the "said W. Campbell have thereof execution," &c. . "Whereupon execution issued from the "Court of Appeals, returnable to the General "Court." This execution was a special *fieri facias*, which after reciting the attachment, the sheriff's return, the judgment of the General Court, the writ of error, and the judgment of the Court of Appeals, commands the sheriff of Prince George's County, that of the lands and tenements attached (describing the squares, &c.) he cause to be made the damages and costs, &c.

Upon this execution the sheriff sold the attached property to W. Campbell, the plaintiff, for a comparatively small sum.

Under these proceedings the defendant, Campbell, in his answer contends that, by the laws and constitution of Maryland, his title and interest in the said lots is conclusive upon all the world, and that the judgment of the Court of Appeals of Maryland cannot be opened. He admits, however, that he acquired by those proceedings no more interest or title than Morris & Nicholson had in the property at the time of the attachment, and that Mr. Law's mortgage was a prior incumbrance; but denies that there is any other lien or incumbrance thereon. He contends that he has a right to redeem the lots from that mortgage on any terms which should be agreed upon between him and Mr. Law. He affirms that the complainants knew of his attachment when they took their deed of assignment of the property. He denies that the complainants had any valid attachment prior to his. He admits that Morris & Nicholson had **469***] only an *equitable title in the lots at the time of his attachment. He admits that he knew of the assignment to the complainants when Mr. Law executed his release, and at the time he purchased the property under his attachment.

He demurred to so much of the bill as charged that he purchased the notes of Morris & Nicholson (upon which the attachment issued) on speculation, at a low price, and to so much as required him to state what consideration he paid therefor. To this answer the complainants excepted, because the defendant, Campbell, did not answer that part of the bill to which he demurred.

The bill of Law against Pratt and others, stated the bond of Morris, Nicholson & Greenleaf of the 3d December, 1794, to convey to him 2,400,000 square feet of ground in the city of Washington; the agreement of the 10th of March, 1795; and the mortgage of the 4th of September, 1795. That he had received conveyances for 773,121¼ square feet on the 14th of March, 1796; for 1,142,068¼ square feet on the 20th July, 1797; and for 128,223 square feet by a subsequent conveyance, the title of which last-mentioned quantity was defective. That Morris & Nicholson, having obtained all the right, title, and interest of all the joint property of M., N. & G. in the city of Washington, in the year 1797 became insolvent, and conveyed the same to the defendants, Pratt and others. That neither M., N. & G. nor the defendants, Pratt and others, did procure from the commissioners of the city of Washington a good, clear, and sufficient title to the property, out of which the complainant, Law, had the right of selection; so that although he made his selection, and requested a conveyance of the remaining 400,000 square feet, the defendants refused to convey the same, and are unable to comply with the engagements of M., N. & G. with him. Wherefore he prays a decree that they should pay him the original purchase money of five pence, Pennsylvania currency, per square foot for the amount of square feet unconveyed, with interest, from the 3d December, 1794, by a certain day; and in default thereof, that they should be foreclosed of their equity of redemption; and for general relief.

The joint and several answer of the defendants, Pratt *and others, admits the [***470** bond of 3d December, 1794, the agreement of the 10th of March, 1795, and the mortgage of the 4th of September, 1795, which, it is averred, was executed to remedy a defect in a former mortgage of the 11th May, 1795. The defendants also produce the agreement of the 4th of December, 1794. They admit that the complainant, Law, had received good titles to 1,915,189¾ square feet in part compliance with the condition of the bond; and that the title to the 128,223 square feet was defective. They admit that M., N. & G. became insolvent and conveyed all their interest to these defendants as trustees for certain creditors.

They do not admit that either they or M., N. & G. were ever bound to procure a good title to all the property out of which the complainant had a right to select, nor that he made his selection within the time limited by the contract of the 10th of March, 1795; nor that they, or M., N. & G., ever refused to convey to him any property which he had a right to demand under those agreements.

They say that they have been informed and believe that the complainant, Law, never made a definite and final selection of lots to satisfy the condition of the bond; but, without au-

thority or limitation of time, assumed the right of varying his choice from time to time according as circumstances indicated a prospect of increasing value, and did not confine himself to the property, nor to the terms contained in the contract of the 10th of March, 1795. They admit, however, that Morris & Nicholson, as a matter of indulgence, acquiesced in the selections thus made, as far as they had the ability to convey the lots so selected.

They contend that upon the complainant's having failed to make his selection within the limited time, the right to select reverted to M., N. & G., and that the complainants, as their assignees, had a right to select and tender a conveyance for the balance remaining unconveyed; and that they had done so, but the complainant refused to accept the same.

They contend also that the complainant is not entitled to relief in equity, until he shall **471***] have complied with *his agreement to build certain houses according to the agreements of the 4th of December, 1794, and 10th of March, 1795; and they aver that the damage they have sustained by reason of his not having built the houses exceeds the value of the property remaining to be conveyed to him.

They claim the benefit of his releases of certain parts of the mortgaged property, dated March 11th, 1796; September 4th and October 5th, 1797, copies of which they exhibit; and,

They deny, in general terms, that the mortgage is forfeited or the condition thereof broken.

After replication to this answer, the complainant, Law, filed an amended bill stating in substance the same matters which are contained in his answers to the bill of Pratt and others against him.

To this amended bill the defendants, Pratt and others, filed their answer, referring to the proceedings in all the causes before mentioned, and praying that the whole may be considered as one cause. They aver that the building contract constituted a material part of the consideration in the sale of lots to the complainant; that the assignment of that contract to the commissioners of the city, by Morris & Nicholson, was not valid, and did not exonerate the complainant from his obligation in equity to perform it. They proceed to state with more minuteness the facts and transactions stated in their original and amended bills against Law and Campbell.

They deny that Morris & Nicholson could authorize the complainant to make a new selection so as to embarrass the mortgaged property, or to disable themselves from complying with the terms of the mortgage, whereby subsequent incumbrancers, whose rights accrued before such new selection, could be defeated.

They deny, also, that they are bound by any agreements between the complainant and M. & N., of which they had not notice at the time of the assignment to these defendants.

472*] *The complainant having in his amended bill stated that he had solicited to have the residue of what was due to him conveyed out of half of square 743, square 699, square 696, square 730, and the square north of 697, the defendants in that answer deny his right to select either of those squares. As to the square 743, which is the only one in which Morris & Greenleaf ever held any definite interest, they aver that all their interest therein, consisting of one moiety thereof, has been conveyed to him. That as to the square 696 and 730, the complainant was expressly prohibited from selecting them by the contract of the 10th of March, 1795; and that neither of the squares 699, 730, 696, and north of 697 are mentioned in the complainant's selection of December 5th, 1795, nor in any former selection pretended to have been made by him; that neither of those squares ever belonged to M., N. & G. or either of them, nor are included in the 6,000 lots bought by Morris & Greenleaf of the commissioners, or have been apportioned to them or either of them, or can of right be claimed by them, or either of them, under any contract.

To this answer there was a general replication.

The bill of Pratt and others against Duncanson and Ward was originally filed to obtain an injunction to prevent Duncanson from selling certain squares which he had advertised for sale under a mortgage dated the 12th of September, 1795, given to him by Morris, Nicholson & Greenleaf to indemnify him against the return of certain bills of exchange which he had drawn for their accommodation for £12,000 sterling, £7,600 sterling of which had been taken up by the defendant, Ward, with the funds of Greenleaf, and the residue by Greenleaf himself; and to obtain a conveyance of those squares to the complainants who were the assignees of Morris, Nicholson & Greenleaf's equity of redemption. Those squares were all included in the prior mortgage to Thomas Law.

After Duncanson and Ward had filed their answers, and testimony had been taken in the cause, by which it appeared that the facts stated in the bill were true, William Campbell filed a bill against all the parties to the cause, viz., Pratt and others, assignees of Morris, *Nicholson & Greenleaf, and Duncan- [***473** son and Ward, in which bill (which he calls a bill of interpleader) he sets forth his attachment of the squares included in the mortgage to Duncanson, the condemnation thereof by the judgment of the Court of Appeals of Maryland (while the city of Washington was under the jurisdiction of Maryland), the *fieri facias* issued upon that judgment, and his purchase of the squares at the sheriff's sale; whereby he avers he acquired the equity of redemption of those squares. He states that the bills mentioned in the mortgage had all been discharged by Morris, Nicholson & Greenleaf, or one of them, or with their funds, and the property thereby exonorated; and prays for a conveyance thereof to him, and for general relief.

The defendants, Pratt and others, in their answer, admit that they have heard that the complainant, Campbell, claims the lots mentioned in his bill, by virtue of a pretended judgment of condemnation upon certain pretended attachments issued upon certain pretended claims against Morris & Nicholson; but they deny the validity of those claims and of all proceedings founded thereon; and aver that if any such judgments of condemnation have been obtained, they were obtained, as they believe, by fraud and imposition practiced upon the

court rendering such judgments, by producing to such court certain pretended deeds of release fraudulently executed by Thomas Law (meaning the releases mentioned in the bill of *Pratt and others* v. *Law and Campbell*). They aver that they were not parties to such judgments, and cannot be bound thereby. That the proceedings exhibited by the complainant appear to be proceedings at law, and not in equity; and therefore, that if the complainant has any title under those proceedings, it must be a title at law, and his remedy is at law and not in equity; and that no proceeding by these defendants against Duncanson and Ward in equity can injure the complainant's title at law, if any he has. They therefore deny his right to relief in equity, and contend that the court, as a court of equity, has not jurisdiction in the case stated by the complainant in his bill. They do not admit that any valid attachment was laid on the property before the assignment from M., N. & G. to them. They aver that on the day before the date of Campbell's attachment, Green-
474*] leaf, being a large creditor *of Morris & Nicholson, caused attachments in his name, but for the use of these defendants, to be laid on the same property; which attachments remained in full force (if the property was liable to attachment for the debts of Morris & Nicholson) until and after their assignment of their interest therein to these defendants, when they, having by the assignment obtained all the benefit which they could have obtained by prosecuting the attachments to judgment of condemnation and sale, caused the attachments to be dismissed. And therefore that if Campbell could claim any title in equity under his attachments, these defendants have a prior claim in equity by virtue of their prior attachments, and the assignment from Morris, Nicholson & Greenleaf. They deny that the legal title was ever in Morris & Nicholson, or either of them, but was in Greenleaf alone, until conveyed to Thomas Law by the mortgage of the 4th of September, 1795, in whom it remained until his releases of the 4th of September, and 5th of October, 1797, which releases, if valid, enured to the benefit of these defendants.

As to certain squares contained in the mortgage to Duncanson, viz., the square east of 546, the square east of 547, the squares 549 and 596, the square east of 596, and the square 597, they aver that long before Campbell's pretended attachment, viz., on the 20th of June, 1796, Morris & Nicholson conveyed to the said Greenleaf all their interest therein for a valuable consideration, since which time M. & N. have never had any interest therein.

They aver that the complainant had notice of all these facts at the time of his purchase at the sheriff's sale under his attachment.

They contend also that if the complainant could, by any process at law, attach the equity of redemption, yet he can have no remedy in equity, unless he has offered and can show himself able to redeem the property by a compliance with the contract between Law and M., N. & G., which he has not done.

They say they have heard, and believe that the complainant's pretended attachments were
475*] founded on notes *of M. & N. purchased in market at a great discount as an object of speculation, with a view to take the chance of such an attachment; and they are advised that if the complainant should in equity have a prior lien on the property, he could not claim, in equity (as against these defendants who are *bona fide* creditors of Morris & Nicholson, and purchasers of their equity of redemption for a valuable consideration, and who are seeking for satisfaction out of the same fund) more than the amount of money actually paid by the complainant for the said notes and bills, with lawful interest thereon.

One of the defendants, John Miller, Junior, assignee of Greenleaf under the bankrupt law of the United States, answering separately, for himself, states that the bills for £12,000 sterling, in the bill mentioned, were sold and the proceeds thereof equally divided between Morris, Nicholson & Greenleaf, each of whom were bound in equity, as well as by agreement, to take up one-third of the amount if they should come back protested. That they did come back protested; that Morris & Nicholson wholly failed to take up any part thereof, but the whole was paid by Greenleaf with his own separate funds, and that Morris & Nicholson are still indebted to him for two-thirds of the amount of the £12,000 sterling, with interest, charges, damages and costs of protest, and were also otherwise largely indebted to him at the time of the attachment. That upon taking up the bills, Greenleaf informed Duncanson thereof and forbade him to release the mortgage, on his intimating a design so to do, and requested him to retain the same as a security to him (Greenleaf) for the two-thirds of the amount of the said bills, which Duncanson agreed to do; and thereby became in equity a trustee of the mortgage for the benefit of Greenleaf; and this defendant, as his assignee, claims a right to stand on the same equitable ground as Duncanson would have stood upon if the bills had not been taken up, so far as respects two-thirds of the amount of the bills, with damages, &c., and therefore to have a prior equity to that of the complainant, if any he has.

There was evidence tending to show that Mr. Law made a selection of squares within the time stipulated. And that the public property in those squares which *Morris & [*
476 Greenleaf had contracted to purchase of the commissioners, was more than sufficient to satisfy Mr. Law's contract. That the commissioners had conveyed to him about 2,000,000 of square feet; and that it was probable they would have conveyed the remaining 400,000 square feet, also at the same time, if Mr. Law would have taken them out of the squares contained in his first selection. No tender, however, was made to him of the balance out of those squares, and there was evidence that Morris, Nicholson & Greenleaf had acquiesced in Mr. Law's claim to have part of the property which Greenleaf had contracted to purchase of Mr. Carroll, although neither Greenleaf nor Morris & Greenleaf ever had any right of selection in that property. There was also evidence that it was the universal practice of the commissioners, in selling lots, to charge each lot with its proportion of the alley laid out for the general benefit of the lots in the squares; and that such practice had been universally acquiesced in.

With regard to the opinion of the Court of

Appeals of Maryland upon the subject of Campbell's attachment, there was evidence that the counsel for Morris & Nicholson had written a letter to Judge Rumsey, the Chief Judge of the Court of Appeals of Maryland, requesting to know the extent and ground of the opinion of the court upon which the judgment was rendered; and received from him the following answer:

"The Court of Appeals signed a regular "judgment under their hands. It does not con- "tain the point upon which they gave it; but "my brethern thought the covenant for a quiet "enjoyment[1] was a lease for years, which was "an interest subject to attachment, and this in- "fluenced their judgment and they gave it ac- "cordingly. The opinion (whether a fee-sim- "ple, or an estate for years) will not alter the "nature of the judgment, which, in my opinion, "will be only of such interest as the party had "in the estate, and, if tried in ejectment, can "only operate so far. I own, privately I was "of opinion that an attachment ought to lie "against a mortgageor's interest, because he is **477***] "considered, in chancery, as the *owner; "because I would not send a man to chancery "in so plain a case where there ought to have "been conformity in law; and becausc all men "would secure themselves under this artifice. "This, also, was agreeable to the practice of the "city of London, where an equitable interest is "attachable. But on this the judges gave no "opinion. Sufficient to them was it, that in "their opinion any interest was attachable, and "upon ejectment this would have been dis- "closed.

"In conformity to my opinion I pointed out "a case or two, that was in my common place "book, to Mr. Shaaff, that indicated an equita- "ble interest attachable.

"But this was done as an individual, not as "a judge; but, being at the time of judgment, "he might have mistaken. At the same time "I remarked, and do so now, that the dis- "tresses of my family and my own state of "health were such that I could not be so much "master of the subject as I wished.

"You were wrong in delaying opening the "points so long, in which you obliged the "court to give a judgment so late in the cause. "And wherein is their judgment (hastily ob- "tained) better than that of other courts? It "quite destroys the use of a court of the last "resort.

"I have opposed, I shall hereafter oppose, "this practice *totis viribus, ergo caveto.*

"There is no impropriety in asking the "court's opinion; they always wish their senti- "ments to be known; and will, I hope, in a "land of law and liberty, always be willing to "disclose them when required.

"I am, &c.

"1st March, 1801."

These causes having been heard together as one cause, the court below decreed as follows:

In the case of *Pratt and others* v. *Law and Campbell*, that the complainants' bill be dismissed.

478*] *In the case of *Law* v. *Pratt and others*, that the defendants should pay to the complainant on or before the 1st of April, 1814, $25,832.88, being the original purchase money for the part not conveyed, with interest from the 3d of December, 1794, and in default thereof, that the mortgaged property should be sold to raise the same, &c.

In the case of *Pratt and others* v. *Duncanson and Ward*, no decree appears to have been made.

In the case of *Campbell* v. *Pratt and others* (assignees of Morris, Nicholson & Greenleaf), and Duncanson and Ward, the defendants, Duneanson and Ward, never answered the bill, nor was it taken for confessed against them, nor was the bill dismissed or abated as to them, but the court below decreed "that the defend- ants," Pratt and others, "and William M. "Duncanson, and Samuel Ward, release, con- "vey and transfer to the complainant, Wil- "liam Campbell, all their interest and estate in "the squares and lots of land sold under the "complainant's attachment, as mentioned and "set forth in his bill; and that the said "complainant, his heirs and assigns, be for- "ever quieted in the title, possession, and en- "joyment of said squares and lots, against all "the claims, interest and estate of the said de- "fendants."

From these decrees Pratt and others appealed to this court.

The cases were argued at great length by *Jones* and *P. B. Key* for the appellants, and by *J. Law*, *F. S. Key* and *Pinkney* for the appellees, Law and Campbell.

In the case of *Law* v. *Pratt and others*, the argument turned almost entirely upon questions of fact.

In the cases of *Pratt and others* v. *Law and Campbell*, and *Campbell* v. *Pratt and others*, and *Ward and Duncanson*, the following questions were made:

1. Whether Campbell, by the judgment of condemnation in the Court of Appeals of Maryland, and the proceedings *under it, ac- [***479** quired Morris & Nicholson's equity of redemption in the squares attached.

2. Whether J. Miller, the assignee of Greenleaf, had a prior equitable lien upon the squares mortgaged to Duncanson, to the extent of the two-thirds of the amount of the bills of exchange secured by that mortgage.

3. Whether Campbell was bound to disclose the consideration he gave for Morris & Nicholson's notes, upon which he obtained the attachments.

P. B. Key, for the appellants, contended,

1. As to the first point, that nothing was condemned under those attachments but the legal estate of Morris & Nicholson, if they had any.

An equitable estate is not liable to attachment or execution under the laws of Maryland.

The judgment of the Court of Appeals of Maryland, in this case, does not purport to condemn the equity of redemptionn, or to designate what interest in the land Morris & Nicholson had.

It appears by the letter from Judge Rumsey, the Chief Judge of that court, that the majority of the court was of opinion that the covenant in the mortgage to Mr. Law, that Morris, Nicholson & Greenleaf should quietly enjoy the land until default made, gave them a legal estate, in

1.—The mortgage from Morris, Nicholson & Greenleaf to Mr. Law, contained a covenant that they should quietly enjoy the mortgaged property, until the condition of the mortgage should be broken.

the nature of an estate for years, which was liable to condemnation; and that the court intended to condemn nothing more than the legal estate, whatever it might be, which Morris & Nicholson had in the land at the time of the attachment. That it was the legal, and not the equitable estate, which they considered liable to condemnation, appears from the language of the judge. "But on this" says he (meaning, on the question whether an attachment ought to be against a mortgagor's interest), "the "judges gave no opinion. Sufficient to them "was it that, in their opinion, any interest was "attachable, and upon ejectment this would have been disclosed." Now, no interest could, in Maryland, have been maintained upon **480***] ejectment, but a *legal estate; which shows that the Court of Appeals contemplated the condemnation of a legal interest only. This is sufficient to show that the judgment of the Court of Appeals is not conclusive evidence that the equity of redemption of Morris & Nicholson was affected by the attachment.

By the construction which the courts of Maryland have uniformly given to the British Statute of 5 G. 2, making lands in the colonies liable for debts, nothing but the legal estate is liable to execution at law. The rule is the same in England. (2 Atk. 292, *Plunket* v. *Penson;* 3 Atk. 200, *Shirley* v. *Watts;* 3 Atk. 739, *Burden* v. *Kennedy.*) The act of assembly of Maryland, 1794, ch. 60, sec. 10, is founded upon this known and acknowledged rule of law. It recites that, "whereas, it often occurs that per- "sons against whom judgments or decrees are "obtained, hold and possess, or claim lands, "tenements, or hereditaments, by equitable "title only, and the creditor or creditors of such "persons are often without remedy, either at "law or in equity," and then goes on to give the chancellor power to decree a sale of the equitable title; and to give the purchaser all the remedies which the person had whose equitable title is thus sold.

The act of Maryland in 1810, ch. 60, which, for the first time subjected equitable estates to legal process, was passed ten years after the judgment of the Court of Appeals in this case, and is strong, if not conclusive evidence, that such estates were not before that time liable to such process.

But if an equity of redemption be liable to attachment, yet the complainant's equity is prior to that of Campbell, for they had a prior attachment, in the name of Greenleaf, against Morris & Nicholson, which was continued until they obtained an assignment of that equity of redemption which was the object of their suit. If I attach the personal property of a man, and before condemnation he sell it to me in satisfaction of my claim, I am under no obligation to proceed with my suit to judgment. I have already obtained the fruit of my action. If he does voluntarily what the law would compel him to do, it is sufficient.

481*] *2. As to the prior equity of Miller, assignee of Greenleaf, under the bankrupt law of the United States.

Greenleaf conveyed his rights in the Washington property, on the 13th of May, 1796, with certain exceptions, reservations, and conditions.

That conveyance was expressly made subject to this mortgage to Duncanson. All the rights of Greenleaf, growing out of those exceptions, reservations and conditions, were assigned, by the bankruptcy, to Miller, one of the defendants to Campbell's bill, and one of the complainants in the bill against Law & Campbell.

The bills secured by the mortgage to Duncanson were sold, and the proceeds equally divided between Morris, Nicholson & Greenleaf, each of whom agreed to take up one-third of the amount thereof if they should return protested. They returned protested, and Greenleaf was obliged to take up the whole. Upon doing this, he requested Duncanson not to release the mortgage, but to retain it as his security. This Duncanson agreed to do, and thereby became a trustee, in equity, of the mortgage for the benefit of Greenleaf.

Ten of these squares, mortgaged to Duncanson, had been conveyed by Morris & Nicholson to Greenleaf, in June, 1796, subject to Law's and Duncanson's mortgage; Morris & Nicholson, therefore, at the time of the attachment, had no equity of redemption in those ten squares. Four other squares are claimed by Ashley, another of these defendants, to whom Morris & Nicholson had assigned their equity of redemption prior to Campbell's attachment.

3. As against these defendants, who are seeking satisfaction out of the same fund with Campbell, he ought not, even if he has a prior lien, to be permitted to enforce it beyond the amount of what he paid for Morris & Nicholson's notes, with interest. Equity will not permit him to profit by our loss. "Equality is equity." (Maxims in Equity, p. 9.) "A stran- "ger who buys in a prior incumbrance, shall "be allowed only what he really paid, as "against other incumbrancers." (1 Vern., 476.) "But as against the owner of *the es- [***482** "tate, who made the incumbrance, or his heir, "he shall be allowed the whole that is due "upon it."

Morris & Nicholson, it is true, could not set up this defense; but we, who are their *bona fide* creditors, and assignees of their equity of redemption for a valuable consideration, have a right to redeem Campbell's incumbrance by paying him his purchase money and interest.

F. S. Key, for Campbell, relinquished the claim as to the ten squares conveyed to Greenleaf, and the four squares assigned to Ashley.

As to Miller's claim to a lien in consequence of Greenleaf's payment of the bills, he contended that no such lien was thereby created, or could be created, without an actual assignment of the mortgage. The condition of the mortgage was, that Morris, Nicholson & Greenleaf, or one of them, should take up the bills. One of them did take up the bills and thereby the mortgage was discharged. The lien no longer existed, and the property reverted to Morris & Nicholson.

As to the claim that Campbell should be compelled to take only what he gave for the notes, he contended that the judgment of the Court of Appeals had ascertained the amount of this debt, and that the judgment could not now be opened.

As to the question whether an equitable interest could be attached, he relied upon the judgment of the Court of Appeals as conclusive.

As to the prior attachment by Greenleaf, for

the use of Pratt and others, he contended that it created no lien inasmuch as it was not prosecuted to judgment. That the attachment and the deed of assignment could not be connected together so as to preserve the inchoate lien which was commenced by the attachment.

Pinkney, on the same side.

Campbell contends, not only that he has an equitable, but a legal title. His attachment gave him a legal title to an equitable thing. If **483***] it did not, it gave him no title. *Upon the great principles of justice, real property is as much liable for a man's debts as personal. Uses were never extended in England until the statute of H. 8. And the courts always refused to extend trusts until the statute of frauds authorized them so to do. Nor could an equity of redemption be affected at law.

But this question here turns wholly upon the local law of Maryland, and the construction of the statute under which these attachments were issued. It is the act of 1795, ch. 56, which authorizes a justice of peace, &c., to issue his warrant to the clerk of the court requiring him to issue an attachment "against the lands, tenements, goods, chattels and credits" of the debtor.

The single question is, whether these were the lands of Morris & Nicholson at the time of the attachment.

From the time of the colonization of Maryland, its jurisprudence has been divided between courts of law and courts of chancery. If the statute speaks the language of the courts of chancery, as well as of law, the case is clear. In chancery, the mortgageor, and not the mortgagee, is owner of the land. The equity of redemption descends to the heir; the testator may devise it; his wife is entitled to dower; the husband is tenant by curtesy; in short, the mortgageor is owner of the land, as against all the world except the mortgagee. The legislature, by its acts, speaks to the whole jurisprudence of the state, not to one branch only.

A trust estate was liable to execution and attachment long before. Why should not an equity of redemption be equally liable? The act expressly makes credits liable to attachment, which was as contrary to the course of the common law as to subject equitable interests in land to condemnation.

Lord Mansfield, in a case in Douglass's reports (Doug., 610) says, it is an affront to common sense to say that the mortgageor is not the real owner. The equity of redemption is the substantial ownership in the view of all the world.

The act of Maryland in 1810 applies to exe-**484***] cutions *only, and not to attachments, upon equitable interests in lands. The legislature supposed the case of attachments already provided for.

The act of 1794 only shows that the legislature thought equitable interest in lands ought to be as much liable for debts as legal interests.

They also thought it expedient to give the purchaser of an equitable interest under the decree of the court, all the remedies legal as well as equitable which the debtor formerly had.

The case of *Waters* v. *Stewart* (1 Caine's Cases in Error, 47) is precisely analagous to this. The statute of New York, upon which that case arose, subjected to execution, "lands, tenements and real estate;" under which expressions it was decided that an equity of redemption, of a mortgage in fee, was liable to be sold by virtue of a *fieri facias*.

It is said, however, that the Court of Appeals in Maryland was of opinion that the covenant for quiet enjoyment was equivalent to a lease for years, which is a legal estate, and that they did not mean to condemn anything more than that legal interest. But that covenant created no legal estate. No specific term was mentioned during which Morris & Nicholson should hold it. It was not an estate for years. If anything was condemned by the judgment of the Court of Appeals, it must have been the equity of redemption; for that was the only interest in Morris & Nicholson at the time of the attachment. To that equity of redemption Campbell acquired a legal right.

But it is said that Campbell purchased the notes of Morris & Nicholson at a discount, and ought to be permitted to enforce his lien only to the extent of his purchase money and interest. There is no evidence of the fact; but if there was, yet if he was guilty of no fraud, he became the creditor of Morris & Nicholson to the full amount of the notes; he was *pari gradu* with the other creditors, and he who got the first attachment was in the best situation. Campbell obtained the first effective lien. That of Greenleaf was only incipient. *It was [***485** abandoned before it was complete. The assignment cannot be connected with it. The claim under the attachment is a claim in the *post;* that under the assignment is a claim in the *per*. No two claims can be more distinct. They cannot be amalgamated, nor is the latter a continuation of the former. The deed does not purport to be a continuation of the lien; nor could it transfer what Morris & Nicholson did not possess,. *Non dat qui non habet.*

But it has been objected that the judgment cannot be executed by a *fieri facias*, which is applicable only to legal estates in possession. But if the condemnation of an equity of redemption is sanctioned by the act, the sale of that equity under a *fieri facias* is equally sanctioned. The one is a necessary consequence of the other. An execution is as natural to a decree in equity as to a judgment at law. In both cases the thing is to be taken to satisfy the debt.

This is no longer a mere equitable lien. It is a right of property, derived from the attachment, the judgment, the execution, the sale, and the purchase, which it may be necessary for a court of equity to effectuate; but the right is a legal right.

This was a proceeding *in rem*, and the judgment of the Court of Appeals of Maryland is conclusive against all the world.

As to the rule cited from Maxims in Equity, p. 9, and found also in 1 Vern., 479, that "a stranger who buys "in a prior incumbrance "shall be allowed only what he really paid, as "against other incumbraneers;" its authority is doubtful. It is questioned by two cases; one in Salkield, cited in the margin; and the other in 2 Atk., 54, *Mullet* v. *Park*. And the doctrine applies only to agents, trustees, heirs at law, or executors.

Campbell's incumbrance was a legal one. He had a statute title.

P. B. Key, in reply.

There cannot be a legal title to an equitable **486***] thing. It *is a solecism. No legal right can exist without a legal remedy. It is true there may be tenaut by courtesy in an equity of redemption; but he has no legal estate. He has a just title, but it is an equitable title. His remedy is in equity, and not at law. A trust estate may be sold under a *fieri facias*, because such a proceeding is expressly authorized by the statute of frauds. The general rule is that equitable rights must be enforced by equitable means, aud legal rights by legal means.

The case in New York was decided upon the statute of that state, and a long previous practice under the statute of 5 G. 2, c. 7.

The judgment of the Court of Appeals of Maryland does not purport to decide what sort of a title Morris & Nicholsou had in the property attached. It was sufficieut for them that Morris & Nicholson were in possession. They cousidered that possession under a covenant for quiet enjoyment, as a legal estate; and they gave judgment of condemnation in order that Campbell might make out his title in ejectment. So says the Chief Judge of that court in his letter, and that opinion is perfectly consistent with the terms of the judgment. No inference can be drawn from the judgment that the court was of opinion that an equity of redemptiou was subject to attachment; aud the judge affirms that on that point the court gave no opinion. The point is therefore entirely open for discussion. No case has been produced from Maryland iu which an equity of redemption has been sold under a *fieri facias* or attachmeut. The want of such a case is strong evidence of the universal opinion of the courts of judicature in Maryland upon that point; and the statutes of 1794, c. 60, and 1810, c. 160, seem conclusively to show what was the opinion of the legislature.

March 11. JOHNSON, *J.*, delivered the opin ion of the court as follows:

In order to present a distinct view of the uumerous questions which arise out of this intricate and voluminous case, we will pursue them through a history of the transactions in which they originated, and consider them in order as they occur.

487*] *It is well known that at the founding of this city, the proprietors of the soil gratuitously relinquished a proportion of their property to commissioners appointed to receive it.

Morris, Nicholsou & Greenleaf purchased city lands to the amount of fifty millions of square feet, to which quautity they were entitled on the 3d of December, 1794. Of this quantity 6,000 lots were purchased from the commissioners; 220 lots of Dauiel Carroll, and the residue of other persons not necessary to be specified in this case.

In the agreement with the commissioners they stipulate to choose the lots by squares; to build twenty houses *per annum* for seven years; and until the year 1796, not to sell without the building stipulation.

In the agreement with Carroll, the divisiou was to take place by lots; not by selection, but alternately in order; and a variety of building and other stipulations were entered iuto, which, not being complied with, Carroll re-entered on his land, and the contract was finally abandoned.

On the 3d of December, 1794, Law entered into a contract with Morris, Nicholson & Greenleaf for the purchase of 2,400,000 square feet of city land at the rate of five pence, Pennsylvania currency, per foot, for which Law paid them £50,000, and took their bond to convey him that quantity of land, in the penalty of £100,000.

To secure this boud the mortgage was given which is the principal subject of these suits.

On the 13th of May, 1796, Greenleaf conveyed all his estate and interest in the Washington lands to Morris & Nicholson, who, on the 26th of June, 1797, executed an assignment of all their interest to these complainants (Pratt and others). Greenleaf afterwards becoming bankrupt, John Miller, one of these complainants, was made his assignee.

In the several bills and answers relative to these transactions, there are various contradictory assertions on *the subject of [***488** fraud; but as there is no evidence to sustain any charge of that kind, and all the various writings executed between the parties appear fair, unimpeached and reconcilable, we shall wholly reject the cousideration of that subject, and dispose of the case upon the unequivocal meaning of the contracts of the parties, and their various acts, which have relation to the execution of those contracts.

By the bond to make titles, dated Dec. 3, 1794, Morris, Nicholson & Greenleaf are simply bound to make titles to Law, for the specified quantity of laud in the city of Washington, leaving the situation of it, and the mode of selection entirely undefined, and, of coursc, retaining it to themselves.

On the day following, the same parties entered into articles of agreement, having relation to objects which appear not to have entered into their contemplatiou originally, and which, on the face of them, bear the appearance of perfect reciprocity. An option is given to Law to decline his purchase in eighteen months, and Law stipulates that if he should not then decline it, he shall be bound to improve every third lot pursuant to the original coutract of Morris & Greenleaf with the coumissiouers, iu a specified time.

On the 10th of March, 1795, Law purchases other concessious. By reliuquishiug his right of declining the purchase, he is allowed the right of selecting the property to be conveyed to him "excepting water property, and except- "ing such squares as are now appropriated, or "respecting which the said Morris, Nicholson "& Greenleaf have made arrangements." A list of the excepted squares is subjoined, numerically distinguished.

Morris, Nicholson & Greeuleaf also stipulate to secure Law in the discharge of their coutract by a mortgage of other lands in the city "which "are now in their possession, uutil they can "give good and sufficient titles to the said Law "of such property as he may select, and of "which the titles are not already vested in "them." But Law is to select by squares; to select in ninety days, and to build in conformity with Morris & Greenleaf's contract with the commissioners.

*From this contract emanated the [***489** mortgage of the 4th of September, 1795.

It was evidently incumbent on Law to make his selection in ninety days, or show some adequate cause to excuse him from the discharge of that part of his agreement. The evidence that he did make his selection in the prescribed time is contained in his amended answer, drawn from him by express allegations in the bill, and an exception to his answer, in which he swears that his selection was made in due time, and that a copy of his selection, thus made, was, in due time, communicated to the other parties. This fact, therefore, being uncontradicted by any evidence, and confirmed by the solicitude expressed by Law, in all his correspondence, to obtain his titles, must be considered as established, and throws upon the opposite party an obligation to show, either that he complied with the selection so made or some sufficient reason why it was not complied with. For these purposes they contend that it was in part complied with, and that it was the fault of Law himself that it was not wholly complied with.

It appears that on the 14th of March, 1796, there were conveyed to Law 792,939 square feet of ground; and on the 20th of July, 1797, 1,155,857 square feet.

In these conveyances Law acquiesces, with two exceptions:

1. That 128,223 square feet contained in squares 727, 789, and 729 have since been recovered of him by due course of law.

2. That in the computation of square feet supposed to be conveyed to him, are included the superfices of the alleys passing through those squares in which the entire squares were not conveyed.

To understand this objection it is necessary to remark that, in the division between the commissioners and the proprietors, it frequently happened that several lots in a square were assigned to the proprietor. In the selections made by Morris & Nicholson, and in those made by Law, the exigency of the agreement to choose **490***] by *squares was considered as gratified by the choice of all that part of a square which had been allotted to the commissioners.

To the first exception, the assignees reply that Law was conusant of the defect of title in the squares alluded to; that he took them with his eyes open, and therefore cannot now claim indemnity.

But we do not subscribe to this opinion. There is no evidence in the case that he did agree to take these squares *cum onere*. The letter of the 1st of September, 1799, proves nothing of the kind. The condition of the obligation is not complied with by a conveyance of a defective title.

The obligation to convey a good and sufficient title with a general warranty will carry with it the obligation to refund in case of eviction. Law's knowledge of the incumbered state of the title is of no consequence whilst the opposite party was under an obligation to make that title good and sufficient. The assignees are, in this respect, in no better situation than the original parties. Their rights and interests are altogether subordinate to those of Law. They take the property in every respect incumbered with the obligation to make good the contracts of Morris, Nicholson & Greenleaf with him, not only on general principles, but by express exception in favor of existing liens and incumbrances.

With regard to the allowance for the superficies of the alleys, we remark, that if the alleys be comprised under the denomination of streets, the conveyance of the ground which they cover would be void, and unquestionably will not amount to a gratification of the contract. But from the President's instructions of the 17th of October, 1791, there is reason to think that they were rights of way appurtenant to the lots of each square respectively. If this claim of Law's extended to the alleys in those squares, of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think the allowance ought to be made; for Law certainly has not acquired a title in fee-simple in those alleys.

*2. It is contended that it was in Law's [***491** power to have obtained a full performance; and they charge him with various acts to which alone they attribute the non-compliance on their part.

1. His frequent varying of his selections.

On this subject there is a great variety of evidence and many contradictory allegations. But upon the whole, it appears that after acquiescing in a number of changes, the selections about the last of the year 1796, settled down to 699, 696, and half of 743, and the deficiency, if any, to be supplied out of squares 730, and north of 697.

But Law's inclination to vary his selections furnishes no sufficient excuse; for a tender of a conveyance conformably to any one of those selections would have been a performance.

On the 5th of December, 1796, it appears a deed was tendered, and this is asserted to have been a legal performance of their part of the agreement. Law contends that it was not because it contained the building stipulation, a distinct, independent contract, and which ought not to have been made a part of this conveyance. This question appears at that time to have been submitted to counsel and decided in favor of Law. Whether correctly or not, it is now too late to inquire; for it appears to have been acquiesced in, and conveyances executed for nearly the whole of the same land which was contained in the tendered deed. The conveyance tendered cannot, even if in unexceptionable form, be now considered as a performance for the balance unconveyed, since the land contained in it constitutes a great part of that for which credit is given upon the agreement; and after receiving conveyances in a different form, it is surely too late now to contend for the sufficiency of those tendered.

3. It is contended that the selection of squares 696, 699, and 743 was not sanctioned by the contract of March, 1795, and therefore Morris & Nicholson were under no obligation to convey.

It appears that these squares were situated in Carroll's *land, and, in the division [***492** between Carroll and the commissioners, were assigned to the former. They thus became a part of that land out of which Morris & Nicholson were to be entitled to have conveyed to them their 220 lots, and it is contended that Law's right of selection could not extend to these lots because they were to be assigned al-

ternately; whereas, Law's right of selection was to be made by squares out of those in which Morris & Greenleaf had the right of selection. It appears, however, that Morris & Nicholson acquiesced in Law's right to select from Carroll's land, and in a letter of March 19th, 1797, explicitly acknowledge it.

The solution of this apparent inconsistency is to be found in an observation previously made on another point in this case. A selection by squares was in practice considered by these parties as complied with when made of all those lots contained in any given square which were owned by the party bound to convey. There could then be no reason for excluding Law from enjoying his right of selection from among the squares contained in Carroll's land. The objection certainly comes too late at this day. In Morris's letter to Mr. Cranch, of February 22d, 1796, is contained an express recognition of the correctness of that selection, or at least of his acceptance of it in lieu of one more correctly made.

This act with its attendant consequences must be considered by this court as giving legitimacy to the selection, though it had been otherwise indefensible. Had Law been then informed that this selection was not authorized by contract, he would have been thrown on his right to amend his selection, at a time when he might have done it with little prejudice to his interest. But at this time it is surely too late to retract an assent given nearly twenty years ago.

With regard to the two other squares selected, as it was only provisional, to make up any deficiency that might exist after conveying the three positively selected; until the three absolutely chosen were conveyed, nothing final could be done with these.

The last objection is founded on Law's failure to comply with his building contract.

493*] *But to this we auswer: Law was not restricted as to the specific lots on which the buildings were to be erected. His choice, therefore, extended over the whole, and the obligation was not complete until the whole land was conveyed to him. We are of opinion that the selection was sufficiently proved; and that Morris, Nicholson & Greenleaf were in default with regard to the deficiency of laud. On them, therefore, must fall the consequences of a state of things produced by their own default.

But there are other reasons, furnished by the case, in support of this opinion.

Law had advanced very considerably in the discharge of his building contract. He asserts (and it is hardly possible to believe otherwise) that he was originally induced to enter into that stipulation in consideration of similar stipulations entered into by Morris, Nicholson & Greenleaf with the commissioners and Carroll, and urges their failure as his excuse in part for desisting from building. But be this as it may, it is impossible for the ingenuity of man to devise any expedient by which a means of comparison can be resorted to that would enable this court, or a jury, to ascertain the injury resulting from this cause, or the sum in damages by which it may be compensated. We therefore put the building contract entirely out of the case.

It then only remains to decide what remedy Law is entitled to.

It is contended in behalf of Morris, Nicholson & Greenleaf that it should be by specific performance or by an issue *quantum damnificatus;* that, at any rate, it should not be by a decree to refund the purchase money with interest, as the value of the residue was necessarily diminished by the gratification of so large a proportiou of his right to select.

To obtain a specific performance is no object of Law's bill; it is incumbent on the opposite party, therefore, to show some ground of right to force such a decree upon him. But considering, as we do, that Law is not in default, there can be no reason to decree a specific performance *when everything shows that it [***494** would be productive of nothing but loss. Besides, a specific performance, such as would answer the ends of justice between these parties, has now become impossible. Carroll's property is resumed; a large proportion of the land, purchased of the commissioners, sold under legal process, and thus the benefit of selection so diminished that if performance were to take place, it must take place stripped of this its most valuable appendage; whilst the diminution of the value of property, and the change of circumstances, produced by a lapse of twenty years, would render it mockery to call any execution specific.

An issue *quantum damnificatus* it is certainly competent to this court to order in this case; but it is not consistent with the equity practice to order it in any case in which the court can lay hold of a simple, equitable, and precise rule to ascertain the amount which it ought to decree.

In this case, the failure on the part of Morris, Nicholson & Greenleaf certainly was as early as December, 1796, at a time when there is no reason to suppose that any diminution in the value of property had taken place.

And as to the argument that the value of the right of selection diminished in proportion to the exercise of it; that each subsequent choice was of less value than the preceding, we think it is a sufficient answer that Law never appears to have enjoyed the full benefit of his right of selection in consequence of the difficulties which appear at all times to have obstructed his getting titles from the commissioners or others. And finally, when his choice settled dowu upon the squares 727, 789 and 729, and on Carroll's squares 696, 699, and half of 743, he was evicted from the three former, and never could get the titles to the three latter. Now, these squares nearly make up his deficiency, and there is reason to believe they are among the most valuable of his choice. At any rate they appear to have been the favorite objects of his choice. We are therefore of opiniou that the rule of equity in this case is that adopted by the court below—to wit, refuuding at the rate of purchase according to the quantity actually deficient; but that interest is to be calculated only from the time when the selections were finally made, which we fix at 1st of January, 1797.

*With regard to the actual deficien- [***495**
cy, it is understood that there will be no difficulty in adjusting it, as the measurement and calculations of Mr. Kiug will be acquiesced in.

We must next determine in what manner the money to be decreed to Law, in pursuance of

the foregoing principles, is to be raised from the mortgaged premises; and this leads us to the connection between the interests of Law and those of Campbell & Duncanson.

Campbell was holder of the negotiable paper of Morris & Nicholson to a considerable amount.

Greenleaf had conveyed to Morris & Nicholson all his interest iu the mortgaged premises, so that each of them was entitled to an undivided half part of the equity of redemption. Campbell sued out an attachmeut against Morris aud Nicholson severally, under the laws of Maryland (as this part of the district was then under the jurisdiction of Maryland), and had it levied on sundry of these mortgaged squares, specifically designating them by their numbers. An issue was made up, and at the trial before the court to which the writ was returnable, the question was distinctly made whether the equitable interest of the defendants in these squares was the subject of attachment. That court decided that they were not; and the plaintiff appealed to the Court of Appeals to have their judgment reversed.

On the hearing before the Court of Appeals the decision of that court is reversed and the squares attached are specifically and numerically condemned to satisfy the debt due to Campbell. And finally, process issues out of that court, to the sheriff of the county, reciting the attachment and condemnation of these squares, describing them with equal precision, and commanding the sheriff to make, from the said lands, the money necessary to satisfy the judgment. Under this writ the squares so condemned were sold; Campbell becomes the purchaser; and Law, at the instance of Campbell, and without the privity of the assignees, executes a release to Morris & Nicholson, which is put on record; at the same time taking a bond of indemnity, from Campbell, against all consequences that might result from this act.

496*] *Much ability has been exhibited in argument ou the question whether an equitable interest in lands and tenements be the subject of attachment under the laws of Maryland. But we are of opinion that we are not now at liberty to enter into the consideration of that question. The decision of the Court of Appeals is final and conclusive on this point. The question was fully brought before them; and although it had not fixed the law, would have fixed the fate of these lands beyond reversal.

Some doubt is entertained, by one member of the court, whether the laws of Maryland go farther than to authorize the condemnation of this interest to satisfy the judgment so as to leave the plaintiff still under the necessity of applying to an equitable tribunal to effect a sale.

But the majority are of opinion that the attachment act, in making this interest tangible, makes it subject to the ordinary process of the law courts, and that in vesting in the courts in which the condemnation takes place, the power to issue execution as in case of other judgments, it has left it with those courts so to fashion its process as to meet the exigency of each case. In this case, the very special nature of the execution shows that it has been fashioned with great care and learning. We therefore hold the sale, under this execution, to be valid.

Some conclusions were attempted to be drawn, in favor of the assignees, from the inadequacy of the price at which the property sold, and from the following state of facts: Greenleaf had issued au attachment, to the use of the assignees, against this property of Morris & Nicholson, a day prior to that of Campbell. Subsequent to that of Campbell, Morris & Nicholson assign all their interest in this property to these assignees. Greenleaf's attachment was never proseeuted to judgment.

It is contended that this union between the prior lien and the interest attached, defeats the immediate lien.

But we cannot admit this conclusion.

*Levying an attachment has the [***497** double effect of creating a lien and instituting an action. But the lien is only inchoate; it awaits the judgment of the court for its consummation, and must fall with the suit. To decide otherwise would be to permit the defendant, by collusion, or his own act, to nullify the lien of the subsequent attachment.

As to the inadequacy of price, the evidence is full to show that it was produced altogether by the steps taken by the agents of the assignees to embarrass or prevent the sale, and by the supposed weight of the incumbrances resting upon the land. In this respect, therefore, there is no imputation to be cast upon Campbell.

With regard to the release, it is very evident that, as it was never accepted by the assignees, it ought in no wise to operate to their prejudice; nor ought Campbell to derive any benefit from it, as it was gratuitously proposed by him under an arrangement with Law. Give efficacy to this release, and consider how it will operate. Campbell purchases at a reduced price, subject to an incumbrance; but give effect to this release and he holds an absolute fee absolved from all incumbrance.

Again, the property mortgaged to Law is liable for the whole amount to be raised for his indemnity; but give efficaey to this release and whilst Campbell acquires an unincumbered estate on the one hand, on the other the residue of the mortgaged property (that of which the assignees have not been deprived by sale of the sheriff) must be sacrificed to raise the money due to Law. From this it will follow, either that a rateable abatement should be made by Law, proportionate to the squares by him releascd to Campbell, or that those squares should contribute their due proportion towards paying Law.

Before we proceed to apply these principles to the final disposal of the case, it is necessary to show in what manner the interests of Duncanson and Ward become involved with those of these other parties.

Duncanson, at the request of Morris, Nicholson & *Greenleaf, and for their use, [***498** drew bills on a variety of correspondents to the amount of £12,000.

On the 12th of September, 1795, Morris, Nicholson & Greenleaf executed a mortgage of eighteen squares in the city of Washington to indemnify Duncanson against the return of these bills. They were eighteen of the squares previously mortgaged to Law.

Of these bills about £7,600 were returned under protest as the property of Ward; and that sum, together with the damages, was paid,

on the 26th of December, 1796, to Ward by Greenleaf. No satisfaction was entered on the mortgage; nor any assignment demanded until a day long subsequent. The residue of the bills were also returned and paid by Greenleaf.

Thus circumstanced, whilst the mortgage appeared on record in full life when in fact defunct, as the purpose for which it was created had been answered, the attachment of Campbell was levied on thirteen of these squares, and they were finally condemned, sold, and purchased by him. After the sale, notice was given to Duncanson not to release, and that an assignment to Miller, the assignee of Greenleaf, would be demanded of him. The demand of Greenleaf on Morris & Nicholson, arising from taking up these bills, was contained in his assignment to Miller; and this payment is among the items making up the debit side of the account stated between Greenleaf and Morris & Nicholson.

Miller, the assignee, contends that he is entitled to such an assignment from Duncanson, and therefore to be considered in this court as entitled to all the advantages which he would have derived from such an assignment if actually made.

On the one hand, Campbell had, at the sale, all the benefit of this sum as an existing incumbrance upon the land. It was, in fact, so much credited on the purchase money for which it sold; but on the other, it is contended that it was a fraud upon the public to keep up the appearance of an existing mortgage on this property when it was in fact satisfied; that the agents of the assignees alone knew this fact, and good faith demanded of them that they should have avowed it.

499*] *We are of opinion that the answer to this argument is complete. The assignees did not conceive it to be a satisfied mortgage; they then supposed, and now contend, that an equitable interest in the security given for the payment of the bills resulted to Greenleaf for two-thirds of the sum paid by him on the bills and passed to them on the assignment. This reply, whether correct in point of law or not, certainly removes all imputation of fraud. But if it did not, what reason can be assigned why Campbell should take to himself a benefit from it? Had it been productive, in any mode, of injury or loss to him, it might have been urged with some plausibility; but there is no reason to suppose that any such effect has resulted from it. It could only operate to reduce the sales of the squares; and in this respect all the effects produced by it resulted to his benefit altogether.

One thing is indisputable; that if this mortgage be decreed satisfied, Campbell has acquired an interest which he never purchased, and acquired that interest in property which ought otherwise to belong to the assignees. It might, perhaps, be made a question whether the whole amount apparently secured by the mortgage ought not to be made the measure of compensation to the assignees; for to that amount it may reasonably be supposed the price of the property was reduced at the sale; to that amount were they damnified, and to that amount the purchaser was benefitted. But it would not be consistent with the nature of these purchases to apply that rule to them with strictness. The uncertainty under which a purchase is made, when made subject to an unliquidated incumbrance, gives such a purchase somewhat the nature of a speculation which the purchaser ought, to a reasonable extent, to have the benefit of, if it prove lucrative. It is, therefore, only on the ground of an equitable existing lien upon the mortgaged premises, or equitable claim upon Campbell, that the court can decree in favor of the assignees. And as Campbell has filed his bill of interpleader, in the nature of a bill to redeem, we think the court at liberty, when decreeing in his favor, to impose on him such equitable terms as the nature of the case suggests.

The foregoing reasoning proves that Campbell ought in conscience to make compensation to the mortgageor, *the former proprietor [***500** of the fee, for that part of the interest which the mortgage appeared to cover. He did not purchase it, and therefore, although strict right may secure to him the whole, he ought to be charged with a sum in compensation for the interest so acquired above what was proposed to be sold.

Again, had these bills not been taken up, and the holder prosecuted all the drawers and indorsers to insolvency, there can be no doubt that the holder would have been entitled to charge the mortgaged premises, in equity, with the payment of the bills. But what difference is there, in equity, between the case of any other holder of these bills and that of Greenleaf, who, when liable equitably only for one-third, was compelled to take up the whole, and did it with his own funds? It consists only in this: that the one becomes creditor for the whole; the other only for two-thirds.

Upon the whole, we are of opinion that the thirteen squares purchased by Campbell should be rateably charged with the payment of the debt resulting, under these transactions, from Morris & Nicholson to Greenleaf.

PRATT AND OTHERS, *Plaintiffs below*, v. THOS. LAW AND WM. CAMPBELL. } DECREE.

THIS cause came on to be heard, &c. Whereupon it is ordered, adjudged and decreed, that the decree of the Circuit Court for the District of Columbia in this case be reversed and annulled; and this court decrees, that the complainants shall be permitted to redeem the mortgaged premises, exclusive of those squares purchased by the said William Campbell, upon paying and satisfying to the said Thomas Law, at the rate of five pence Pennsylvania currency, per square foot, for the actual difference between the number of square feet conveyed to the said Law and the number of 2,400,000 square feet which Morris, Nicholson & Greenleaf were bound to convey, deducting from the number of square feet, said to have been conveyed to Law, the square feet covered by the alleys in those squares in which the entire square was not conveyed to Law, with interest on the sum so to be liquidated, calculated from the first day of January, 1797, at 6 per cent.

*And it is further decreed, that [***501**

towards paying and satisfying the sum so to be ascertained, the said William Campbell do pay and contribute a sum proportionate to the ratio which the squares purchased by him bear to the residue of the premises mortgaged to Law, in quantity of square feet, with interest thereon from the 1st of January, 1797.

That on payment of the said sum, the said Thomas Law shall reconvey to the complainants all those squares, or other mortgaged premises which were not sold as aforesaid; and to the said William Campbell all those squares which the said William Campbell attached and purchased as in bill and answer set forth.

And the court further decrees, that if the said William Campbell shall not, in six months after the liquidation of the sum to be paid by him and notice thereof, with interest thereon as aforesaid, pay and satisfy to the said complainants the sum so liquidated, then the said squares, so purchased by him, shall be sold under order of the said Circuit Court, to pay and satisfy that sum; and that this cause be remanded to the said Circuit Court for further proceedings necessary to carry into effect this decree.

PRATT AND OTHERS, *Def'ts. below*, v. THOMAS LAW. } DECREE

THIS cause came on to be heard, &c. Whereupon it is ordered, adjudged and decreed, that the decree of the Circuit Court be reversed and annulled; and this court decrees, that the said mortgaged premises, whereof the said Thomas Law prays foreclosure, shall be sold, under order of the Circuit Court for the District of Columbia, in the county of Washington, to pay and satisfy to the said Thomas Law so much of the sum adjudged to the said Law, in the case of these defendants against the said Law and W. Campbell, decided at this term, as will be proportionate to the ratio which the said portion of the said premises bears to that proportion of the said premises to which the said Law executed a release in favor of Campbell, as in bill mentioned; unless the **502***] said *complainants shall, in six months after liquidation of the said sum, and notice thereof, pay and satisfy to the said Law so much of the said sum as is, in this decree, ordered to be raised. Upon payment of which sum the said Law (shall) release to the said complainants his interest in the said premises.

It is further ordered, that this cause be remanded to the Circuit Court for the District of Columbia, in the county of Washington, for further proceedings to carry into effect this decree.

PRATT AND OTHERS, *Def'ts. below*, v. WILLIAM CAMPBELL. } DECREE

THIS cause came on to be heard, &c. Whereupon it is ordered, adjudged, and decreed, that the decree of the Circuit Court be reversed and annulled; and this court decrees, that whenever William Campbell shall pay and satisfy to John Miller, Junior, assignee of James Greenleaf, so much of the two-thirds of the sum paid by Greenleaf on the bills secured by the mortgage to Duncanson as will be proportionate to the ratio which the squares bought by Campbell subject to the mortgage to Duncanson bear, in quantity, to the whole 18 squares mortgaged to Duncanson, then the said Campbell shall hold the said squares so purchased by him, free and discharged of the said mortgage; and the said Duncanson, and the complainants shall thereupon convey and assign to the said Campbell all their right and interest in the said squares so purchased by him.

And it is further ordered and decreed, that if the said Campbell shall not within six months next after the liquidation of the sum to be paid by him and notice thereof, pay and satisfy the said sum to the said Miller, then the said squares so purchased by him shall be sold under order of the Circuit Court, and the proceeds thereof applied to the payment thereof; having regard, nevertheless, to any other existing prior lien upon the said squares; and this cause is remanded to the Circuit Court for further proceedings thereon to carry into effect this decree.

Cited—5 Wheat. 429; 2 Pet. 354; 14 Pet. 175; 8 How. 160, 161; 1 McLean, 65, 401; 2 McLean, 298; 2 Brock. 247; 1 Wood. & M. 113, 114; 2 Wood. & M. 221; 5 Cranch, C. C. 146.

[END OF FEBRUARY TERM, 1815.]

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl.	Atlantic Reporter,	**So.**	Southern Reporter,
Pac.	Pacific Reporter,	**S. E.**	Southeastern Reporter,
N. E.	Northeastern Reporter,	**S. W.**	Southwestern Reporter,
N. W.	Northwestern Reporter,	**S. Ct.**	Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

IX CRANCH.

9 Cr. 9–11, 3 L. 639, MANDEVILLE v. UNION BANK OF GEORGETOWN.

Bills and notes — Set-off.— By making note payable at bank, maker waives right to offset claim against payee in action by bank, p. 11.

Cited and principle applied in Spence's Admr. v. Whitaker, 3 Port. 321, holding that certificates of stock issued by private association are not subject, in hands of bona fide assignee, to offset against original stockholder; Emanuel v. Atwood, 6 Port. 389, and Knapp v. McBride, 7 Ala. 28, holding such note not subject to set-off in hands of assignee of bank; Bedford Bank v. Acoam, 125 Ind. 586, 21 Am. St. Rep. 260, 25 N. E. 714, holding that where note payable at bank, bank has right to pay note from general funds of maker on deposit. See also note 23 Am. Rep. 52. Cited approvingly in Merchants' Bank v. Meyer, 56 Ark. 509, 20 S. W. 408, discussing general subject and collecting authorities.

Distinguished in Parham v. Randolph, 4 How. (Miss.) 454, 35 Am. Dec. 408, and Allein v. Bank, 3 Smedes & M. 58, under statute; Raymond v. Middleton, 29 Pa. St. 530, where note not negotiated at place specified; Grissom v. Bank, 87 Tenn. 370, 10 Am. St. Rep. 681, 10 S. W. 781, holding that making note payable at bank does not of itself confer authority of bank to pay out of funds of maker; so also in Barrett v. Wills, 4 Leigh, 116, 117, 26 Am. Dec. 316.

9 Cr. 11–18, 3 L. 639, MEIGS v. McCLUNG'S LESSEE.

Indian lands.— Treaty between United States and tribe of Indians concerning lands is the contract of both parties, and its terms cannot be controlled by acts of agent of United States, p. 18.

Cited and applied in Clark v. Smith, 13 Pet. 201, 10 L. 126, where grant to Indians held to confer only right of occupancy; Holden v. Joy, 17 Wall. 247, 21 L. 535, as to inability of president to convey public lands without consent of congress; United States v. Lee, 106 U. S. 210, 212, 217, 246, 27 L. 178, 179, 181, 191, 1 S. Ct. 252, 254, 258, 282, on point that court will protect property rights unlawfully invaded by public officers; Lee v. Kaufman, 3 Hughes, 94, 131, 132, 138, F. C. 8,191, holding further as to jurisdiction of Federal courts in cases involving title to public lands; see also same case, 3 Hughes, 150, F. C. 8,192; United States v. Reese, 5 Dill. 409, F. C. 16,137, denying right of congress to interfere with rights under

such treaty; so also in United States v. Payne, 2 McCreary, 295, 8 Fed. 888, on same point. Approved and principle applied in following cases, holding that ejectment may be maintained against United States officer: Polack v. Mansfield, 44 Cal. 40, 42, 13 Am. Rep. 154, 156; King v. La Grange, 61 Cal. 227; King v. La Grange, 61 Cal. 230; McConnell v. Wilcox, 1 Scam, 365, and Budd v. Tax Collector, 36 La. Ann. 961. Cited also in Cherokee Nation v. Georgia, 5 Pet. 48, 8 L. 42, in discussion of general subject.

Miscellaneous citations.— Cited in Cunningham v. Railroad Co., 109 U. S. 452, 27 L. 994, 3 S. Ct. 297; Poindexter v. Greenhow, 114 U. S. 287, 29 L. 192, 5 S. Ct. 912; Reagan v. Farmers' Loan, etc., Co., 154, U. S. 391, 38 L. 1021, 14 S. Ct. 1052; Head v. Porter, 48 Fed. 482, 486; Railroad Co. v. Commissioners, 36 Tex. 410, on point that officer setting up authority as defense must show that such authority was sufficient to protect him. (Not decided in principal case.)

9 Cr. 19–28, 3 L. 642, SIMMS v. GUTHRIE.

Equity — Pleading.— Legal owners must be made parties to suit brought by holders of equitable title, p. 25.

Cited and applied in Findlay v. Hinde, 1 Pet. 245, 7 L. 130, holding person who executed deed should be made party to proceeding brought by person claiming under deed and alleging it to have been lost; Smith v. Shane, 1 McLean, 32, F. C. 13,105, holding that patentee should be made party to action involving title to land conveyed by him; State ex rel. v. Burke, 33 La. Ann. 505, denying right to maintain action against State treasurer where State a necessary party and exempt by Constitution from suit in her own courts; dissenting opinion, Paine v. French, 4 Ohio, 327, on point that mortgagee should be made party to action by assignee.

Distinguished in Kerr v. Watts, 6 Wheat. 559, 5 L. 330, holding that person need not be made complainant in whom there is no interest; Thomas v. Kennedy, 24 Iowa, 403, 95 Am. Dec. 744, holding heirs of immediate grantor not necessary parties where plaintiff claims under deed given by remote grantor to correct error in deed to immediate grantor.

Equity jurisdiction over auxiliary suits does not depend on residence of parties, p. 25.

Cited and applied in Jones v. Andrews, 10 Wall. 333, 19 L. 937, as to bill to restrain proceedings of garnishment; Webb v. Barnwell, 116 U. S. 196, 29 L. 596, 6 S. Ct. 351, as to proceeding to enjoin enforcement of judgment in ejectment; St. Luke's Hospital v. Barclay, 3 Blatchf. 263, F. C. 12,241, as to proceeding to restrain institution of action at law; McDonald v. Seligman, 81 Fed. 756, as to bill to enjoin judgment and for permission to complainant to intervene in action; Davis v. Packard, 10 Wend. 55, and Rogers v. Rogers, 1

Paige Ch. 185, under facts similar to those in principal case; Brooks v. Memphis, 4 Fed. Cas. 286, on point that equity, having acquired jurisdiction of case, may decide all questions arising during proceedings.

Distinguished in Christmas v. Russel, 14 Wall. 81, 20 L. 763, where bill did not relate to matter in addition to or in continuance of original suit.

Public lands.— Entry made by assignee of pre-emption right is good, although name of assignee be not mentioned in the entry, if the entry refer to the warrant and mention an improvement, and the place be sufficiently described, p. 24.

Equity.— Complainant cannot obtain decree for more than he has asked in his bill, p. 27.

Cited and principle applied in Foster v. Goddard, 1 Black. 518, 17 L. 232, holding that in equitable proceeding proof must correspond to allegations; Tilghman v. Tilghman's Exrs., 1 Bald. 491, F. C. 14,045, holding inadmissible evidence as to matter not alleged; Goodyear v. Providence Rubber Co., 2 Cliff. 370, F. C. 5,583, holding defendant limited to defenses set up in answer; Blandy v. Griffith, 3 Fed. Cas. 677, on point that material facts must be alleged in pleadings.

9 Cr. 28–39, 3 L. 645, SPEAKE v. UNITED STATES.

Bond.— Statute directing bond to be taken before clearance granted is merely directory and bond taken afterwards is not necessarily invalid, p. 35.

Cited and principle applied in Bank of United States v. Brent, 2 Cr. C. C. 699, Fed. Cas. 910, holding bond not void for noncompliance with law regulating execution; United States v. Mynderse, 11 Blatchf. 6, F. C. 15,851, holding bond not void because it exceeds requirements of statute; Woolridge v. McKenna, 8 Fed. 662, holding statute prescribing time when act is to be performed merely directory; Sprowl v. Lawrence, 33 Ala. 692, as to sheriff's bond; Branch v. Branch, 6 Fla. 329, as to bond of administrator; Stephens v. Crawford, 3 Ga. 508, 512, holding, however, that bond not conformable to statute can be enforced only according to common-law rules; Chicago v. Gage, 95 Ill. 623, 35 Am. Rep. 193, as to bond of city treasurer; Commissioners of Knox Co. v. Johnson, 124 Ind. 150, 19 Am. St. Rep. 92, 24 N. E. 150, as to time for filing bond of county superintendent of schools; Young v. Maryland, 7 Gill & J. 263, as to statute prescribing form of official bond; dissenting opinion, Milburn v. Maryland, 1 Md. 19, majority holding bond invalid unless approved as required by statute; Jones v. Railroad Co., 5 How. (Miss.) 411, holding forthcoming bond not invalidated by omission to state statutory period between levy and sale; State v. Rhodes, 6 Nev. 373, as to official bond given for greater sum than required; State v. Colvig, 15 Or. 62, 13 Pac. 640, as to statute prescribing

time within which officer must qualify. Cited approvingly in Jackson v. Simonton, 4 Cr. C. C. 261, F. C. 7,147, discussing general subject.

Distinguished in Janes v. Reynolds, 2 Tex. 256, holding that bond must conform substantially to statute; also in Johnson v. Erskine, 9 Tex. 5, holding bond invalid where more onerous than required by statute.

Bond.— Where law requires bond in penal sum equal to double value of vessel, parties are estopped, in absence of fraud, oppression or circumvention, to deny that sum inserted by mutual consent was in fact double that value, p. 36.

Cited in The S. Oteri, 67 Fed. 150, 30 U. S. App. 10, ruling similarly respecting an export bond; Steele v. Adams, 1 Me. 4, as to estoppel by deed; Peters v. State, 10 Tex. App. 306, where sureties on bail bond estopped from denying its validity on ground that it was taken in sum less than that fixed by sheriff. Approved also in Taylor v. Benham, 5 How. 274, 12 L. 150, and Villere v. Armstrong, 4 Mart. (N. S.) 25, discussing general subject.

Alteration of bond.— Bond is not avoided by erasing name of one obligor and inserting name of another after delivery, by consent of all parties proved by parol, p. 37.

Cited and applied in McWhorter v. McGehee, 1 Stew. 554, as to sheriff's bond; Gibbs v. Frost, 4 Ala. 728, as to consent of parties to complete bond after signing in blank, and in Cotten v. Williams, 1 Fla. 49, on same point; Sans v. People, 3 Gilm. 335, as to alteration of sum in bail bond; Stiles v. Probst, 69 Ill. 387, as to alteration of deed; Chicago v. Gage, 95 Ill. 611, 35 Am. Rep. 183, as to completion of bond after signing in blank; State v. Polke, 7 Blackf. 28, under facts similar to those in principal case; Powers v. Nash, 37 Me. 324, as to substitution of surety on note; South Berwick v. Huntress, 53 Me. 97, 87 Am. Dec. 542, as to insertion of sum in penal bond after signing in blank; Howe v. Peobody, 2 Gray, 557, as to alteration of probate bond by increasing penal sum; Camden Bank v. Hall, 14 N. J. L. 585, 588, as to alteration of judgment bond; Rogers v. Hosack's Exrs., 18 Wend. 339, holding further that redelivery after alteration is unnecessary. See also same case on rehearing, 25 Wend. 348; Cribben v. Deal, 21 Or. 214, 28 Am. St. Rep. 748, 27 Pac. 1047, as to filling up of deed signed in blank; Stahl v. Berger, 10 Serg. & R. 172, 13 Am. Dec. 668, as to insertion of name of payee of note signed in blank; Barrington v. Bank, 14 Serg. & R. 422; Burson v. Kincaid, 3 Pen. & Watts, 61, as to release of estate of deceased surety; Arnold v. Jones, 2 R. I. 350, as to alteration of note by changing name of payee; Gourdin v. Commander, 6 Rich. L. 504, as to filling up of bond signed in blank; Lafferty v. Lafferty, 42 W. Va. 788, 26 S. E. 264, where deed signed in blank and subsequently filled in; Vilet v. Camp, 13 Wis. 206, holding that consent may be given either before or after alteration. See also notes, 13

Am. Dec. 671, and 10 Am. Rep. 268, on general subject. Cited approvingly in Owings v. Grubb, 6 J. J. Marsh. 32, but question not decided.

Denied in Simms v. Hervey, 19 Iowa, 291, holding parol evidence inadmissible to show authority to fill in mortgage signed in blank. Distinguished in Tucker v. Allen, 16 Kan. 319, 320, as to deed signed in blank; in the following: People v. Brown, 2 Doug. (Mich.) 13; Smith v. Weld, 2 Pa. St. 55; Cleaton v. Chambliss, 6 Rand. 92; Rhea v. Gibson, 10 Gratt. 220; Preston v. Hull, 23 Gratt. 612, 14 Am. Rep. 161, where consent of parties not shown, and in Spencer v. Buchannan, Wright, 584, where bond signed in blank, held not to be completed by inference of court.

Alteration apparent on face of instrument does not avoid it unless shown to have been made fraudulently or without consent of parties affected, p. 37.

This rule has been applied in dissenting opinion, Miller v. Stewart, 9 Wheat. 717, 6 L. 198, majority holding bond of tax collector for performance of duties in eight townships avoided by extending it to another township without consent of sureties; Bailey v. Taylor, 11 Conn. 535, 29 Am. Dec. 324, as to alteration of note; Stewart v. Preston, 1 Fla. 22, 44 Am. Dec. 624, as to interlineation in assignment of mortgage; Pelton v. Prescott, 13 Iowa, 570, holding new consideration not necessary to support assent to alteration of date of promissory note; Albert v. Buhler, 3 Mart. (N. S.) 492, holding that mere clerical error will not impair validity of bond; Collins v. Collins, 51 Miss. 319, 321, 323, 24 Am. Rep. 637, 638, 640, as to interlineation of deed by consent of parties after recording; Den v. Farlee, 21 N. J. L. 289, holding that alterations in deed are presumed to have been made before execution and delivery; Crossman v. Crossman, 95 N. Y. 153, dissenting opinion; In re Conway's Will, 124 N. Y. 466, 26 N. E. 1032, majority distinguishing Crossman v. Crossman, supra; McArthur v. Ladd, 5 Ohio, 518, 519, as to alteration in contract for work and labor; Franklin v. Baker, 48 Ohio St. 304, 29 Am. St. Rep. 549, 27 N. E. 552, and Newman v. King, 54 Ohio St. 282, 56 Am. St. Rep. 710, 43 N. E. 685, as to alteration of promissory note.

Distinguished in United States v. Nelson, 2 Brock. 73, 74, F. C. 15,862, as to bond under seal.

Miscellaneous citations.— Cited erroneously in Patterson v. Gibson, 81 Ga. 805, 12 Am. St. Rep. 358, 10 S. E. 10, and Fullerton v. Harris, 8 Me. 397.

9 Cr. 39–43, 3 L. 649, TABER v. PERROTT.

Evidence.— Person to whom bill of exchange is intrusted to deliver to another for collection, is competent witness for owner of bill in action to recover on such bill from collector, p. 43.

Cited in Kilpatrick v. Sisneros, 23 Tex. 137, but not in point.

9 Cr. 43–55, 3 L. 650, TERRETT v. TAYLOR.

Legislative grant is a contract and as such is irrevocable, p. 50.

This rule has been cited and the principle applied in numerous cases: Dartmouth College v. Woodward, 4 Wheat. 695, 4 L. 673, denying power of legislature to modify charter granted to educational corporation by English crown prior to Revolution; Planters' Bank v. Sharp, 6 How. 332, 12 L. 460, holding unconstitutional statute prohibiting bank from transferring notes and bills by indorsement, bank having been empowered by charter to acquire and dispose of property of all kinds; State Bank v. Knoop, 16 How. 389, 14 L. 985, denying right of legislature to repeal clause in charter exempting corporation from taxation; dissenting opinion, Illinois, etc., R. R. Co. v. Illinois, 146 U. S. 475, 36 L. 1051, 13 S. Ct. 126, majority holding that railroad company had no right as riparian owner to reclaim land on shore of lake; Douglas v. Kentucky, 168 U. S. 500, 42 L. 557, 18 S. Ct. 203, denying right of legislature to impair vested rights under grant of power to conduct lottery; Southern Pacific Co. v. Orton, 6 Sawy. 182, 32 Fed. 471, holding that in action of trespass brought by corporation authorized to receive grants of land, defendant cannot dispute authority of corporation to take land in question; Gray v. Davis, 1 Woods, 424, F. C. 5,715, holding that corporate charter cannot be annulled by provisions of State Constitution subsequently adopted; Magill v. Brown, 16 Fed. Cas. 413, 419, as to grant to unincorporated religious society.

Citing cases in the State courts also apply the rule, dissenting opinion, Dale v. Governor, 3 Stew. 418, 423, majority holding that act of legislature settling annuity for military services rendered vested no interest in annuity until paid, and was repealable; Stone v. Gazzam, 46 Ala. 275, ruling similarly as to grant to individual; Boyd v. State, 46 Ala. 334, denying right of legislature to repeal grant of power to conduct lottery during year for which license already paid; Micou v. Bridge Co., 47 Ala. 656, holding that grant of power to build bridge cannot be impaired by grant of power to another company to build similar bridge; Commissioners v. Rather, 48 Ala. 447, and Howard v. Jones, 50 Ala. 69, denying right of legislature to charge remedy upon contracts so as to impair obligation; Montgomery v. Kasson, 16 Cal. 194, as to grant of public lands; Seymour v. Hartford, 21 Conn. 486, denying right to repeal exemption from taxation; Trustees v. Bailey, 10 Fla. 130, 81 Am. Dec. 199, granting injunction to restrain appropriation of funds to other purpose than that for which raised, so as to impair security of bondholder; County Commissioners v. King, 13 Fla. 474, holding that where statute provides for discharge of bonds legislature cannot impair rights of bondholders by amendment providing insufficient means; Savannah v. Steamboat Co., Charlt. (Ga.) 346, 348, as to legislative grant of land to municipal corporation; In re Flournoy, 1 Ga. 608, denying right of governor to remit portion of penalty due to

indlvldual; Young v. Harrison, 6 Ga. 154, 155, as to grant of right to take tolls; Hilliard v. Connelly, 7 Ga. 179, and Winter v. Jones, 10 Ga. 196, 54 Am. Dec. 382, as to grant of land to individual; Campbell v. Georgia, 11 Ga. 370, where authorities collected and discussed; Bruce v. Schuyler, 4 Gilm. 276, 278, 46 Am. Dec. 458, 460, as to grant to individual; dissenting opinion, Weidenger v. Spruance, 101 Ill. 300, majority holding valid act of legislature changing conditions as to liability of shareholders in corporation; Board of Education v. Bakewell, 122 Ill. 351, 10 N. E. 384, denying right of legislature to transfer property of private educational institution to State board of education; Martindale v. Moore, 3 Blackf. 279, where statute exempting executors from personal liability held not to affect judgment rendcred previous to passage; State v. Vincennes University, 5 Ind. 89, holding that corporation cannot be dissolved by legislature because of mere loss of members; State v. Springfield Township, 6 Ind. 97, as to grant of school lands; dissenting opinion, Noel v. Ewing, 9 Ind. 58, majority sustaining right of legislature to diminish inchoate dower; dissenting opinion, Scobey v. Gibson, 17 Ind. 577, arguing that statutc cannot act retrospectively so as to affect rights under judgment rendered previously; Edwards v. Jagers, 19 Ind. 417, as to grant of land to college; Carr v. State, 127 Ind. 207, 22 Am. St. Rep. 627, 26 N. E. 779, denying right of legislature to repeal laws providing for funding and payment of public debt; Louisville v. University, 15 B. Mon. 673, 674, denying right of legislature to control private educational institution, part of whose lands were received from State; Gregory v. Trustees, 2 Met. (Ky.) 598, as to grant of lottery privilege under which vested rights have accrued; dissenting opinion, State v. Flanders, 24 La. Ann. 64, majority asserting power of legislature to control municipal corporation; New Orleans, etc., R. R. Co. v. New Orleans, 26 La. Ann. 482, denying right of legislature to impair vested property rights of municipal corporation; Yarmouth v. North Yarmouth, 34 Me. 418, 56 Am. Dec. 670, as to grant of school lands; Canal Co. v. Railroad Co., 4 Gill & J. 122, 128, denying power of legislature to repeal clause in charter empowering corporation to acquire property; Appeal Court v. Patterson, 50 Md. 372, dcnying power to repeal exemption from taxation; dissenting opinion, Charles River Bridge v. Warren Bridge, 7 Pick. 494, majority holding that grant of power to build bridge and take tolls does not imply agreemcnt on part of State not to grant similar privilege to another corporation; Michigan State Bank v. Hastings, 1 Doug. (Mich.) 234, 41 Am. Dec. 551, holding void statute repealing bank charter where such right not reserved; Tromblcy v. Humphrey, 23 Mich. 483, 9 Am. Rep. 102, denying power of State to exercise right of eminent domain in behalf of Federal government; People v. Hurlbut, 24 Mich. 104, 9 Am. Rep. 112, and Detroit v. Detroit, etc., Co., 43 Mich. 148, 5 N. W. 280, denying power of legislature to impair vested rights of public corporation.

Other citing cases show the following applications of the doctrine that a legislative grant is protected by the obligation clause: State v. Fry, 4 Mo. 132, denying right of legislature to pass special act granting divorce; Mitchell v. Clark, 64 Mo. 582, on point that State legislature is bound by clause in Federal Constitution prohibiting deprivation of property without due process of law; Northern Pacific R. R. Co. v. Majors, 5 Mont. 126, 2 Pac. 325, applying rule to grant by congress to railway corporation; Koenig v. Railroad Co., 3 Neb. 381, holding that where legislature has granted land to be used for certain purpose is cannot subsequently order use for other purpose; Spaulding v. Andover, 54 N. H. 55, applying rule to grant of land to municipal corporation; dissenting opinion, Orr v. Quimby, 54 N. H. 647, majority sustaining right of legislature to appropriate property of corporation under power of eminent domain; State v. Branin, 23 N. J. L. 500, holding that where charter exempts corporation from taxation, such exemption extends to stock in hands of stockholders; Glover v. Powell, 10 N. J. Eq. 229, as to grant of right to build dam, and see dissenting opinion, State v. Mathews, 3 Jones (N. C.), 464; Lowe v. Harris, 112 N. C. 481, 17 S. E. 540, denying right of legislature to give retroactive effect to statute of limitations; Le Clercq v. Trustees, 7 Ohio (pt. 1), 221, 28 Am. Dec. 643, holding that where land dedicated to town for public square, legislature cannot order town to change its character; In re Malone's Estate, 21 S. C. 449, ruling similarly as to grant to municipality of proceeds of escheated estates; Grammar School v. Burt, 11 Vt. 641, as to grant to city for educational purposes, and in Grammar School v. Bailey, 62 Vt. 478, 20 Atl. 823, on same point; dissenting opinion, Prince W. Bd. v. Stuart, 80 Va. 79, majority holding valid act of legislature revoking grant for public charitable uses; Town of Milwaukee v. City of Milwaukee, 12 Wis. 102, 105, denying right of legislature to transfer property of one town to another on consolidation of latter with part of former; Attorney-General v. Railroad Cos., 35 Wis. 606, denying right of legislature to fix rates, where such right granted absolutely to company by charter.

The rule is approved in discussing the general subject, without particular application to the point at issue in the following cases: Wilkinson v. Leland, 2 Pet. 657, 7 L. 553; dissenting opinion, Inglis v. Trustees, 3 Pet. 153, 7 L. 636; Dudley v. Caldwell, 19 Conn. 227; University v. Railroad Co., 76 N. C. 107, 22 Am. Rep. 674; Knighton v. Burns, 10 Or. 550; Lyman v. Martin, 2 Utah, 157. See also note, 35 Am. St. Rep. 532.

The principal case is distinguished on this point as follows: Charles River Bridge v. Warren Bridge, 11 Pet. 582, 9 L. 838, holding grant to bridge company of power to build bridge and take tolls, did not imply agreement on part of State not to grant similar power to another company (see also 7 Pick. 446); West River Bridge Co. v. Dix, 6 How. 542, 548, 12 L. 549, 552, limiting rule in holding that in

exercise of right of eminent domain State may appropriate private bridge for use as part of highway; Rice v. Railroad Co., 1 Black, 373, 17 L. 151, holding that where grant is void no vested rights are impaired by revocation; Pennsylvania College Cases, 13 Wall. 213, 20 L. 553, and Miller v. State, 15 Wall. 489, 21 L. 101, where power of amendment or repeal of charter reserved by legislature; Chicago Ins. Co. v. Needles, 113 U. S. 580, 583, 28 L. 1087, 1088, 5 S. Ct. 684, 685, holding that grant of power is subject to condition that it shall not be abused, and that when so abused it may be revoked; Eagle Ins. Co. v. Ohio, 153, U. S. 454, 38 L. 780, 14 S. C. 870, limiting rule and holding that under police power, State may require insurance companies to submit reports of business done, although charter silent on the point; Pearsall v. Railway Co., 161 U. S. 661, 40 L. 843, 16 S. Ct. 708, holding that where charter authorizes corporation to do acts unnecessary to object of incorporation, such power, until executed, is revocable; Bonaparte v. Camden, etc., Co., 1 Bald. 218, 227, 232, F. C. 1,617, asserting power of legislature to exercise right of eminent domain for benefit of railroad company, and see also dissenting opinion, McElvain v. Mudd, 44 Ala. 76; Galland v. Lewis, 26 Cal. 48, and Higgins v. Bear River, etc., Co., 27 Cal. 159, holding valid retrospective statute not impairing contract or vested rights; Dudley v. Caldwell, 19 Conn. 227, as to executory legislative contracts, where no vested rights have accrued; Wilder v. Lumpkin, 4 Ga. 220, where retrospective statute not impairing vested rights, held valid; Stewart v. Supervisors, 30 Iowa, 17, 1 Am. Rep. 242, asserting power of legislature to take property of corporation in exercise of right of eminent domain; State v. Railway Co., 44 Md. 165, and Inland Fisheries v. Holyoke, etc., Co., 104 Mass. 448, 6 Am. Rep. 250, under constitutional provisions reserving right to repeal or amend corporate charters; Dartmouth College v. Woodward, 1 N. H. 122, but see 4 Wheat. 695, 4 L. 673, supra; Gray v. Navigation Co., 2 Watts & S. 160, 37 Am. Dec. 502, holding that act increasing privileges of corporation will not be declared void on ground that liabilities are thereby increased and stockholder incidentally affected; Durkee v. Janesville, 28 Wis. 468, 9 Am. Rep. 504, holding void act exempting corporation from payment of costs in action against it.

Vested property rights.— Dissolution of government does not work forfeiture of, p. 50.

Cited and rule applied in Dartmouth College v. Woodward, 4 Wheat. 707, 4 L. 676, holding that charter of college created by sovereign of England was not revoked by Revolution; Society, etc. v. New Haven, 8 Wheat. 481, 482, 5 L. 666, holding also that termination of treaty by war does not affect rights vested under it; Blair v. Odin, 3 Tex. 304, holding beneficial use of land not dissolved on attainment of independence by Texas. Approved in Kilpatrick v. Cisneros, 23 Tex. 126.

Corporations, exclusive privileges of, inconsistent with new government, may be abolished under new Constitution, p. 52.

Cited and applied: Murphy and Glover Test Oath Cases, 41 Mo. 381, where court argued in favor of constitutionality of "Test Oath Acts," but followed rule contra as laid down by Supreme Court in In re Cummings, 4 Wall. 277, 18 L. 356; dissenting opinion, Matheny v. Golden, 5 Ohio St. 434, majority denying power of legislature to repeal clause in charter exempting corporation from taxation; Peerce v. Kitzmiller, 19 W. Va. 573, holding that State Constitution will be enforced in all cases unless in conflict with Federal Constitution.

Franchise, forfeiture of, may be decreed after judicial inquiry for misuser or nonuser, p. 51.

Cited and applied in Importing Co. v. Locke, 50 Ala. 334, holding corporation not to be deemed dissolved for purposes of business until misuser judicially determined; State v. Bank, 5 Ark. 604, 41 Am. Dec. 117, holding assignment by bank of all assets and property ground for forfeiture; Darnell v. State, 48 Ark. 324, 3 S. W. 366, holding that decree of forfeiture of turnpike franchise carries with it forfeiture of ferry privilege, incident to such turnpike; People v. Stanford, 77 Cal. 373, 18 Pac. 86, holding also that complaint must allege legal existence of defendant as corporation; Enfield Bridge Co. v. Connecticut River Co., 7 Conn. 46, 48, denying, however, right of legislature to transfer charter to other corporation until default judicially determined; Henderson Loan Assn. v. People, 163 Ill. 206, 45 N. E. 144, decreeing forfeiture of bank charter where business discontinued unreasonable time without excuse; State v. New Orleans Gas Co., 2 Rob. (La.) 532, holding further as to nature of proceedings; Attorney-General v. Bank, Walk. Ch. (Mich.) 97, construing statute providing for dissolution of insolvent corporation; State v. Minnesota, etc., Ry. Co., 36 Minn. 258, 30 N. W. 817, under clause in charter providing for forfeiture in case of nonuse for one year; State v. Commercial Bank, 13 Smedes & M. 578, 53 Am. Dec. 108, where assignment by bank of assets and property held ground for forfeiture of charter; State ex rel. v. Railway Co., 140 Mo. 553, 62 Am. St. Rep. 751, 41 S. W. 958, denying right of city to abridge sovereign power of State to proceed by quo warranto for forfeiture of franchise of railway; also in State v. Equitable Loan Assn., 142 Mo. 340, 41 S. W. 919, holding that where State Constitution provides for issuance of quo warranto writ against corporation, such power cannot be impaired by legislature; State v. Railroad Co., 24 Neb. 156, 8 Am. St. Rep. 172, 38 N. W. 47, where act of railroad company in leasing lines held cause for forfeiture, such power not being given by charter; People v. Bank of Hudson, 6 Cow. 219, holding further that judgment in such case is one of seizure; People v. Turnpike Co., 23 Wend. 235, decreeing forfeiture for failure to maintain road as required by charter; Thompson v. People, 23 Wend.

590, decreeing forfeiture of franchise of individuals for failure to construct bridge as stipulated; Bradt v. Benedict, 17 N. Y. 99, on point that to constitute dissolution of corporation by surrender of charter, such surrender must be accepted by legislature; State v. Choate, 11 Ohio, 519, on point that public officer not deemed to have forfeited right to hold office by reason of misfeasance, until fact determined judicially; Commonwealth v. Bank, 28 Pa. St. 389, decreeing forfeiture of bank charter on ground that bank charged higher rates of interest than allowed by statute; Chincleclamouche, etc., Co. v. Commonwealth, 100 Pa. St. 445, where forfeiture of lumber company's charter decreed for failure to engage in business for which chartered; State v. Bank, 1 Spears L. 502, where suspension of specie payments by bank held cause for forfeiture of charter; Green v. Allen, 5 Humph. 217, on point that equity will by injunction restrain misemployment of land granted to corporation for special purpose. See also notes, 53 Am. Dec. 110, 96 Am. Dec. 757, 5 Am. St. Rep. 804, 7 Am. St. Rep. 719, 725, 8 Am. St. Rep. 179, 180. The principle is approved also in Dartmouth College v. Woodward, 4 Wheat, 663, 664, 4 L. 665, 666, and in dissenting opinion, Landon v. Litchfield, 11 Conn. 273, discussing general subject.

Distinguished in Nevitt v. Bank, 6 Smedes & M. 580, 593, holding that default cannot be set up in action on promissory note where such default has not been judicially determined; State v. Bank, 2 McMull. L. 451, 39 Am. Dec. 139, holding that where forfeiture of charter had been decreed but bank had continued to exist de facto, subsequent regrant of charter operated as waiver of previous forfeiture.

Public corporations.— Charters of, may be amended or repealed by legislature, p. 52.

Cited and applied in East Hartford v. Hartford Bridge Co., 10 How. 536, 13 L. 529, holding revocable, grant to town of right to construct bridge; Lucas v. Commissioners, 44 Ind. 540, sustaining revocation of grant to town of power to purchase railway bonds (but see dissenting opinion, p. 548); State v. B. & O. R. R. Co., 12 Gill & J. 440, 38 Am. Dec. 326, sustaining right of legislature to remit penalty due county under statute; Mayor of Baltimore v. State, 15 Md. 454, 490, 74 Am. Dec. 577, as to power of State to regulate elections of municipal officers; Conner v. Bent, 1 Mo. 238, extending legislative control to money due municipal corporation; St. Louis v. Russel, 9 Mo. 511 (507), as to right of legislature to extend territorial limits of city; Wooster v. Plymouth, 62 N. H. 210, holding that such control extends to property of municipal corporation held for public purposes (but see dissenting opinion, p. 225); Mills v. Williams, 11 Ired. 564, holding valid, repeal of act establishing county; Knoup v. Bank, 1 Ohio St. 622, holding State bank to be public corporation, and its charter subject to amendment by legislature; so also in Bank v. Bond, 1 Ohio St. 670; Luehrman v.

Taxing District, 2 Lea, 430, sustaining power of legislature to regulate taxation by municipal corporation; Stockton v. Montgomery, Dall. (Tex.) 485, as to power of legislature to create political divisions in State. And see note, 53 Am. Dec. 471, on general subject.

Rule limited in Van Hoffman v. Quincy, 4 Wall. 550, 18 L. 408, holding that where city has been authorized to issue bonds, power cannot be withdrawn so as to impair rights of bondholders.

Estoppel.— If grantor, having no title, conveys with general warranty, subsequently-acquired title will inure to grantee, p. 53.

Cited and applied in Carver v. Jackson, 4 Pet. 86, 7 L. 791, where lessor at time of executing lease had no interest; McCleskey v. Leadbetter, 1 Ga. 557; Blanchard v. Allain, 5 La. Ann. 368, 52 Am. Dec. 596, and Somes v. Skinner, 3 Pick. 60, holding further that estoppel extends to heirs and privies of grantor; Pike v. Galvin, 29 Me. 185, and Showman v. Miller, 6 Md. 486, 487, and Rigg v. Cook, 4 Gilm. 348, 46 Am. Dec. 470, under facts similar to those in principal case; Kimball v. Blaisdell, 5 N. H. 535, 22 Am. Dec. 478, applying rule where grantor conveyed same land by different deeds to grantees, one of whom executed reconveyance; Brown v. Manter, 21 N. H. 537, 53 Am. Dec. 227, holding that where instrument contained names of covenantor and covenantee, description of land, and covenant of warranty, but no grant, covenantor was estopped from claiming title. Approved in Ross v. Adams, 28 N. J. L. 176; Blair v. Odin, 3 Tex. 299, where authorities are collected and discussed. See also Galloway v. Finley, 12 Pet. 296, 9 L. 1090, where principle is applied in holding that grant of public land to person who had previously died, vested title in heirs of such person.

Religious corporations.— Lands of, may be sold only upon joint consent of minister and vestry, p. 54.

Cited and applied in Mason v. Muncaster, 9 Wheat. 455, 460, 465, 6 L. 134, 135, 136, under similar facts; and see 2 Cr. C. C. 275, 276, 280, 281, F. C. 9,247; Wardens v. Savannah, 82 Ga. 666, 9 S. E. 540, holding church wardens to be proper parties plaintiff in action for trespass on church property; Showman v. Miller, 6 Md. 486, 487, and Williams v. Presbyterian Society, 1 Ohio St. 503, holding grant to pastor and trustees to vest good title in fee in church society. And see dissenting opinion, Hale v. Everett, 53 N. H. 140, where majority held conveyance to church for special purpose void. Cited approvingly in Price v. M. E. Church, 4 Ohio, 541, and Burr v. Smith, 7 Vt. 285, 302, 29 Am. Dec. 166, 184, discussing general subject.

Miscellaneous citations.— Cited in Osborne v. United States Bank, 9 Wheat. 894, 6 L. 241, as instance where corporation held to have existed under common law. Cited also in Trustees of Bishop's Fund v. Rider, 13 Conn. 96, on point that executory legislative contract, where no consideration has passed, is subject to repeal at will of legislature.

9 Cr. 55–64, 3 L. 655, THE SHORT STAPLE v. UNITED STATES.

Forfeiture.— Burden of proof in proceeding for forfeiture under embargo acts, is on claimants, p. 64.

Cited and applied in The Meteor, 17 Fed. Cas. 197, in proceeding against vessel for violation of neutrality laws.

Distinguished in The William King, 2 Wheat. 152, 4 L. 207, under facts.

Admiralty.— If a vessel be captured by a superior force, and a small force be put on board, it is not the duty of the master of the captured vessel to attempt to rescue her, p. 63.

9 Cr. 64–71, 3 L. 658, PARKER v. RULE.

Tax sale.— Validity of tax deed depends upon compliance with requirements of statute regulating such sales, p. 70.

This rule has been applied in the following citing cases: Williams v. Peyton, 4 Wheat. 83, 4 L. 520, holding sale void where requirements not shown to have been performed by affirmative proof; Early v. Homan, 16 How. 618, 14 L. 1083, where notice not given as required; United States v. Pacific, R. R. Co., 1 McCrary, 7, 1 Fed. 102, holding lien for taxes does not attach until notice given; United States v. Allen, 14 Fed. 265, annulling sale under revenue laws on same ground; Lyon v. Hunt, 11 Ala. 312, 46 Am. Dec. 223, where land not described in notice as required by statute; Hobart v. Frisbie, 5 Conn. 595, and Mitchell v. Kirkland, 7 Conn. 231, applying principle to sale on execution and annulling sale because of insufficiency of notice; Curtis v. Swearingen, Breese, 141, and Taylor v. Whiting, 2 B. Mon. 272, annulling sales in absence of affirmative proof of compliance with statute; St. Anthony Falls, etc., Co. v. Greely, 11 Minn. 326, denying right of collector to collect tax where notice not given; Reeds v. Morton, 9 Mo. 886 (875), holding tax deed invalid where not recorded as provided by statute; Cahoon v. Coe, 57 N. H. 569, where notice not posted as required by statute; Jackson v. Shepard, 7 Cow. 92, 17 Am. Dec. 505, holding burden of proof to be on person claiming under deed; Register v. Bryan, 2 Hawks, 21, holding sale en masse invalid where land susceptible of division; Minchie v. Mullens, 5 Hayw. (Tenn.) 93, annulling sale made without notice; Hall v. Collins, 4 Vt. 324, and Flannagan v. Grimmett, 10 Gratt. 426, holding that compliance must be alleged and proved; Dequasie v. Harris, 16 W. Va. 353, construing strictly, statute providing that tax deed shall be prima facie evidence of regularity of sale.

Distinguished in Hutchins v. Lee, Walk. (Miss.) 294, where provisions of statute regulating sale of fugitive slaves held merely directory.

9 Cr. 71–76, 3 L. 660, THE STRUGGLE v. UNITED STATES.

Evidence.— Circumstances may outweigh positive testimony, p. 74.

Cited and applied in The Bark John Griffin, 4 Ben. 26, F. C. 7,348, holding, in proceedings against vessel for smuggling, that positive testimony of crew was outweighed by circumstance that contraband goods were found on board and by fact of probable interest; The Meteor, 17 Fed. Cas. 197, condemning vessel fitted out and armed in violation of neutrality laws, where there was no evidence to explain suspicious circumstances surrounding actions of vessel.

Evidence.— Party offering an excuse for violating a penal statute must make out the vis major, so as to leave no reasonable doubt of his innocence, p. 74.

9 Cr. 76–86, 3 L. 662, RANDOLPH v. DONALDSON.

Escape.— United States marshal is not liable for escape of prisoner whom he has committed to State jail, p. 86.

The principle involved in this rule has been applied in the following citing cases: United States v. Ewing, 140 U. S. 145, 35 L. 389, 11 S. Ct. 744; United States v. Harden, 4 Hughes, 463, 10 Fed. 809; United States v. Ebbs, 4 Hughes, 482, 10 Fed. 376, 49 Fed. 155, and Erwin v. United States, 37 Fed. 485, holding that as keeper of State jail is not deputy of United States marshal, mittimus is necessary in order to authorize such keeper to detain prisoner as against habeas corpus from State court; United States v. Martin, 9 Sawy. 95, 17 Fed. 154, holding that keeper of State jail is not obliged to deliver prisoner to Federal court without written order from court; In re Hartwell, 1 Low. 537, F. C. 6,173, sustaining right of State authorities to remove such prisoner to another jail; Ex parte Paris, 3 Wood. & M. 235, F. C. 10,714, holding that order to bring prisoner up for trial should be addressed directly to keeper of State jail; In re Birdsong, 39 Fed. 600, holding State jailer liable personally for mistreatment of prisoner; State v. Dews, Charlt. (Ga.) 409, holding sheriff not liable for negligence of jailer resulting in escape of prisoner. Cited approvingly in Nall v. State, 31 Ala. 266; Morre v. Allen, 7 J. J. Marsh. 651.

Distinguished in Lewis v. Marsh, 38 Fed. 796, where marshal held liable for escape of prisoner from deputy marshal.

9 Cr. 87–102, 3 L. 665, POLK'S LESSEE v. WENDAL.

Statutes.— Federal courts will adopt construction of State statute settled by State courts, p. 98.

This principle has been cited and applied in Jackson v. Chew, 12 Wheat. 168, 6 L. 589, construing statute regulating devises of lands; Green v. Neal's Lessee, 6 Pet. 296, 8 L. 404, construing statute

of limitations as applied to action of ejectment; Fairfield v. County of Gallatin, 100 U. S. 52, 25 L. 546, as to construction of State Constitution; Burgess v. Seligman, 107 U. S. 34, 27 L. 365, 2 S. Ct. 22, as to statute prescribing liability of stockholders for debts of corporation; McArthur v. Scott, 113 U. S. 391, 28 L. 1031, 5 S. Ct. 667, as to statute regulating descent, applying rule although similar statute receives opposite construction in other States; Thompson v. Phillips, 1 Bald. 284, F. C. 13,974, construing statute prescribing effect of sheriff's deed; Blanchard v. Sprague, 1 Cliff. 290, F. C. 1,516, as to statute prescribing rules of evidence; Loring v. Marsh, 2 Cliff, 319, F. C. 8,514, refusing to reverse judgment based upon construction of State statute regarding contract law, although State court had subsequently adopted different construction; Merrill v. Portland, 4 Cliff. 144, F. C. 9,470, as to construction of municipal regulations; Hiller v. Shattuck, Flipp. 274, F. C. 6,504, construing statute allowing new trials in actions of ejectment; In re Wyllie, 2 Hughes, 459, F. C. 18,112, construing "homestead exemption" clause, in insolvency statutes; Mitchell v. Lippincott, 2 Woods, 472, F. C. 9,665, as to statute limiting capacity of married woman to mortgage separate estate; State v. Grand Trunk Railway, 3 Fed. 888, construing statute defining liability of railroads for injuries resulting from negligence; New Orleans Water Works v. Southern Brewing Co., 36 Fed. 834, and Evansville v. Woodbury, 60 Fed. 720, 18 U. S. App. 514, construing grant of power to municipal corporation; Lookout Mountain Ry. Co. v. Houston, 44 Fed. 450, holding that where cause is removed to Federal court after decision on demurrer in State court, such decision is binding on Federal court; Hearfield v. Bridges, 75 Fed. 51, 44 U. S. App. 574, as to statute defining rights of husband and wife in community property; Willis v. Commissioners, 86 Fed. 873, following decision of State court declaring statute unconstitutional; Prentice v. Zane, 19 Fed. Cas. 1272, as to statute defining liabilities of parties to negotiable note; Bloodgood v. Grasey, 31 Ala. 589, construing statute respecting emancipation of slaves. The rule has been cited approvingly but without particular application in the following cases: Hempstead v. Reed, 6 Conn. 487; McClure v. Owen, 26 Iowa, 254; Levy v. Mentz, 23 La. Ann. 262.

Distinguished in Beals v. Hale, 4 How. 54, 11 L. 873, where decision relied upon was not rendered in court of last resort; Foxcroft v. Mallett, 4 How. 379, 11 L. 1020, ruling otherwise as to construction by State court, of deed by rules of common law; Webster v. Cooper, 14 How. 504, 14 L. 517, and Withers v. Buckley, 20 How. 89, 15 L. 818, where statute in conflict with State Constitution; Railroad Co. v. National Bank, 102 U. S. 53, 26 L. 75, denying authority of State decisions on questions of general commercial law. Limited in Lauriat v. Stratton, 6 Sawy. 347, 11 Fed. 114, holding that where there is but one decision on statute in question, Federal court is not bound by it if clearly erroneous. Criticized in Hart v. Burnett, 15 Cal. 603.

Public lands.— Younger patent on elder entry prevails over elder patent on younger entry, p. 98.

Rule applied in Ross v. Reed, 1 Wheat. 486, 4 L. 142, under similar facts; McAfee v. Keirn, 7 Smedes & M. 789, 45 Am. Dec. 333, holding title of actual settler, complying fully with requirements, superior to title claimed by mere entry and patent, although later patent be the older; Lee v. Summers, 2 Or. 268, holding that legal title under patent relates back to date of entry.

Distinguished in Chavez v. De Sanchez, 7 N. Mex. 86, 32 Pac. 146, holding that patent issued by United States will prevail over grant by Spanish Crown, where such grant not confirmed as required by act of congress. Limited in Parkison v. Bracken, 1 Pinn. 181, 39 Am. Dec. 298, holding first patent conclusive in action at law.

Public lands.— Patent raises presumption that all prerequisites of law have been complied with, p. 98.

This rule has been cited and applied in United States v. Arredondo, 6 Pet. 728, 730, 731, 8 L. 561, 562, in suit involving grants of land by Spanish officers in Florida before acquisition by the United States; Brush v. Ware, 15 Pet. 105, 10 L. 677, sustaining patent founded on assignment of certificate of military right; Minter v. Crommelin, 18 How. 88, 15 L. 279, holding patent to Indian lands prima facie evidence that Indian reservee had abandoned such lands; Clements v. Macheboeuf, 92 U. S. 425, 23 L. 507, holding that where deed is regular on face, invalidity must be established by affirmative proof; Hardy v. Harbin, 4 Sawy. 547, F. C. 6,060, applying principle to Mexican land grant; Harkrader v. Carroll, 76 Fed. 476, as to patent of mineral lands; Mayor of Mobile v. Eslava, 9 Port. 596, 33 Am. Dec. 332, as to grant executed by officer of Spanish government; so also in Kennedy's Exrs. v. Jones, 11 Ala. 86; Knabe v. Burden, 88 Ala. 439, 7 So. 93, applying rule to certificate of entry given by land commissioner; Yount v. Howell, 14 Cal. 469, holding that courts will take judicial notice of such patent, as authenticated by signature of president and seal of government; Payne v. Treadwell, 16 Cal. 229, ruling similarly in construing grant by Mexican governor; Johnson v. Drew, 34 Fla. 137, 43 Am. St. Rep. 177, 15 So. 782, holding such patent prima facie evidence of title of government and authority of officer to convey; Winter v. Jones, 10 Ga. 206, 54 Am. Dec. 390, 391, holding that warrant and survey of land and payment of price gives purchaser right to action of ejectment; McKinney v. Bode, 33 Minn. 453, 23 N. W. 853, holding patent not impeachable for mere irregularity in proceedings; Kissell v. St. Louis Public Schools, 16 Mo. 582, as to grant to city of school lands; Cramer v. Keller, 98 Mo. 282, 11 S. W. 735, as to grant of swamp lands; Ming v. Foote, 9 Mont. 219, 23 Pac. 520, ruling similarly in case of grant by State land officers; American Dock, etc., Co. v. Trustees, 39 N. J. Eq. 448, 449, as to grant by State of lands below tide water;

dissenting opinion, Pino v. Hatch, 1 N. Mex. 140, majority holding burden of proof on grantee, to show authority of Mexican officers to execute grant; People v. Mauran, 5 Den. 400, entertaining ejectment by holder of patent from State; Bell v. Duncan, 11 Ohio, 197, holding that in case of issue of patent to assignee, there is no presumptive notice of latent defects in assignment; Delay v. Chapman, 3 Or. 461, and Blakesley v. Caywood, 4 Or. 288, construing grants under "Donation Act;" Neal v. College, 6 Yerg. 197, applying rule in case of grant for military services; Parkison v. Bracken, 1 Pinn. 180, 39 Am. Dec. 297, holding patent conclusive evidence of title in action at law, and evidence is admissible to show adverse equitable title. See also notes, 2 Am. Dec. 570, and 12 Am. Dec. 565, 566, on general subject. The rule has also been approved in general discussion in State v. Batchelder, 5 Minn. 237, 242, 80 Am. Dec. 414, 418; Ferry v. Street, 4 Utah, 537, 11 Pac. 576.

Distinguished in Patterson v. Jenks, 2 Pet. 237, 7 L. 409, holding it to be error to instruct jury that no fraud of public officer could invalidate public grant. Limited in Sabariego v. Maverick, 124 U. S. 281, 31 L. 438, 8 S. Ct. 472, holding that patent to lands confiscated by government because of treason of owner, raises no presumption that such treason was judicially determined. Distinguished in Reeder v. Barr, 4 Ohio, 459, 22 Am. Dec. 763, where patent issued to person as assignee, and such patent held to give notice of existing equities. Limited in Goode v. McQueen, 3 Tex. 255, holding burden of proof to be on patentee to show authority of officer to issue it.

Patent.— Obliteration of consideration will not avoid patent, in absence of fraud, p. 97.

Public lands.— Patent is void at law if State had no title, or if officer issuing it had no authority to do so, p. 99.

This rule has been cited and the principle applied in numerous cases: Polk v. Wendell, 5 Wheat. 302, 5 L. 94, where entry on public lands was under forged warrant; Rice v. Railroad Co., 1 Black, 375, 17 L. 152, holding void, act of territorial legislature granting to railroad land to which territory had not title; Morton v. Nebraska, 21 Wall. 675, 22 L. 645, where land granted had been previously reserved from sale; Doolan v. Carr, 125 U. S. 625, 626, 629, 31 L. 847, 848, 8 S. Ct. 1231, 1233, 1236, admitting evidence of grant from Mexican government properly confirmed, to show want of power of land office to issue patent to same land; but see dissenting opinion, p. 634, 31 L. 850, where principal case distinguished; Knight v. United States Land Assn., 142 U. S. 176, 35 L. 979, 12 S. Ct. 262, following Doolan v. Carr, supra; Noble v. Railroad Co., 147 U. S. 174, 37 L. 127, 13 S. Ct. 274, holding that defect in patent may be shown in any collateral proceeding; but see St. Louis, etc., Co. v. Green, 4 McCrary, 235, 13 Fed. 210, citing principal case to opposite effect; Patterson v. Tatum, 3 Sawy. 173, F. C. 10,830,

holding patent void where land in question granted to another prior to acquisition of title by United States; Chamberlain v. Marshall, 8 Fed. 409, holding tax sale of lands held under void grant, ineffectual to convey title; Lake Superior, etc., Co. v. Cunningham, 44 Fed. 832, 838, allowing defendant in ejectment to set up title in third person; Lakin v. Dolly, 53 Fed. 336, holding such patent impeachable in collateral proceeding; Northern Pacific Ry. Co. v. Cannon, 54 Fed. 258, 7 U. S. App. 507, holding void, grant of land previously reserved from sale; United States v. Winona, etc., Ry. Co., 67 Fed. 956, 959, 32 U. S. App. 272, holding void, grant by land department of military lands; Garrard v. Silver Peak Mines, 82 Fed. 583, 587, where grant was of land previously reserved; United Land Assn. v. Knight, 85 Cal. 462, 480, 24 Pac. 825, 821, where government had no title (see 142 U. S. 176, 35 L. 979, 12 S. Ct. 262, supra); Chever v. Horner, 11 Colo. 75, 7 Am. St. Rep. 222, 17 Pac. 498, where State had no title; Wright v. Nagle, 48 Ga. 391, ruling similarly as to grant of exclusive right by municipal corporation, when power to make such grant not included in corporate charter; Ballance v. McFadden, 12 Ill. 324, holding void, patent issued to person who had not complied with law as to settlement; Bruckner's Lessee v. Lawrence, 1 Doug. (Mich.) 30, holding grant void if at same time land is in possession of another claiming under title adverse to grantor; Webber v. Pere Marquette Boom Co., 62 Mich. 637, 30 N. W. 473, where government had previously conveyed some land to other person; Perry v. O'Hanlon, 11 Mo. 595, 49 Am. Dec. 109, where land previously reserved from sale; so also in Easton v. Salisbury, 23 Mo. 106, holding also that subsequent repeal of such reservation does not operate to confirm void patent; Magwire v. Tyler, 40 Mo. 434, holding that elder patent conveys absolute title, and junior patent void; Le Beau v. Armitage, 56 Mo. 194, holding that congress cannot confirm void patent as against one regularly issued previous to such confirmation; Mantle v. Noyes, 5 Mont. 291, 294, 5 Pac. 862, 864, holding that under statute patent to placer claim passes no title to previously located quartz claim; Silver Bow, etc., Co. v. Clark, 5 Mont. 422, 425, 5 Pac. 580, 582, holding that patent to mining claim relates back to date of location, and is not defeated by intermediate town site patent; so also in Talbott v. King, 6 Mont. 108, 9 Pac. 442, on same point, following Silver Bow etc., Co. v. Clark, supra; Rose v. Richmond M. Co., 17 Nev. 64, 27 Pac. 1113, holding that running claims are not open to relocation until rights of former locator abandoned or forfeited; Miller v. Tobin, 16 Or. 552, 16 Pac. 168, as to patent issued by land office for land included in previous grant to State; Overton v. Campbell, 5 Hayw. (Tenn.) 167, 173, 203, 9 Am. Dec. 785, holding that void grant is attackable collaterally in any action; Moss v. Gibbs, 10 Heisk. 286, where State had no title; so also in Calloway v. Hopkins, 11 Heisk. 377; Sherwood v. Fleming, 25 Tex. Supp. 427, holding legislative act cannot confirm void patent

so as to defeat rights accruing under second patent issued before such act; Blankenpickler v. Anderson's Heirs, 16 Gratt. 62, holding patent void, where grantee dead at time of issue; Randolph v. Longdale Iron Co., 84 Va. 466, 5 S. E. 34, holding patent void on face, impeachable in any collateral proceeding. The rule is cited generally in Hart v. Burnett, 15 Cal. 612; in Horsky v. Moran, 53 Pac. 1067, holding mining claimant estopped by laches from attacking town titles; notes, 3 Or. 399, and 2 Overt. 37.

Distinguished in Patterson v. Winn, 11 Wheat. 382, 6 L. 500, denying retroactive effect of statute restricting size of grant; Wright v. Roseberry, 121 U. S. 520, 30 L. 1048, 7 S. Ct. 999; Anderson v. Bartels, 7 Colo. 264, 3 Pac. 229; Hancock v. McKinney, 7 Tex. 440; Todd v. Fisher, 26 Tex. 241, and Bryan v. Shirley, 53 Tex. 458, holding grant not avoided by mere irregularity in manner of issue; Colorado Coal Co. v. United States, 123 U. S. 325, 31 L. 189, 8 S. Ct. 140, holding that where "coal lands" are reserved from sale mere surface indications of coal will not invalidate grant, and burden of proof is on government to show them to be in fact coal lands; St. Paul & N. P. Ry. Co. v. St. Paul, W. & M. Ry. Co., 57 Fed. 273, holding excessive grant voidable only; New Dunderberg Mining Co. v. Old, 79 Fed. 602, 49 U. S. App. 208; Doll v. Meador, 16 Cal. 330, holding such patent not attackable collaterally unless void on face; Garner v. Willett, 18 Ill. 458, where congress had confirmed patent irregularly issued; Hollinan v. Peebles, 1 Tex. 700, holding that abandonment of patent confers authority on United States to regrant; Carson City, etc., Co. v. North Star, etc., Co., 73 Fed. 600, holding that statute limiting size of grant does not limit number of grants that may be held.

Public lands.— Conflicting claims under a patent are subject to jurisdiction of equity courts, p. 99.

This rule has been cited and applied in Smelting Co. v. Kemp, 104 U. S. 642, 648, 652, 26 L. 877, 879, 880, where patent tainted with fraud; Smythe v. Henry, 41 Fed. 716, entertaining bill to quiet title; and in the following: Arnold v. Grimes, 2 G. Greene, 83, 84; De Armes v. New Orleans, 5 La. 178; Cook's Lessee v. Carroll, 6 Md. 112, and Green v. Barker, 47 Neb. 942, 66 N. W. 1034, all denying jurisdiction to entertain action at law where fraud set up; in Sykes v. McRory, 10 Ga. 471, 54 Am. Dec. 404, holding that mistake as to grantee can be corrected only by scire facias. Approved also in Davis v. Davis, 9 Mont. 276, 23 Pac. 717.

Limited in Sharp v. Stevens, 6 Sawy. 50, F. C. 12,710, holding that patent can be impeached in equity only by directly pleading fraud or mistake.

Miscellaneous citations.— Cited also in Ming v. Foote, 9 Mont. 221, 23 Pac. 522, on point that consideration named on face of deed is not conclusive; Derby v. Jacques, 1 Cliff. 439, F. C. 3,817, but application doubtful.

9 Cr. 102–104, 3 L. 670, THE RICHMOND v. UNITED STATES.

Admiralty jurisdiction.— Seizure of vessel without jurisdiction of United States does not render unlawful, regular judicial proceedings against vessel instituted after arrival within such jurisdiction, p. 104.

Cited and rule applied in The Merino, 9 Wheat. 403, 6 L. 121, holding that appearance and claim in admiralty waives objection to regularity of process to enforce appearance; dissenting opinion, United States v. Rauscher, 119 U. S. 435, 30 L. 434, 7 S. Ct. 249, majority holding that person extradited for purpose of being tried for murder can be tried for no other offense; Kerr v. Illinois, 119 U. S. 444, 30 L. 424, 7 S. Ct. 229, refusing to revise decision of State court holding that forcible transfer of defendant within jurisdiction renders him amenable to prosecution on criminal charge; In re Johnson, 167 U. S. 126, 42 L. 105, 17 S. Ct. 737, sustaining indictment for murder, although prior arrest illegal; In re Ezeta, 62 Fed. 968, holding in extradition proceedings that it is immaterial how party came or was brought within jurisdiction of court; United States v. Arms and Ammunitions, 24 Fed. Cas. 863, where American vessel seized within foreign jurisdiction for violation of neutrality laws.

Non-intercourse act.— Under act prohibiting intercourse with enemy, vessel cannot proceed to prohibited port in ballast, p. 103.

Miscellaneous citations.— Cited also in United States v. Packages, 27 Fed. Cas. 288, but not in point.

9 Cr. 104–120, 3 L. 671, ARNOLD v. UNITED STATES.

Computation of time.— Where computation is to be made from act done, date on which act is done is to be included, p. 120.

This rule is cited and applied in Lapeyre v. United States, 17 Wall. 198, 21 L. 608, holding proclamation of president relieving certain classes from penalties to have taken effect when signed by president and sealed with great seal of United States; Taylor v. Brown, 147 U. S. 644, 37 L. 315, 13 S. Ct. 551, holding that in computing time during which alienation of public land acquired under patent is forbidden, day of issue of patent should be included; Smith v. Draper, 5 Blatchf. 240, F. C. 13,037, construing statute imposing duty on teas; United States v. O'Neill, 19 Fed. 572, as to statute increasing duty on liquors; United States v. Chong Sam, 47 Fed. 883, construing Chinese exclusion act; Vailes v. Brown, 16 Colo. 466, 27 Pac. 946, construing statute of limitations; Taylor v. Brown, 5 Dak. Ter. 349, 40 N. W. 530 (see S. C., 147 U. S. 644, 37 L. 315, 13 S. Ct. 551, supra); Woolbright v. Sneed, 5 Ga. 171, on point that statute of limitations does not begin to run until right of action accrues; so also in Jacobs v. Graham, 1 Blackf. 392; Ryman v. Clark, 4 Blackf. 329, construing statute prescribing time within which return on execution to be made; Swift v. Tousey, 5 Ind. 198,

construing statute prescribing time for taking appeal, and in Coal Co. v. Barber, 47 Kan. 30, 31, 27 Pac. 115, on same point; Batman v. McGowan, 1 Met. (Ky.) 547, construing statute requiring notice of intention to contest election; Mallory v. Hiles, 4 Met. (Ky.) 55, holding act suspending courts effective after approval by governor; Parkinson v. State, 14 Md. 200, 74 Am. Dec. 533, holding that where act declares time when it shall take effect, it will operate at such time, although not published; Commonwealth v. Brooks, 109 Mass. 357, holding that municipal ordinance takes effect from date of passage, unless otherwise specified; Bailey v. Lubke, 8 Mo. App. 60, construing statute prescribing time for taking appeal; Carothers v. Wheeler, 1 Or. 196, construing statute prescribing time for taking appeal; Barber v. Chandler, 17 Pa. St. 50, 55 Am. Dec. 534, construing statute regulating issue and return of summons; Ex parte De Hay, 3 S. C. 565, holding void proceedings of court after time prescribed in statute changing time for holding such court; State v. Maneke, 18 S. C. 86, construing statute regulating issue of municipal licenses; In re Welman, 20 Vt. 660, denying validity of petition filed on same day that bankrupt act repealed; Robinson v. Robinson, 32 Vt. 741, construing statute prescribing time for taking appeal; State v. Mounts, 36 W. Va. 190, 14 S. E. 410, holding that term "passage" refers to passage by legislature and not approved by governor. See also notes, 7 Am. Dec. 250, and 26 Am. Dec. 234. Cited, generally, also in Spencer v. Champion, 13 Conn. 16, and note, 2 Hill, 356.

Distinguished in Dutcher v. Wright, 94 U. S. 560, 24 L. 132, excluding day on which petition in insolvency is filed, in computing time, before such filing, within which assignments are void; Burgess v. Salmon, 97 U. S. 384, 24 L. 1106 (see 1 Hughes, 359, F. C. 12,262), and Louisville v. Bank, 104 U. S. 475, 26 L. 777, holding that increase in internal revenue did not operate upon goods on which tax paid before act approved, although paid on same day that act approved; United States v. Stoddard, 89 Fed. 701, under terms of statute; Wood v. Fort, 42 Ala. 642, limiting rule to remedial statutes not prescribing punishments or penalties; Bemis v. Leonard, 118 Mass. 505, 19 Am. Rep. 473, and McGinley v. Laycock, 94 Wis. 208, 68 N. W. 872, where statutes expressed different intention; Arrowsmith, Hamering, 39 Ohio St. 578, holding that rule will not prevail when actually in conflict with right acquired earlier in point of time on same day. Denied in In re Tyson, 13 Colo. 489, 22 Pac. 812, construing statute prescribing time within which execution shall be held; Vailes v. Brown, 16 Colo. 466, 27 Pac. 946, construing statute limiting time for filing contest of election; Weeks v. Hull, 19 Conn. 382, 50 Am. Dec. 252, holding that date of act from which future time is to be ascertained, is to be excluded from computation; Parkinson v. Brandenburg, 35 Minn. 295, 59 Am. Rep. 326, 28 N. W. 919, holding that where statute provides that it shall

take effect "from and after passage," day of passage is to be excluded.

Duties, right to, accrues on arrival of goods within port of entry, p. 120.

Rule applied in Meredith v. United States, 13 Pet. 494, 10 L. 262, holding, further, that duties due, constitute personal debt of importer as well as lien upon goods; dissenting opinion, Keck v. United States, 172 U. S. 463, majority holding that mere concealment of goods after entering port did not constitute smuggling; United States v. Cigars, 2 Curt. 437, F. C. 16,450, holding importation without manifest complete, for purposes of forfeiture, when goods brought within limits of port of entry; so also in United States v. Dodge, Deady, 126, F. C. 14,973; United States v. Lyman, 1 Mason, 499, F. C. 15,647, holding that action of debt lies to recover such duties; Kidd v. Flagler, 54 Fed. 369, holding exportation complete when goods landed in foreign port; United States v. Merriam, 26 Fed. Cas. 1239, holding entry in custom-house not necessary to render goods liable to forfeiture for fraud in invoicing. Cited in general discussion in Brown v. Maryland, 12 Wheat. 453, 6 L. 690; United States v. Segars, 27 Fed. Cas. 1017; note, 1 Abb. (U. S.) 423, F. C. 16,555.

Distinguished in McLean v. Hager, 31 Fed. 606, holding opium exempt from duty where collector refused to give permit for trans-shipment as required by statute.

Bond, recovery on, cannot exceed penalty with interest (so held in lower court, 1 Gall. 358, F. C. 14,469, but point not raised on appeal).

Cited to this point in Lawrence v. United States, 2 McLean, 586, F. C. 8,145, as to postmaster's bond; Lewis v. Dwight, 10 Conn. 103, fixing amount of liability of surety on promissory note; Fraser v. Little, 13 Mich. 202, 87 Am. Dec. 744, holding that recovery on replevin bond cannot exceed penalty and costs of suit; Clark v. Bush, 3 Cow. 158, as to bond of indemnity against partnership debts; Boyd v. Boyd, 1 Watts, 369, allowing as damages, interest beyond penalty in administrator's bond; Perry v. Horn, 22 W. Va. 385, ruling similarly in action on injunction bond. Cited, generally, in Lyon v. Clark, 8 N. Y. 156; note, 87 Am. Dec. 750, 754.

Distinguished in New Holland, etc., Co. v. Lancaster County, 71 Pa. St. 445, holding that, although penal bond in sum certain is given to secure expense of county in building bridge, if amount of expenses exceeds penalty, county may waive bond and sue in contract.

Miscellaneous citations.— Cited also in United States v. Meeker, 26 Fed. Cas. 1234, on point that interest runs only from date of demand on surety; United States v. Reiter, 27 Fed. Cas. 779, not in point.

9 Cr. 120–122, 3 L. 676, THE ST. LAWRENCE.

Trading with enemy.— Quære, whether one belligerent may withdraw his property from country of the other, on breaking out of war, p. 121.

Referred to in Amory v. McGregor, 15 Johns. 36, 8 Am. Dec. 209, asserting right to do so within reasonable time.

9 Cr. 122–125, 3 L. 677, DRUMMOND v. MAGRUDER.

Appeal, evidence.— Court is confined to proofs as shown by record of lower court, p. 125.

Cited and applied in Kerr v. Watts, 6 Wheat. 562, 5 L. 331, holding that higher court will not consider a particular defense as having been waived, from mere fact that court below did not consider it.

Appeal.— If the Supreme Court reverse a decree upon a technical objection to the evidence, it will not dismiss the bill absolutely, but remand the cause for further proceedings, p. 125.

Authentication.— Document attested by clerk of court, cannot be received as evidence, without certificate of presiding judge that such attestation is in due form, p. 125.

Cited and applied in Taylor v. Carpenter, 2 Wood. & M. 4, F. C. 13,785, as to copy of judgment; in McRae v. Stokes, 3 Ala. 403, 37 Am. Dec. 700, holding that attestation necessary is that prescribed for court where proceedings had; Pennel's Lessee v. Wayant, 2 Harr. 505, holding deeds within meaning of act of congress, prescribing method of authenticating records; Giles v. Shaw, Breese, 126, holding insufficient, certificate of judge, omitting to state that attestation of judgment is "in due form;" so also in Hutchins v. Gerrish, 52 N. H. 206, 13 Am. Rep. 20; Chase v. Caryl, 57 N. J. L. 554, 31 Atl. 1028, construing State statute requiring authentication of recording and cancellation of mortgages; Hatcher v. Rocheleau, 18 N. Y. 94, holding further that such certificate is conclusive of competency of copy as evidence; Snyder v. Wise, 10 Pa. St. 161, applying principle to judgment rendered in justice's court.

9 Cr. 126–151, 3 L. 678, THE MARY.

Foreign judgment of court of competent jurisdiction in an action in rem, is conclusive as to matters it purports to decide, pp, 142, 144.

This rule has been cited and applied in Tompkins v. Tompkins, 1 Story, 553, F. C. 14,091, to decree of Probate Court ordering sale of personal property; Bradstreet v. Insurance Co., 3 Sumn. 605, F. C. 1,793, to sentence of condemnation for illicit trading; Alabama, etc., Ry. Co. v. Jones, 1 Fed. Cas. 282, 7 Bank Reg. 171, to decree of District Court in bankruptcy proceedings; The Hendrik Hudson, 11 Fed. Cas. 1093, to decree of sale of vessel to satisfy bottomry bond;

Thoms v. Southard, 2 Dana, 482, 26 Am. Dec. 473, holding decree of admiralty in proceeding to enforce lien, conclusive as to title; Whitney v. Walsh, 1 Cush. 32, 48 Am. Dec. 590, holding decree of forfeiture conclusive as to legality of seizure; so also in Tracey v. Corse, 58 N. Y. 151; Williams v. Saunders, 5 Cold. 78, holding decree of register of wills, directing distribution of property, conclusive as to facts on which it is based; likewise in Brown v. Brown, 86 Tenn. 319, 7 S. W. 647, as to decree admitting will to probate. See also notes, 62 Am. Dec. 243, 75 Am. Dec. 724. Cited approvingly in Allen v. United States, Taney, 117, F. C. 240.

Distinguished in Burnham v. Webster, 1 Wood. & M. 178, F. C. 2,179 holding evidence admissible to show want of jurisdiction of such court; so also in The Trenton, 4 Fed. 659, 661; Sneed v. Ewing, 5 J. J. Marsh. 465, 22 Am. Dec. 47, and Richardson v. Seevers, 84 Va. 267. Distinguished in Ashbrook v. Golden Gate, Newb. 306, F. C. 574, where action was at common law and against owners of vessel personally. Limited in Bank v. Hodges, 12 Ala. 122, holding that bill in equity by feme covert to have property settled to separate use is not such proceeding in rem, and decree is binding only on parties and privies. Distinguished in dissenting opinion, Fisher v. Fielding, 67 Conn. 128, 34 Atl. 724, majority holding judgment on pecuniary demand conclusive on merits; Brigham v. Fayerweather, 140 Mass. 413, 414; 5 N. E. 266, 267, holding decree admitting will to probate not conclusive as to testator's mental capacity; Thompson v. The Julius D. Morton, 8 Ohio St. 227, holding sale ordered by Admiralty Court conclusive only when made to bona fide purchaser.

Notice is necessary in order to make person party to action and bind him by judgment, p. 144.

Cited and applied in Earle v. McVeigh, 91 U. S. 510, 23 L. 401, holding void judgment founded on defective notice; Scott v. McNeal, 154 U. S. 46, 38 L. 902, 14 S. Ct. 1112, holding void administrator's sale of lands of living person who had no notice of proceedings; so also in Lavin v. Bank, 18 Blatchf. 24, 1 Fed. 663; Parsons v. Lyman, 5 Blatchf. 179, F. C. 10,780, reprinted, 32 Conn. 576, as to proceedings in Probate Court to settle trustee's account; Mathewson v. Sprague, 1 Curt. 462, F. C. 9,278, applying statute requiring notice of proceedings for probate of will; Sumner v. Marcy, 3 Wood. & M. 118, F. C. 13,609, holding void sale on execution; The Globe, 10 Fed. Cas. 481, holding void decree of sale of vessel, where owner had no notice of proceedings; In re Shepard, 21 Fed. Cas. 1254, 1 Bank. Reg. 117, holding claim of creditor not barred by decree in bankruptcy of which he had no notice; Hunt's Heirs v. Ellison's Heirs, 32 Ala. 187, setting aside decree of foreclosure made after death of party to mortgage, his heirs having had no notice of proceedings; Bowler v. Eldredge, 18 Conn. 10, dissolving attachment of vessel where owner had no notice of proceedings against her; Beard v. Beard, 21 Ind. 324, denying validity of statute authorizing judg-

ments for alimony, upon constructive notice, against citizens of other States; City of Salem v. Railroad Co., 98 Mass. 449, 96 Am. Dec. 660, denying right of city to recover for expenses incurred in removing nuisance, notice to remove not having been served on owner; Wight v. Maxwell, 4 Mich. 63, denying extra-territorial effect of statute providing that attachment gives constructive notice of proceedings; dissenting opinion, Conklin v. Cunningham, 7 N. Mex. 483, 38 Pac. 181, majority holding notice of default not necessary to removal, by governor, of officer for shortage in accounts; McKee v. McKee, 14 Pa. St. 237, where decree of specific performance of contract made by decedent, held invalid, notice of proceedings not having been served on heirs; Underwood v. McVeigh, 23 Gratt. 420, and Dorr v. Rohr, 82 Va. 362, 3 Am. St. Rep. 108, dissolving attachments where notice not given as required by statute. Cited also in discussing general subject, but without particular application, in Ex parte Woods, 3 Ark. 535; Borden v. State, 11 Ark. 526, 54 Am. Dec. 220 (see dissenting opinion, 11 Ark. 558); Dorrance v. Raynsford, 67 Conn. 8, 52 Am. St. Rep. 269, 34 Atl. 708; Fowler v. Lewis, 36 W. Va. 138; note, 48 Am. Dec. 270.

Distinguished in Hamilton v. Brown, 161 U. S. 274, 40 L. 699, 16 S. Ct. 592, under statute providing for notice by publication in escheat proceedings. Limited in Daily v. Doe, 3 Fed. 912, 913, holding that want of notice will not avoid sale of court under decree of admiralty, but merely reopen proceedings.

Admiralty.— Seizure gives constructive notice to all parties, p. 144.

Cited and principle applied in Miller v. United States, 11 Wall. 325, 20 L. 151, holding that seizure of corporate stock may be made by service of notice on officers of corporation; The Ann, 5 Hughes, 297, 8 Fed. 927, as to seizure of vessel for violation of State statute; United States v. Mackoy, 2 Dill. 308, F. C. 15,696, holding lienors barred by failure to assert claims in proceedings for forfeiture of property seized for violation of revenue laws; Merrick v. Hutt, 15 Ark. 343, applying principle in case of attachment of land for nonpayment of taxes; note, 48 Am. Dec. 274, on point that proceedings in rem involving seizure of subject-matter constitute exception to general rule as to notice. Cited arguendo in Daily v. Doe, 3 Fed. Rep. 913, 917.

Distinguished in dissenting opinion, Miller v. United States, 11 Wall. 328, 20 L. 152 (see 11 Wall. 325, supra); The Henrietta, Newb. 291, F. C. 6,121, holding person not bound by decree of court if his claim was not assertible in such court. Denied in Verner v. Bosworth, 28 Kan. 673.

Admiralty.—All persons having interest in subject-matter are parties, p. 145.

Cited and applied in The Commander-in-Chief, 1 Wall. 52, 17 L. 612, holding decree conclusive as to all parties, if, after due notice,

they fail to appear; Cushing v. Laird, 107 U. S. 79, 27 L. 395, 2 S. Ct. 204, holding that person conducting defense on behalf of parties interested is not estopped to set up, subsequently, his own equity in the property (see S. C. in lower court, 6 Ben. 461, F. C. 3,509). Cited generally, and without particular application, in Nations v. Johnson, 24 How. 205, 16 L. 632; Ray v. Noseworthy, 23 Wall. 136, 23 L. 118, 12 Bank. Reg. 150; The Ann, 5 Hughes, 297, 8 Fed. 927; Bradstreet v. Insurance Co., 3 Sumn. 609, F. C. 1,793; Poole v. Nixon, 19 Fed. Cas. 1000.

Bottomry bond, holder of, cannot claim in court of prize, p. 145.

Cited, arguendo, in The Mary Anne, 1 Ware, 106, F. C. 9,195.

Miscellaneous citations.— Cited in La Manche v. Sprague, 214, 216, F. C. 8,004, as to what constitutes probable cause for seizure; The Parkhill, 18 Fed. Cas. 1192, and United States v. The F. W. Johnson, 25 Fed. Cas. 1236, but application doubtful. Erroneously cited in Boston, etc., Co. v. Fiske, 2 Mason, 122, F. C. 1,681, and Amory v. McGregor, 15 Johns. 37, 8 Am. Dec. 209.

9 Cr. 151–153, 3 L. 687, LEWIS v. McFARLAND.

Executor may maintain suit in foreign jurisdiction for lands devised to him by testator, p. 152.

Cited and principle applied in Slack v. Walcott, 3 Mason, 518, F. C. 12,932, holding that in order to bring bill for specific performance to convey land, executor need not prove will in jurisdiction where such action commenced; De Forest v. Thompson, 40 Fed. 377 (see S. C., 32 W. Va. 3, app.), sustaining right of executor to defend in action of ejectment; Wilson v. Tootle, 55 Fed. 217, applying principle to action by executor, as trustee, for wrongful death of testator; Apperson v. Bolton, 29 Ark. 435, 437, sustaining validity of sale in foreign jurisdiction by executor; Way v. Slaughter, 3 A. K. Marsh. 510, and May v. Hill, 5 Litt. (Ky.) 312, entertaining ejectment by foreign executor. Approved also in Taylor v. Benham, 5 How. 273, 12 L. 149, in discussing general subject.

Rule limited in Leavens v. Butler, 8 Port. 402, and Perkins v. Lewis, 41 Ala. 662, 663, 94 Am. Dec. 626, 627, holding that executor must sue as devisee; Crusoe v. Butler, 36 Miss. 171, 172, holding that will must be produced to show authority as executor; Cabanne v. Skinker, 56 Mo. 367, and Emmons v. Gordon, 140 Mo. 499, 62 Am. St. Rep. 740, 41 S. W. 1001, holding that will must be proved in such foreign jurisdiction.

Executor.—Authority to sue for personal estate of testator does not extend outside of jurisdiction of State where letters testamentary granted, p. 152.

Approved and principle applied in Mellus v. Thompson, 1 Cliff. 134, F. C. 9,405, holding that executor cannot be sued without jurisdiction of appointment, for assets received within such jurisdiction;

State v. Joyce, 48 Ind. 318, majority holding admissible in evidence, will of personal property probated in other State; Le Cesne v. Cottin, 2 Mart. (La.) (N. S.) 486, denying right of foreigner to admission as beneficiary heir; Pelletreau v. Rathbone, 1 N. J. Eq. 333, on point that probate of will in one State is of no effect in courts of another; Vaughn v. Barret, 5 Vt. 336, 26 Am. Dec. 307, denying authority of administrator appointed in one State, to discharge debt due testator from citizen of another State. The rule is also cited in general discussion, but without particular application to the point at issue, in Kerr v. Moon, 9 Wheat. 571, 6 L. 163; Trecothick v. Austin, 4 Mason, 32, F. C. 14,164; Clark v. Hornthal, 47 Miss. 490, 491; dissenting opinion, Becraft v. Lewis, 41 Mo. App. 556; Wills v. Cowper, 2 Ohio, 128.

Variance.— Plaintiff, in ejectment, may recover, although interest established at trial is less than that claimed in declaration, p. 153.

Rule applied in Grothans v. De Lopez, 57 Tex. 673, in action by tenant in common to recover undivided interest; Callis v. Kemp, 11 Gratt. 84, where plaintiff claimed whole tract and jury found only undivided interest. See also notes, 54 Am. Dec. 416, and 50 Am. St. Rep. 845.

Miscellaneous citations.— Cited also in Pulliam v. Pulliam, 10 Fed. 45, discussing powers of executor as trustee under will.

9 Cr. 153–164, 3 L. 688, CLARK v. VAN RIEMSDYK.

Equity.— Verified answer of defendant can be overcome only by testimony of two witnesses or one witness and corroborating circumstances, p. 160.

This rule has been applied in the following citing cases: Voorhees v. Bonesteel, 16 Wall. 30, 21 L. 271, denying affirmative relief on ground of fraud in assignment, where answer controverted by but one witness; Godden v. Kimmell, 99 U. S. 206, 25 L. 433, where suspicion of fraud alone, held insufficient to set aside deed; Bowden v. Johnson, 107 U. S. 262, 27 L. 390, 2 S. Ct. 255, holding answer overcome by testimony of one witness and admitted fact that defendant knew bank to be insolvent and transferred stock to escape liability; Delano v. Winsor, 1 Cliff. 505, F. C. 3,754, dismissing proceedings against trustee for breach of trust; Tobey v. Leonards, 2 Cliff. 51, F. C. 14,067, holding testimony of one witness insufficient to sustain bill for specific performance; Parker v. Phettleplace, 2 Cliff. 79, F. C. 10,746, denying sufficiency of one witness in action to set aside mortgage on ground of fraud; Badger v. Badger, 2 Cliff. 146, F. C. 718, dismissing bill charging fraud in settling probate accounts; Scammon v. Cole, 3 Cliff. 479, 5 Bank. Reg. 264, F. C. 12,432, where answer denying fraud in executing mortgage under bankrupt act, held not overcome by testimony of one witness; Hayward v. Bank, 4 Cliff. 296, F. C. 6,273, where allegations of fraud in

bill supported only by testimony of complainant; Gilman v. Libbey, 4 Cliff. 459, F. C. 5,445, dismissing bill to set aside sale on ground of fraud; West v. Randall, 2 Mason, 205, F. C. 17,424, dismissing bill for account where only witnesses were complainant and one identified with him in interest; United States v. Parrott, 1 McAll. 302, 311, F. C. 15,998, applying rule in bill for injunction (see also same case, 1 McAll. 449, F. C. 15,999); Sadler v. Robinson, 2 Stew. 524, holding acquiescence in transfer of land to be circumstance which will, in addition to testimony of one witness, control answer denying assent to conveyance; Fenno v. Sayre, 3 Ala. 478, on point that answer directly responsive to bill is evidence in all cases; Cummins v. Harrell, 6 Ark. 315, applying rule in proceeding to annul bond on ground of fraud; Field v. Howell, 6 Ga. 431, where, in action to enjoin trespass, answer showed lease in defendant; Ruckersville Bank v. Hemphill, 7 Ga. 412, dismissing bill where cause submitted on bill and answer alone; Dodge v. Griswold, 12 N. H. 577, refusing to set aside conveyance for fraud where only one witness for complainant; Bellows v. Stone, 18 N. H. 479, dismissing bill for account where answer uncontroverted except by circumstances; Brown v. Bulkely, 14 N. J. Eq. 300, holding that complainant cannot impair effect of answer by impeaching defendant's reputation for veracity; Bent v. Smith, 22 N. J. Eq. 566, applying rule in proceeding to establish trust; Gibbs v. Guignard, 1 S. C. 377, applying rule to answer of trustee to bill for account; Burnley v. Cook, 13 Tex. 590, 65 Am. Dec. 82, dismissing bill for injunction; Taylor v. Moore, 2 Rand. 577, dismissing bill to set aside deed on ground of fraud; Moore v. Ullman, 80 Va. 310, sustaining bill to set aside deed where fraud proved by one witness and corroborating circumstances. The rule is approved in the following cases, discussing the general subject: Carpenter v. Insurance Co., 4 How. 218, 11 L. 946; Tobey v. Leonards, 2 Wall. 430, 17 L. 845; May v. Le Claire, 11 Wall. 233, 20 L. 54; United States v. Hodson, 26 Fed. Cas. 339; White v. Crew, 16 Ga. 423; Long v. White, 5 J. J. Marsh, 228; Warren v. Swett, 31 N. H. 339; Morris v. White, 36 N. J. Eq. 329; Maise v. Garner, 1 Mart. & Y. 385, 17 Am. Dec. 819; Autrey v. Cameron, 11 Tex. 114; Frank v. Lilienfield, 33 Gratt. 381.

Distinguished in Barraque v. Siter, 9 Ark. 547, 550, and Robinson v. Stewart, 10 N. Y. 195, holding that rule does not apply, where answer contains admissions inconsistent with previous positive denial.

Equity.— Where answer of defendant is made only upon information and belief, and is not verified, the general rule that two witnesses, or one witness and corroborating circumstances, are necessary to overcome it, does not apply, p. 160.

This limitation of the general rule has been applied in a number of citing cases: Union Bank v. Geary, 5 Pet. 111, 8 L. 65; Bucking-

ham v. McLean, 13 How. 171, 14 L. 99; Hickox v. Elliott, 11 Sawy. 641, 27 Fed. 841; Poor v. Carlton, 3 Sumn. 78, F. C. 11,272; Berry v. Sawyer, 19 Fed. 290; Mason v. Jones, 16 Fed. Cas. 1041; Dugan v. Gittings, 3 Gill, 158, 43 Am. Dec. 314; Neale v. Hagthorp, 3 Bland Ch. 568; Shackelford v. Brown, 72 Miss. 387, 17 So. 898; Gamble v. Johnson, 9 Mo. 628. See also Commonwealth v. Cullen, 13 Pa. St. 143, 53 Am. Dec. 458, where rule approved in general discussion.

Equity — Evidence.— Answer of one defendant is not evidence against co-defendant, p. 160.

Cited and applied in Lenox v. Natrebe, Hemp. 257, F. C. 8,246c, holding that infants cannot be prejudiced by misstatements of guardian in answer to bill for cancellation of mortgage; Collier v. Chapman, 2 Stew. 166, 167, holding inadmissible against co-defendant answer of another defendant tending to invalidate title made by latter; Moore v. Hubbard, 4 Ala. 192, as to answer in action against partnership for settlement of accounts; Robinson v. Sampson, 23 Me. 389, in proceeding to set aside mortgage on ground of fraud; Martin v. Martin, 13 Mo. 64, holding rights of heirs not prejudiced by faulty answer of administrator; Van Derveer v. Holcomb, 17 N. J. Eq. 553, holding in action to foreclose mortgage, answer of owner could not prejudice his co-defendant, the second mortgagee; Judd v. Seaver, 8 Paige Ch. 553, as to admission by joint maker of note, in proceedings for relief on ground of usury.

Rule approved in McElroy v. Ludlum, 32 N. J. Eq. 831, discussing general subject.

Distinguished in Barraque v. Siter, 9 Ark. 547, 550, and Lingan v. Henderson, 1 Bland Ch. 267, where defendants interested jointly as partners; Christie v. Bishop, 1 Barb. Ch. 116, holding heirs bound by admissions of testator implied from failure to answer; Pettit v. Jennings, 2 Rob. (Va.) 681, denying application of rule where one defendant claimed title through other.

Bankruptcy.— Discharge in bankruptcy will not protect debtor against debt contracted in foreign jurisdiction, p. 162.

Cited in Davidson v. Smith, 1 Biss. 349, F. C. 3,608, denying extra-territorial effect of State insolvency laws.

Agency.— Subsequent ratification of unauthorized act is equivalent to original authority, p. 161.

Cited and applied in Mason v. Crosby, 1 Wood. & M. 358, F. C. 9,234, holding that where agent guilty of fraud in sale of land, owners, by accepting purchase price, became parties to such fraud; Jones v. Atkinson, 68 Ala. 170, as to unauthorized sale of personal property, holding, further, subsequent ratification irrevocable; Byrne v. Doughty, 13 Ga. 53, holding that conduct of principal should be construed liberally in favor of agent; Mathews v. Gilliss, 1

Iowa, 254, applying principle where attorney in fact exceeded authority in selling land and principal demanded specific performance of contract; Davison v. Davenport, etc., Co., 24 Iowa, 424, where alleged principal received consideration, although contract made by agent in his own behalf; Lingan v. Henderson, 1 Bland Ch. 278, as to power of partner to bind copartners by contract for partnership purposes; Merrifield v. Parritt, 11 Cush. 597, holding principal estopped from denying authority of agent where he acquiesced in acts done under it; Grant v. Beard, 50 N. H. 133, holding that such ratification relates back to original transaction, and suit against party ratifying is not based upon act of ratification; Marshall v. Hann, 17 N. J. L. 431, ruling similarly where alleged principal failed to dissent within reasonable time after act done; Pentz v. Stanton, 10 Wend. 276, as to unauthorized act in drawing bill of exchange; followed in Moss v. Averell, 10 N. Y. 454, holding that where officer of corporation contracts on behalf of corporation, he is estopped, in suit brought against him as stockholder, to deny authority of corporation to so contract; Newton v. Bronson, 13 N. Y. 594, 67 Am. Dec. 93, as to ratification by executor of unauthorized sale of lands; McMahan v. McMahan, 13 Pa. St. 381, 53 Am. Dec. 484, as to subsequent ratification by coparcener of parol partition; Colwell v. Bank, 16 R. I. 290, 15 Atl. 81, as to power of partner to bind co-partners in contract for partnership purposes; Devendorf v. Oil Co., 17 W. Va. 170, where authorities are collected and discussed. Cited also in general discussion in the following cases: Haskell v. Cornish, 13 Cal. 48; Kenyon v. Williams, 19 Ind. 46; in Citizens' Bk. v. Millet, 44 S. W. 372, to point that agent subscribing contract, as such, is still bound if the wording imports a personal undertaking.

Distinguished in Delafield v. Illinois, 26 Wend. 226, holding that doctrine of estoppel cannot operate, as against State, on unauthorized contract of agent. Limited in Dodge v. Hopkins, 14 Wis. 639, holding that where person seeking advantage of ratification is one who ratified contract, consent of other party to such ratification must have been obtained.

9 Cr. 164–172, 3 L. 691, FINLEY v. WILLIAMS.

Public lands.— As between pre-emption rights, the prior improvement will hold the land as against a prior certificate, entry, survey and patent, p. 167.

Cited and applied in Johnson v. Towsley, 13 Wall. 86, 20 L. 487, setting aside patent issued to third party after original improvement by pre-emptioner (see also S. C. reported in 2 Neb. 490, app.); McAfee v. Keirn, 7 Smedes & M. 789, 45 Am. Dec. 333, sustaining pre-emption right under which all requirements have been complied with, as against older patent under which entry only has been made.

Boundaries.— Where monuments are relied upon to control courses and distances, they must be found as called for, p. 168.

Cited and applied in Pollard v. Shively, 5 Colo. 316, holding that where variation exists between monuments, and courses and distances in patent, patentee must keep up monuments sufficiently to give notice; so also in Patin v. Blaize, 19 La. 400, 401; Alshire v. Hulse, Wright, 171, 5 Ohio, 534, holding void for uncertainty a call for "a beech tree" in forest of such trees; McNeel v. Herold, 11 Gratt. 314, holding that where monuments called for possess but local notoriety, they must be proved by party asserting validity of entry.

9 Cr. 173–179, 3 L. 694, McIVER'S LESSEE v. WALKER.

Boundaries — Courses.— If nothing exists to control calls for courses and distances, land must be bounded by courses and distances of patent, according to magnetic meridian, p. 177.

Cited and applied in Wells v. Jackson, etc., Co., 47 N. H. 260, 90 Am. Dec. 580, construing term "due," as prefixed to designation of course; Brooks v. Tyler, 2 Vt. 350, applying rule where plaintiff in ejectment described land only by course and distance, and without monument except at point of beginning. And see note, 90 Am. Dec. 592, on general subject.

Boundaries.— Monuments designated in patent will control courses and distances, p. 178.

Cited and applied in Blake v. Doherty, 5 Wheat. 372, 5 L. 112, holding that such monuments may be proven by testimony not found in grant; Cleaveland v. Smith, 2 Story, 291, F. C. 2,874, where, in grant to town, natural object held to prevail over clearly-defined course, although lines thus formed were widely divergent; Guilmartin v. Wood, 76 Ala. 210, applying rule where land described as certain "lot," and holding parol evidence admissible to show location; Wise v. Burton, 73 Cal. 171, 14 Pac. 681, holding, further, that surveyors' field notes are admissible to show location of monument; Higley v. Bidwell, 9 Conn. 452, under facts similar to those in principal case; Alshire v. Hulse, 5 Ohio, 535, holding that proof that posts were set up at corners of land conveyed controls calls for distance; Urquehardt v. Burleson, 6 Tex. 511, correcting survey calling for wrong course; Racine v. J. Case, etc., Co., 56 Wis. 542, 14 N. W. 600, applying principle in determining location of city streets. Cited also in the following cases discussing the general subject, but without particular application to the point at issue: Croghan v. Nelson, 3 How. 193, 11 L. 557; Clements v. Pearce, 63 Ala. 292; dissenting opinion, People v. San Francisco, 75 Cal. 406, 17 Pac. 530; Daggett v. Wiley, 6 Fla. 506; Riley v. Griffin, 16 Ga. 147, 60 Am. Dec. 729. And see note, 40 Am. Dec. 110.

Distinguished in Claremont v. Carlton, 2 N. H. 372, holding parol evidence inadmissible to establish location of monument otherwise indeterminable; so also in Bowman v. Farmer, 8 N. H. 403. Limited in McNeel v. Herold, 11 Gratt. 315, holding that where calls are repugnant court will adopt those appearing to be consistent.

Boundaries.— If patent refer to plat annexed, resort may be had to it to correct repugnancies in description in patent, p. 179.

This rule is cited and applied in Brown v. Clements, 3 How. 672, 11 L. 778, where patent described land as "southwest quarter of fractional section 22;" United States v. Texas, 162 U. S. 37, 40 L. 879. 16 S. Ct. 733, referring to map annexed to treaty of 1819 with Spain, to determine boundary line of Texas; Knowles v. Nichols, 2 Curt. 574, F. C. 7,897, where rule applied in determining extent of right conveyed by grant from State, of common for purposes of taking seaweed; Chadwick v. Carson, 78 Ala. 120, allowing reference to former deed to determine bounds of land conveyed by mortgage; Ferris v. Coover, 10 Cal. 626, where map referred to in Mexican grant held to be part of grant, and to control uncertainties in description; Burk v. Baltimore, 77 Md. 472, 26 Atl. 869, holding that where ordinance providing for opening street refers to plat, such plat corrects inaccuracies in ordinance defining line of street; Coles v. Yorks, 36 Minn. 391, 31 N. W. 355, holding that where land described as being certain block, reference may be had to city maps to determine location; Wolfe v. Scarborough, 2 Ohio St. 368, referring to map, where deed described land by numbers of lots; Waterman v. Andrews, 14 R. I. 598, holding that reference in one deed to another "for more particular description" incorporates such description in former. Cited, arguendo, in Langdon v. New York, 93 N. Y. 147.

Distinguished in Martin v. King, 3 How. (Miss.) 146, holding map made under authority of United States land office inadmissible to vary prior Spanish grant.

Miscellaneous citations.— Cited in Craigin v. Powell, 128 U. S. 699, 32 L. 569, 9 S. Ct. 206, on point that survey made under direction of land office cannot be impeached collaterally; Tift v. Griffin, 5 Ga. 194, but not in point.

9 Cr. 180, 3 L. 697, OWENS v. HANNEY.

Appeal.— Judgment will not be reversed because it appears on record that plaintiff is an alien enemy, and defendant had no opportunity to plead such fact, p. 180.

Cited approvingly in Kershaw v. Kelsey, 100 Mass. 564, 97 Am. Dec. 128, discussing general subject.

Appeal.— Appeal will not be dismissed because of failure to state names of jurors in transcript of record, p. 180.

9 Cr. 181–183, 3 L. 698, UNITED STATES v. THE FANNY.

War — Non-intercourse act.—Vessel from Great Britain had right to lay off coast of United States to receive instruction from owners in New York, and if necessary to drop anchor in harbor in case of storm, p. 182.

Cited in The Sarah Starr, Blatchf. Pr. 85, F. C. 12,352, but not in point.

9 Cr. 183–190, 3 L. 398, THE FRANCES.

Prize.— Where foreign vendor attaches condition that goods are not to be delivered until price paid, property remains in vendor, and is liable to capture as enemy's property, p. 189.

Rule applied, Blum v. The Caddo, 1 Woods, 65, F. C. 1,573, holding consignor to be merely agent of consignee for purposes of delivery to carrier, and denying former's right to sue carrier for loss of goods; Treadwell v. Anglo-American Packing Co., 13 Fed. 24, holding that where shipment is made under condition of payment before delivery, vendor is liable for any loss prior to such payment; Southern Express Co. v. Craft, 49 Miss. 496, 19 Am. Rep. 9, 10, sustaining right of consignor to sue carrier for loss of goods after former had indemnified consignee for such loss; Woolsey v. Bailey, 27 N. H. 219, holding that where shipper has general discretionary orders to ship goods, shipment is at his own risk, unless such shipment clearly designated to correspondent; Farmers', etc., Bank v. Logan, 74 N. Y. 577, holding that where factor purchases goods for principal, but with his own credit, property remains in him, and he may demand payment before delivery to principal. See also note, 34 Am. Rep. 522, on general subject of conditional sales.

9 Cr. 191–199, 3 L. 701, THIRTY HHDS. OF SUGAR v. BOYLE.

International law.— Territory in temporary occupation of enemy is to be considered as enemy's colony, p. 195.

Cited and rule applied in United States v. Huckabee, 16 Wall. 434, 21 L. 464, holding that land captured from Confederate States belonged to United States and was subject to sale on extinction of Confederacy; United States v. Reiter, 27 Fed. Cas. 779, sustaining power of president to establish provisional courts in conquered territory during Rebellion; Jeffries v. State, 39 Ala. 659, sustaining power of provisional governor of State to suspend slave laws; Rutlege v. Fogg, 3 Cold. 560, 91 Am. Dec. 302, holding that Constitution and laws of conquering belligerent determine power and form of government established over captured territory. See also note, 91 Am. Dec. 280, on general subject of belligerent rights.

Distinguished in dissenting opinion, The Circassian, 2 Wall. 158, 17 L. 802.

International law.— Produce of soil of territory conquered and occupied by enemy is liable to condemnation, so long as owned by individual proprietor of soil, although he be neutral, p. 197.

Rule applied in New Orleans v. Steamship Co., 20 Wall. 397, 22 L. 359, to rents of wharves and levees in conquered territory; The Sarah Starr, Blatchf. Pr. 75, 76, F. C. 12,352, holding that inhabitant can neither acquire nor transfer title to property adversely to interests of belligerent captor; dissenting opinion, Miller v. Gould, 38 Ga. 477, majority holding valid transfer of property between residents of conquered territory during occupation by enemy. Approved in general discussion in United States v. Cement, 27 Fed. Cas. 294, and Tait v. New York, etc., Ins. Co., 1 Flipp. 330, F. C. 13,726.

Distinguished in Kershaw v. Kelsey, 100 Mass. 566, 97 Am. Rep. 129, holding valid transfer of lands between inhabitants of conquered territory.

International law.— Judicial decisions on questions of international law are to be referred to as precedents, p. 330.

Maritime law of England has been adopted by United States so far as adapted to conditions of country, p. 198.

Cited in The Siren, 13 Wall. 393, 20 L. 506, holding that right to prize money can be created only by act of sovereign power, and that no such right exists in case of joint capture by army and navy. Approved in The Parkhill, 18 Fed. Cas. 1192.

Miscellaneous citations.— Cited also in Our House v. State, 4 G. Greene, 175, on point that proceedings in rem against property used for unlawful purposes may be sanctioned by law.

9 Cr. 199–204, 3 L. 704, EVANS v. JORDAN.

Patent.— Act extending patent on machine is not to be construed as authorizing general use, after passage of such act, of machines erected during interval between expiration and grant of extension, p. 203.

Cited and rule applied in Bloomer v. McQuewan, 14 How. 560, 562, 14 L. 541, 542, holding that assignee under original patent has right to continue use during period of extension; so also in Day v. Union, etc., Co., 3 Blatchf. 495, F. C. 3,691, sustaining right of assignee under original patent, as against assignee for extended term; Graham v. Johnston, 21 Fed. 43, under facts similar to those in principal case; Rein v. Clayton, 37 Fed. 355, holding that person purchasing patented article before patent issued cannot continue use after such issue; Blanchard v. Haynes, 3 Fed. Cas. 628, granting injunction to restrain use of machine after extension of patent right. Cited generally in Washburn v. Gould, 3 Story, 135, F. C. 17,214.

Distinguished in Underhill v. Van Cortlandt, 2 Johns. Ch. 359,

where machines erected while patent in force, and amount presumed to have been paid for privilege included in valuation of "mills and appurtenances" under covenant in lease.

9 Cr. 205–209, 3 L. 706, THE HAZARD v. CAMPBELL.

Prize.— Neutral cover of enemy's property. Time for further proof refused under facts.

Cited in The Adula, 89 Fed. 355, as instance where time for further proof was refused.

9 Cr. 209–212, 3 L. 707, THE SHIP SOCIETE.

Maritime lien.— Vessel has no lien on one cargo for freight which may accrue on another, p. 212.

No citations.

9 Cr. 212–243, 3 L. 708, UNITED STATES v. GILES.

Set-off.— Debtor of United States cannot set-off claim for debt due him by United States, until such claim has been rejected by treasury department, p. 237.

This rule has been cited and the principle applied in Ware v. United States, 4 Wall. 629, 18 L. 392, where, in action against postmaster to recover moneys due United States, defendant claimed damages for wrongful discontinuance of office; United States v. Eckford, 6 Wall. 489, 18 L. 922, holding, however, that where such claim is properly presented and allowed, court has no jurisdiction to render judgment against United States for excess over latter's demand against defendant; Watkins v. United States, 9 Wall. 764, 19 L. 822, holding that such claim must be presented by items; Hall v. United States, 91 U. S. 562, 23 L. 447, as to claim of revenue officer for extra services, in action by United States for balance due on settlement of accounts; Yates v. United States, 90 Fed. 59, holding that books of department can be the only evidence of disallowance of claim; United States v. Peterson, 91 Fed. 855, holding set-off claimed for clerk's errors must, likewise, be presented to the treasury department; Mason v. Cooper, 19 Ga. 545, construing State statute to like effect; Moore v. Tate, 87 Tenn. 740, 10 Am. St. Rep. 721, 11 S. W. 938, construing strictly State statute regulating set-off in actions brought by State. Explained in Borden v. Houston, 2 Tex. 610, 612, denying right to set-off as against State, in absence of statute. The following cases cite the rule approvingly, but without particular application to the point at issue: United States v. Hawkins, 10 Pet. 132, 9 L. 372; Railroad Co. v. United States, 101 U. S. 549, 25 L. 1069; Robinson v. Bank, 18 Ga. 98.

Distinguished in Powers v. Bank, 18 Ga. 659, holding that where attorney has collected money due State, he may retain sufficient to satisfy claim due him from State for professional services.

Payment.— Comptroller of treasury may direct payment by marshal of money received on execution, p. 237.

Distinguished in Walker v. Chapman, 22 Ala. 128, denying right of comptroller to receive money levied upon, before institution of proceedings against debtor.

Official bond.— Sureties are not liable for money received before execution of, p. 239.

Cited and rule applied in Myers v. United States, 1 McLean, 497, F. C. 9,996, holding burden to be on plaintiff to show that money was in hands of principal at date of execution; so also in United States v. Linn, 2 McLean, 506, F. C. 15,606; Boody v. United States, 1 Wood. & M. 169, F. C. 1,636, holding that where successive bonds were executed, default occurring prior to execution of second, rendered sureties on first liable, and such sureties are to be indemnified by first payment by principal; Thompson v. Dickerson, 22 Iowa, 363, where money was received during existence of prior bond; People v. Parker, 53 Me. 257, holding sureties exempt from liability for prior neglect in performance of public duties; Thompson v. MacGregor, 81 N. Y. 597, as to liability of sureties on receiver's bond; Lyttle v. Cozad, 21 W. Va. 206, under similar facts. Cited arguendo in Hernandez v. Montgomery, 2 Mart. (La.) (N. S.) 429. See also note, 10 Am. St. Rep. 844, on general subject.

Distinguished in United States v. Bicket, 24 Fed. Cas. 1143, and State v. Newton, 33 Ark. 281, where default occurred after execution of bond; Robey v. Turner, 8 Gill & J. 130, under facts; State v. Sooy, 39 N. J. L. 547, 549, holding sureties liable for money used in payment of arrears due at time of execution; Clark v. Wilkinson, 59 Wis. 550, 18 N. W. 484, holding sureties liable for money on hand at time bond executed.

Miscellaneous citations.— Cited in Bollin v. Blythe, 46 Fed. 181, on point that terms of bond are to be construed in favor of sureties; Aldridge v. Warner, 2 Port. 99, but application doubtful; Alton v. Gilmarton, 2 N. H. 521, but not in point.

9 Cr. 243, 244, 3 L. 719, UNITED STATES v. BARBER.

War.—"Fat cattle" are provisions or munitions, within meaning of act of congress, prohibiting citizens of United States from trading with public enemy, p. 244.

Explained in United States v. Sheldon, 2 Wheat. 122, 4 L. 200, holding that driving living cattle on foot is not a "transportation," within meaning of act prohibiting trading.

9 Cr. 244–289, 3 L. 719, THE ADELINE.

Admiralty — Appeal.—When merits plainly appear, court may allow new allegation to be filed, and for this purpose, remand cause to Circuit Court, p. 284.

Cited and applied in Garland v. Davis, 4 How. 154, 11 L. 918, allowing amendment of pleadings after writ of error; United States v. Weed, 5 Wall. 71, 18 L. 534, remanding cause for new libel where prosecution below was improperly on instance side of court; Liverpool Steam Co. v. Insurance Co., 129 U. S. 447, 32 L. 794, 9 S. Ct. 474, permitting amendment of answer and introduction of proof of foreign law; Anonymous, 1 Gall. 26, F. C. 444, on point that leave to so amend is discretionary with court; Reed v. Cowley, 1 Bank. Reg. 137 (516), 20 Fed. Cas. 434, applying principle to appeals in bankruptcy cases. Followed in The Meteor, 17 Fed. Cas. 185, allowing amendment of defective libel; Bierne v. Triumph, 2 Ala. 742, on point that mere irregularity in service of process, in suit to enforce lien against vessel, is not cause for dismissal of libel. The rule has also been approved in discussion of the general subject, but without particular application, in Richmond v. New Bedford, etc., Co., 2 Low. 316, 317, F. C. 11,800; Crawford v. The William Penn, 3 Wash. 488, F. C. 3,373; The Express, Blatchf. Pr. 146, F. C. 4,476.

Prize.— Pleadings involve, directly, no further question than that of prize, p. 284.

Cited in The Louisa Agnes, Blatchf. Pr. 114, F. C. 8,531, denying right of claimant in prize to put in special claim without assent of United States attorney; The Sally Magee, Blatchf. Pr. 384, F. C. 12,260, holding sufficient, allegation in libel that seized property is prize of war. Approved in Clark v. Lumber, 65 Fed. 241, 24 U. S. App. 509, discussing general subject of pleading in prize courts.

Admiralty — Parties.—If principal is at great distance from court, claim and affidavit may be made by agent, p. 286.

Cited and practice followed in United States v. Ames, 99 U. S. 43, 25 L. 300, under facts similar to principal case; In re Stover, 1 Curt. 202, F. C. 13,507, holding that such agent is to be treated as party and held liable personally for fees for services rendered by clerk at his request; The Farmer v. McCraw, 26 Ala. 203, 62 Am. Dec. 720, ruling similarly in action for damages caused by collision.

Limited in Spear v. Place, 11 How. 526, 13 L. 798, holding that such agent cannot represent principal, resident at place of trial.

Prize — Recapture.— In recaptures of property of friends, rule of reciprocity is to be followed, and where one country awards to recaptors, entire property of friends so recaptured from enemy, that rule must be applied to property of such country, p. 288.

Cited and applied in The Star, 3 Wheat. 92, 4 L. 342, where American vessel was captured by enemy, and in condemnation proceedings title passed to latter, court denied original owner's right to restitution on recapture by American privateer; United States v. The F. W. Johnson, 25 Fed. Cas. 1232, on point that prize cases are governed by "law of nations."

Miscellaneous citations.— Cited in The Parkhill, 18 Fed. Cas. 1194, distinguishing between admiralty and common law; also in United States v. Cement, 27 Fed. Cas. 297, as to burden of proof to show ship's papers genuine [application doubtful].

9 Cr. 289–291, 3 L. 734, THE BRIG ANN.

Forfeiture.— Seizure is necessary to establish jurisdiction of admiralty courts, p. 291.

Cited and rule applied in Dobbins v. United States, 96 U. S. 396, 24 L. 637, in proceedings in rem for forfeiture of apparatus for violation of internal revenue laws; United States v. Raft, 5 Hughes, 409, 13 Fed. 799, where vessel seized for violation of pilot laws; The Fideliter, 1 Abb. (U. S.) 578, 579, 1 Sawy. 155, F. C. 4,755, holding further, that such seizure as well as place of seizure must be alleged in libel; The Tug May, 6 Biss. 244, F. C. 9,330, under similar facts; The Washington, 4 Blatchf. 102, F. C. 17,221, dismissing libel for want of averment of seizure; The Idaho, 12 Sawy. 163, 29 Fed. 192, in proceedings for violation of navigation laws; The Silver Spring, 1 Sprague, 552, F. C. 12,858, holding that in libel for violation of revenue laws, seizure by collector must be alleged; In re Moore, 66 Fed. 950, as to seizure for violation of internal revenue acts. Approved in general discussion in United States v. The Snowdrop, 30 Fed. 80.

Distinguished in The Rio Grande, 23 Wall. 464, 23 L. 159, holding that error of court in restoring vessel does not divest Circuit Court of jurisdiction on appeal.

Seizure.—Abandonment of, and restoration to owner before libel, divests court of jurisdiction, p. 291.

Cited and rule applied in Hall v. Warren, 2 McLean, 333, F. C. 5,952, holding that court will decree abandonment where captor refuses to proceed against goods in court of competent jurisdiction.

Limited in The Young America, 30 Fed. 791, holding that such restoration to owner must be made with intent to abandon seizure. Distinguished in The Rio Grande, 23 Wall. 464, 23 L. 159, holding that error of court in decreeing restoration will not deprive Circuit Court of jurisdiction on appeal; United States v. Wines, 8 Blatchf. 482, F. C. 15,892, holding that forcible dispossession does not work abandonment.

9 Cr. 292–338, 3 L. 735, PAWLET v. CLARK.

Conflicting grants.— Jurisdiction of United States courts extends to disputes arising from conflicting grants to same land by different States, p. 323.

Rule applied in Colson v. Lewis, 2 Wheat. 378, 4 L. 266, to same state of facts.

Dedication to public or pious uses is valid, although there be no grantee in existence, p. 331.

This rule has been cited and the principle applied in the following citing cases: Beatty v. Kurtz, 2 Pet. 583, 7 L. 527, sustaining right of church society, organized subsequent to grant, to maintain equitable action against holder of legal title; Cincinnati v. White, 6 Pet. 436, 437, 8 L. 455, as to dedication of land for use of city as public square; Irwin v. Dixion, 9 How. 31, 13 L. 34, where grant was of land for highway for use of public at large; Vincennes University v. Indiana, 14 How. 274, 14 L. 419, sustaining reservation from sale, by State, of land for use of college to be subsequently incorporated; Ould v. Washington Hospital, 95 U. S. 313, 24 L. 452, holding valid, devise for charitable uses, to trustees to be appointed by congress; Baring v. Erdman, 2 Fed. Cas. 788, on point that grants made for public benefit are to be construed liberally; Magill v. Brown, 16 Fed. Cas. 413, 414, holding valid devise of lands to unincorporated religious society; Harding v. Jasper, 14 Cal. 649, as to dedication of highway; Hart v. Burnett, 15 Cal. 548, holding that such dedication may be absolute or limited; so also in Kittle v. Pfeiffer, 22 Cal. 489, holding further as to what constitutes evidence of such dedication; Chatham v. Brainerd, 11 Conn. 88, upholding grant, by town, of burying ground, to church society, to be subsequently organized; American Bible Society v. Wetmore, 17 Conn. 188, sustaining devise to corporation designated only by description; City of Apalachicola v. Land Co., 9 Fla. 350, 79 Am. Dec. 288, as to grant to town to be subsequently incorporated; State v. Springfield Township, 6 Ind. 96, as to grant by State of school lands; Scott v. Stipe, 12 Ind. 75, holding, however, that person to whom grant made as trustee has no power to sell such land without consent of grantee; Miller v. Chittenden, 2 Iowa, 368, 372, applying cy pres doctrine where grant was to trustees, who had no power to organize beneficiary society (see also S. C., 4 Iowa, 263, 272); Commissioners v. First Presbyterian Church, 30 Kan. 638, 1 Pac. 113, holding parol evidence admissible to identify beneficiary; McKinney v. Griggs, 5 Bush, 405, 96 Am. Dec. 363, on point that public dedication may be made by parol; Shapleigh v. Pilsbury, 1 Me. 281, 286, 287, holding further that until such religious corporation comes into existence, fee remains in grantor; State v. Wilson, 42 Me. 23, as to dedication of highway to public use; Attorney-General v. Merrimack, etc., Co., 14 Gray, 603, 610, under similar facts; Tyler v. Sturdy, 108 Mass. 198, as to dedication to public of footpath; Bartlett v. Nye, 4 Met. 380, on point that executor under will devising land to uniucorporated society, is bound to execute such trust; Vick v. Mayor of Vicksburg, 1 How. (Miss.) 430, 31 Am. Dec. 171, holding further, that dedication for public use may be proved by parol; Rutherford v. Taylor, 38 Mo. 319, as to dedication of land for public square; New Market v. Smart, 45 N. H. 97, 98, under similar

facts; Trustees v. Hoboken, 33 N. J. L. 17, 97 Am. Dec. 699; African etc., Church v. Conover, 27 N. J. Eq. 160, following Beatty v. Kurtz, 2 Pet. 583, 7 L. 527, supra; Pearsall v. Post, 20 Wend. 118, applying rule where land dedicated to educational institution to be subsequently incorporated (see S. C., 22 Wend. 446, 447, 455); Brown v. Manning, 6 Ohio, 303, 27 Am. Dec. 256, as to dedication of land for public square; Fulton v. Mehrenfeld, 8 Ohio St. 444, holding that where dedication to public not by express grant, such dedication operates as estoppel in pais rather than as transfer of interest; Carter v. Portland, 4 Or. 347, holding that dedication to public may be by parol and need not be formally accepted; Nance v. Busby, 91 Tenn. 314, 18 S. W. 877, construing statute empowering unincorporated associations to hold lands; Trustees v. Burt, 11 Vt. 639, under similar facts; Montpelier v. East Montpelier, 27 Vt. 708, on point that lands reserved by municipal charter for public purposes, vest in town as trustee and can be devoted to purposes only for which reserved; so also in Franklin, etc., School v. Bailey, 62 Vt. 473, 474, 20 Atl. 822. See also note, 27 Am. Dec. 567, on general subject. Cited, generally, in Antone v. Eslava, 9 Port. 544; Macon v. Franklin, 12 Ga. 244, 248; Wardens v. Savannah, 82 Ga. 665, 666, 9 S. E. 540; Christian Church v. Scholte, 2 Iowa, 30; Baptist Society v. Candia, 2 N. H. 21, but without particular application.

Distinguished in dissenting opinion, Canal Co. v. Railway Co., 4 Gill & J. 194, majority holding irrevocable, grant of franchise to corporation to be subsequently created; Price v. Methodist Episcopal Church, 4 Ohio, 544, under statute.

Legislative grant to private corporation is irrevocable, p. 332.

The principal case is cited as authority for this rule in the following cases: Dartmouth College v. Woodward, 4 Wheat. 695, 4 L. 673, denying right of legislature to appropriate funds devised to corporation for eleemosynary purposes; Planters' Bank v. Sharp, 6 How. 332, 12 L. 460, denying right of legislature to revoke charter powers of bank, regarding acquisition of personal property; State Bank v. Knoop, 16 How. 389, 14 L. 985, applying rule where bank exempted, by charter, from taxation; Savannah v. Steamboat Co., Charlt. (Ga.) 348, 349, denying right of legislature to impair vested property rights of municipal corporation; Young v. Harrison, 6 Ga. 154, holding charter of private corporation to be contract and not subject to repeal by legislature; Hilliard v. Connelly, 7 Ga. 180, holding unconstitutional, act of legislature authorizing State officers to correct errors in grants and issue alias grants where lands in question are in hands of person not party to original grant; Bruce v. Schuyler, 4 Gilm. 278, 46 Am. Dec. 460, denying retroactive effect of statute, where such effect would impair validity of contracts; so also in Martindale v. Moore, 3 Blackf. 280; Gaines v. Buford, 1 Dana (Ky.), 488, holding unconstitutional, act impairing rights of patentee, under patent; Atchafalaya Bank v. Dawson, 13 La. 506, holding that where

charter of corporation liable to forfeiture, such forfeiture must be decreed by courts, and not by legislature; New Orleans, etc., R. R. Co. v. New Orleans, 26 La. Ann. 482, denying right of legislature to impair vested property rights of municipality (see also S. C., 26 La. Ann. 521); so also in Trustees v. Bradbury, 11 Me. 126, 26 Am. Dec. 520; Canal Co. v. Railroad Co., 4 Gill & J. 128, 146, applying principle to grant of franchise to corporation to be created (see, however, dissenting opinion, p. 194, distinguishing principal case); Michigan State Bank v. Hastings, 1 Doug. (Mich.) 234, 41 Am. Dec. 551. denying right to repeal charter of bank, without judicial hearing to determine liability to forfeiture; People v. Hurlbut, 24 Mich. 104, 9 Am. Rep. 112, applying principle to grant of land to public corporation; so also in Detroit v. Detroit, etc., Co., 43 Mich. 148, 5 N. W. 280; Clark v. Mitchell, 64 Mo. 582, holding that legislatures are bound by provision in Federal Constitution, prohibiting deprivation of property without due process of law; Spaulding v. Andover, 54 N. H. 55, applying rule to grant of bonds to municipal corporation; Commonwealth v. Pennsylvania Canal Co., 66 Pa. St. 48. 5 Am. Rep. 339, holding void, act of legislature requiring canal company to construct sluice boxes not provided for in charter; In re Malone's Estate, 21 S. C. 449, holding irrevocable, grant to municipal corporation of funds for support of orphan asylum; Town of Milwaukee v. City of Milwaukee, 12 Wis. 102, holding that, although legislature may change corporate limits of town, it cannot at same time transfer land belonging to town, as such, to adjoining city whose boundaries are made to include part of former. See also note, 35 Am. St. Rep. 532, on general subject. Cited also in general discussion in Yarmouth v. North Yarmouth, 34 Me. 418, 56 Am. Dec. 670.

Distinguished in East Hartford v. Hartford Bridge Co., 10 How. 536, 13 L. 529, in case involving grant of franchise to municipal corporation; Rice v. Railroad Co., 1 Black, 373, 17 L. 151, asserting right of congress to revoke conditional grant to territory before vested rights acquired. Rule limited in Pearsall v. Railroad Co., 161 U. S. 661, 40 L. 843, 16 S. Ct. 708, holding that where charter authorizes, in general terms, acts unnecessary to object of grant, legislature may revoke such powers, unless vested rights acquired under them.

Common law of England is the law of the particular States so far as applicable to conditions, and not abrogated by statute, p. 333.

Cited and applied in Bains v. Schooner James and Catherine, 1 Bald. 553, F. C. 756. holding that admiralty jurisdiction is referred to in Federal Constitution as limited by common law of England; dissenting opinion, Ex parte Holman, 28 Iowa, 126, on point that habeas corpus, being a common-law writ, State courts may under it inquire into legality of imprisonment by order of Federal courts. Cited approvingly also in United States v. New Bedford Bridge Co., 1 Wood. & M. 448, F. C. 15,867.

Distinguished in In re Barry, 42 Fed. 120, 127, F. C. 1,059 (see same case, 136 U. S. 607, 617, note, 34 L. 507, 510); Gatton v. Railway Co., 95 Iowa, 117, 63 N. W. 591, holding that common law forms no part of Federal jurisprudence; Lisbon v. Lyman, 49 N. H. 582, denying application of rule where subject regulated by statute.

Miscellaneous citations.— Cited in Robinson v. Bank, 18 Ga. 98, and dissenting opinion, Hale v. Everett, 53 N. H. 140, but application doubtful. Cited also in Mormon Church v. United States, 136 U. S. 52, 59, 34 L. 494, 497, 10 S. Ct. 806, 809, on point that congress, in exercise of plenary power over territories, may revoke grants made by them.

9 Cr. 339–358, 3 L. 752, OTIS v. WATKINS.

Pleading.— If facts stated in special plea do not amount in law to justification, yet if issue be joined thereon, and facts proved as stated, it is error to instruct jury that facts so proved cannot sustain issue on part of defendant, p. 355.

Applied in Lonergan v. Fenlon, 15 Fed. Cas. 804, holding that answer in equity must prevail unless overcome by testimony of two witnesses, or of one witness and attending circumstances. Cited generally in Logan v. Mathews, 6 Pa. St. 421.

Public officer, vested with discretionary powers, is not liable for abuse of such power if he acted within his jurisdiction and without malice or fraud, p. 356.

Cited to this point in Gould v. Hammond, McAll, 237, F. C. 5,638, as to act of collector in selling perishable goods, holding further that shortness of notice of sale affords no presumption of fraud; United States v. The Reindeer, 27 Fed. Cas. 768, as to act of officer seizing vessel under mistake of fact.

Public officer.— If public officer, vested with discretionary powers, exercise malice in performance of his duties, he is liable for resulting injury, p. 358.

Cited and applied in Bailey v. Berkey, 81 Fed. 741, holding assessor liable in damages for maliciously making excessive assessment.

9 Cr. 359–367, 3 L. 758, THE ALERTA v. BLAS MORAN.

Prize.— If capture be made by privateer illegally equipped in neutral country, it is duty of prize court of such country to restore property, if brought within its jurisdiction, to owner, p. 364.

This rule is cited approvingly in the following cases in discussing the general subject: The Divina Pastora, 4 Wheat. 71, 4 L. 517; The Schooner Tilton, 5 Mason, 471, F. C. 14,054; Hallett v. Lamothe, 3 Murph. (N. C.) 297.

Distinguished in Juando (Stroughton) v. Taylor, 2 Paine, 670, 677, 681, F. C. 7,558, denying application of rule when capture made by foreign cruiser on high seas and prize not brought into American port.

Salvage will not be decreed for services from which wrecked vessel derived no advantage, p. 367.

This rule is applied in The Narragansett, Olcott, 392, F. C. 10,020, denying right of vessel to claim as salvor, where she rendered no assistance, although participating in search; Clarke v. The Dodge Healy, 4 Wash. 657, F. C. 2,849, denying claim of persons forcibly taking possession of vessel exposed to danger, against will of master; Byrne v. Johnson, 53 Fed. 842, 2 U. S. App. 520, holding that act of salvors, in unnecessarily proceeding to port where cargo will not sell to advantage, will operate to reduce amount of salvage.

9 Cr. 368–372, 3 L. 762, THE GROTIUS.

Prize.— In order to constitute a capture, some act should be done indicative of intention to seize and retain as prize, p. 370.

No citations.

9 Cr. 372–374, 3 L. 763, GETTINGS v. BURCH.

Practice.— It is error to decide cause against answer of defendant, if answer has not been denied by replication, nor contradicted by evidence appearing in record, p. 374.

Cited in Sarchet v. The Sloop Davis, Crabbe, 193, F. C. 12,357, holding that dismissal, in order to be bar to second suit, must have been ordered on merits of cause. Approved in Parton v. Prang, 3 Cliff. 542, F. C. 10,784, in general discussion.

Miscellaneous citations.— Referred to in Scott v. Burch, 6 Harr. & J. 70, as instance of practice.

9 Cr. 374–387, 3 L. 764, UNITED STATES v. BRYAN AND WOODCOCK.

Payment — Priority of United States.— Act of congress, providing for, did not apply to debt previously contracted, p. 387.

Cited in State v. Harris, 2 Bailey L. 600, on point that right of State to priority of payment is not common-law right, and cannot exist in absence of statute.

9 Cr. 387, 388, 3 L. 768, THE BRIG CONCORD.

Duties.— Where goods are brought by superior force, or by inevitable necessity, into United States, they are not to be deemed so imported as to attach right to duties, p. 388.

This rule has been applied in Merritt v. One Package, 30 Fed.

197, 198, and Cargo ex Lady Essex, 39 Fed. 767, where vessel driven ashore by stress of weather; United States v. Celluloid, 82 Fed. 632, holding that goods will not be forfeited, where unlawfully brought into country by mere trespasser, and not by consent of owner.

Duties.— If goods seized for violation of revenue laws are restored to owner under order of court, and sold in country, they become retroactively liable to payment of duties, p. 388.

Cited in The Waterloo, 1 Blatchf. & H. 121, F. C. 17,257, applying rule where lower court ordered derelict goods sold and duties paid thereon; Followed in The Nereide, 1 Wheat. 178, 4 L. 65, and Prince v. United States, 2 Gall. 209, F. C. 11,425; Jackson v. United States, 4 Mason, 190, F. C. 7,149, ruling similarly where goods found derelict and imported voluntarily.

Miscellaneous citations.— Cited in Cross v. United States, 1 Gall. 31, F. C. 3,434, as illustrating distinction between proceedings in admiralty and at common law.

9 Cr. 388–455, 3 L. 769, THE NEREIDE.

Domicile.— Merchant having fixed residence and place of business, does not acquire foreign commercial character by occasional visit to another country, p. 413.

Cited and applied in Cadwalader v. Howell, 18 N. J. L. 144, holding that absence from residence does not deprive person of right to vote, if such absence be with intent to return.

International law.— Stipulation in treaty, that "neutral bottoms make neutral goods," does not include, by inference, rule that "enemies' bottoms make enemies' goods," p. 419.

Cited and applied in El Telegrafo, Newb. 386, F. C. 15,049, holding that where neutral has acquired domicile in enemy's country, his goods will be deemed enemy's goods. See also note, 2 Wheat. 244, 248, 4 L. 230, 231, on general subject of rights of neutrals.

Evidence.— A witness ought never to swear to inferences, without stating the train of reasoning by which his mind has been led to them, pp. 416, 417.

This language is quoted in State v. Musgrave, 43 W. Va. 691, 28 S. E. 821, in discussing, generally, the subject of opinions as evidence.

Neutral goods may be shipped on board belligerent armed vessel, and will not be affected if owner gives no aid to such vessel in combat, p. 425.

Affirmed in The Atlanta, 3 Wheat. 415, 419, 4 L. 423, 424, a case involving similar facts.

Blockade, breach of.— Sailing with intent to break blockade, constitutes cause for confiscation, p. 440.

Applied in United States v. Packages, 27 Fed. Cas. 286, holding mere loading on vessel with intent to ship to blockaded port, cause for forfeiture of goods.

Miscellaneous citations.— Cited in In re Aubrey, 26 Fed. 851, on point that comity to be extended to foreign governments depends upon congress, and not upon the judiciary; also in The Parkhill, 18 Fed. Cas. 1197, but application doubtful.

9 Cr. 456–502, 3 L. 791, PRATT v. LAW.

Streets.— Grantee of land bounded by street or alley, is entitled to right of way over it, as appurtenant to grant, p. 491.

Cited and applied in Moose v. Carson, 104 N. C. 434, 435, 17 Am. St. Rep. 682, 683, 10 S. E. 690, holding conveyance of such street void, if it impairs grantee's right of way.

Contract, part performance.— Where vendor is unable to fully perform contract for sale of lands, equity will confirm conveyance of part already made and decree repayment of proportionate part of purchase money with interest, p. 494.

This rule is cited and applied in Warner v. Daniels, 1 Wood. & M. 113, 114, F. C. 17,181, holding that equity will relieve as to part of contract, although rescinding as to other part on ground of fraud; Palmer v. Gould, 144 N. Y. 675, 39 N. E. 380, holding that where defendant contracts to convey land, to part of which he has not title, equity will order conveyance to extent of interest. The rule is cited approvingly in general discussion in Veazie v. Willlams, 8 How. 160, 161, 12 L. 1029, 1030; Foster v. Swasey, 2 Wood. & M. 221, F. C. 4,984; Kirksey v. Mitchell, 8 Ala. 411.

Specific performance will not be decreed, when impossible or unreasonable, p. 494.

Cited and applied in Taylor v. Langworth, 14 Pet. 175, 10 L. 406, holding that such remedy may be barred by lapse of time; Garnett v. Macon, 2 Brock. 247, F. C. 5,245, applying rule where contract unreasonable when made; Langworth v. Taylor, 1 McLean, 401, F. C. 8,490 (see 14 Pet. 175, 10 L. 406, supra); McKay v. Carrington, 1 McLean, 65, F. C. 8,841, denying specific performance, because of laches of plaintiff; Aday v. Echols, 18 Ala. 357, 52 Am. Dec. 227, holding that contract must be proved as alleged in bill; dissenting opinion, Rogers v. Saunders, 16 Me. 104, majority decreeing specific performance where complainant, because of laches, barred from remedy at law; McAusland v. Pundt, 1 Neb. 252, 93 Am. Dec. 371, refusing decree where complainant guilty of negligence in performance of his part of contract; Hadlock v. Williams, 10 Vt. 572, where defendant had no title to land, contracted to be conveyed;

Garnett v. Macon, 6 Call (Va.), 372, holding that in order to decree specific performance at instance of vendor, his title must be unquestionable; Boaten v. Scheffer, 21 Gratt. 495, denying decree where complainant failed to perform on his part.

Specific performance.— Although bill for, fails, court of equity, having acquired jurisdiction, may give compensation to complainant in quantum damnificatus, p. 494.

This rule is cited and applied in Kelly v. Allen, 34 Ala. 669, in proceedings for injunction to restrain action at law on note, and allowing damages for fraud in executing note; Powell v. Higley, 90 Ala. 109, 7 So. 441, where bill failed, but compensation decreed for improvements made on land; Whitsett v. Kershaw, 4 Colo. 432, on point that equity may render decree for complainant under prayer for general relief, although prayer for specific relief denied; Woodman v. Freeman, 25 Me. 547, 555, awarding damages in case of fraud where no complete remedy at law; Rutherford v. Williams, 42 Mo. 37, in proceedings for accounting, decreeing as damages, defendant's profits as trustee; Van Allen v. Railroad Co., 144 N. Y. 180, 38 N. E. 998, allowing damages for breach of contract, where complainant in good faith prayed for specific performance, not knowing of defendant's inability to perform; Nagle v. Newton, 22 Gratt. 820, under facts similar to principal case; Mason v. Bridge Co., 17 W. Va. 422, in proceedings for injunction, awarding damages for injury received during continuance of wrongful acts. The rule is approved, in general discussion, in the following cases: Veazie v. Williams, 8 How. 160; Magic, etc., Co. v. Elm City Co., 13 Blatchf. 158, F. C. 8,949; Rider v. Gray, 10 Md. 300, 69 Am. Dec. 139; Mitchell v. Sheppard, 13 Tex. 490.

Distinguished in Blanchard v. Railroad Co., 31 Mich. 59, 18 Am. Rep. 155, denying application of rule, where there was no means of computing damages.

Attachment.— Equitable interests are liable to, in Maryland, by statute, p. 496.

Cited and rule applied in Coombs v. Jordan, 3 Bland. Ch. 319, 22 Am. Dec. 266, sustaining attachment of equitable interest in land; May v. Buckhannon, etc., Co., 70 Md. 450, 17 Atl. 275, holding, however, that mere issuing of writ of attachment, does not create lien on such equitable interest. Cited approvingly in Dowdy v. Blake, 50 Ark. 211, 7 Am. St. Rep. 90, 6 S. W. 898. Explained in Sawyer v. Morte, 3 Cr. C. C. 332, 333, F. C. 12,401, and Van Ness v. Hyatt, 5 Cr. C. C. 146, F. C. 16,867.

Denied in Platt v. Oliver, 2 McLean, 298, F. C. 11,115, applying common-law rules.

Subrogation.— One who has paid amount due on mortgage of land in which he had certain interest, may hold land as if mortgage still subsisted, until reimbursed by mortgagor, p. 499.

Cited and rule applied in Wilson v. Kimball, 27 N. H. 307, holding that such payment may operate as assignment of mortgage, although understood between parties to be discharge; Aiken v. Gale, 37 N. H. 505, and Bank v. Ackerman, 70 Tex. 321, 8 S. W. 47, holding further, that such payment creates lien on land covered by mortgage.

Distinguished in Robinson v. Leavitt, 7 N. H. 101, where party giving bond for payment of mortgage had no interest in land.

Miscellaneous citations.— Cited also in Brent v. Smith, 5 Cr. C. C. 673, F. C. 1,841, but application doubtful.

GENERAL INDEX

TO THE

FIVE VOLUMES OF CRANCH CONTAINED IN THIS BOOK. FORMED BY CONSOLIDATION.

N. B.—Figures at right of title show volume to whose index it belongs.

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ABANDONMENT—5.

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ABANDONMENT—6.

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Cheasapeake Ins. Co. v. Stark, (268) **220**
2. The informality of a deed of cession is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the rights of either party. *Id.* (*Ib.*) **220**
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5. What is reasonable time of abandonment is a question compounded of fact and law, which must be found by a jury under the direction of a court.
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6. The right to abandon may be kept in suspense by mutual consent.
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1. Upon a policy on a cargo the underwriters are not liable for freight, whether there be an abandonment or not. *Caze and Richaud v. Baltimore Ins. Co.*, (358) **370**
2. The question whether the abandonment were made in due time, is not a question of fact to be exclusively left to a jury, but to be decided by them under the direction of the court.
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ABATEMENT—7.

1. A plaintiff who has declared jointly against two defendants, as being in custody, when, in fact, only one of the defendants was taken on the *capias*, cannot abate his own action against the party not taken, unless authorized so to do by the return of the process against that party.
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2. If the marshal of Virginia return that the defendant is no inhabitant of the District of Virginia, the suit shall abate as to such defendant.
Id. (*Ib.*) **313**
3. The plaintiff in Virginia is not bound to declare until all the defendants have appeared, or the suit be abated as to such as have not appeared.
Id. (*Ib.*) **313**

ABATEMENT—8.

1. See Bankrupt. (84) **496**
2. If there be several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ of right; and if they be, they may plead in abatement of the writ.
Green v. Liter, (229) **545**
3. If the demandant demand against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof non-tenure is pleaded and admitted, or proved.
Id. (*Ib.*) **545**
4. Under the act of Kentucky to amend process in chancery and common law, the party may recover although he prove only part of the claim in his declaration; but it does not enable him to join parties in an action who could not be joined at the common law. *Id.* (*Ib.*) **545**
5. Notwithstanding the act of Virginia of 1786, reforming the method of proceeding in writs of right, the tenant shall still have the full benefit of the ordinary pleas in abatement.
Id. (*Ib.*) **545**
6. If tenants, claiming different parcels of land by distinct titles, omit to plead that matter in abatement, and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the demandant for any parcel of the land, may be general that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants that they have more mere right to hold the same than the demandant.
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ACCOMMODATION—5.

1. An accommodation endorser is liable to an action by the holder of a note made negotiable at the bank of Alexandria, although the maker has not been sued nor proved insolvent.
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2. It is no objection to the liability of an endorser that he endorsed to accommodate the maker.
Id. (50) **34**

ACCOUNT—5.

1. The exception in the statute of limitations, in favor of merchants' accounts, extends to all accounts current which concern the trade of merchandise. *Mandeville et al. v. Wilson*, (15) **23**
2. It applies as well to actions of *assumpsit* as to actions of account. *Id.* (*Ib.*) **23**
3. An account closed is not an account stated.
Id. (*Ib.*) **23**

4. It is not necessary that any of the items should have been charged within the 5 years, nor that the declaration should aver the money to be due upon an open account between merchants. *Id.* (*Ib.*) 23

ACCOUNT—7.

1. An account current, sent by a foreign merchant to a merchant in this country and not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection.
Freeland v. Heron et al., (147) 297
2. A final account settled with the Orphan's Court, by an administrator, is not conclusive evidence in his favor upon the issue of *devastavit vel non*. *Beatty v. State of Maryland*, (281) 343
3. A debtor of the United States is not entitled to credit for money received by an agent of an officer of the United States, whose office becomes extinct before the money is received by the agent.
United States v. Patterson, (575) 444

ACCOUNTS PUBLIC—9.

1. The comptroller of the treasury has a right to direct the marshal to whom he shall pay money received upon execution, and a payment according to such direction is good; and it seems he may avail himself of it, upon the trial, without having submitted it, as a claim, to the accounting officers of the treasury. *U. S. v. Giles and others*, (213) 709
2. No debtor of the United States can, at the trial set-off a claim for a debt due to him by the United States unless such claim shall have been submitted to the accounting officers of the treasury and by them rejected, except in the cases provided for by the statute.
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ACT OF CONGRESS—7.

1. The revival of an act of Congress may depend upon a future contingent event, to be made known by proclamation. *The Aurora*, (382) 378
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2. When an act of Congress is revived, it is revived in that form and with that effect which it had at the moment when it expired. *Id.* (382) 378

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ADMINISTRATOR—6.

In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded.
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ADMINISTRATOR—7.

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ADMINISTRATION—8.

So long as a qualified executor is capable of exercising the authority with which he has been invested by the testator, that authority cannot be conferred, either with or without limitation, by the Court of Ordinary, or any other person; and if, during such capability of the executor, the ordinary grant administration, either absolute or temporary, to another person, that grant is absolutely void. *Griffith v. Frazier*. (9) 471

ADMIRALTY—5.

1. The continental court of appeals in prize causes, had the power to revise and correct the sentences of the state courts of admiralty.
United States v. Judge Peters, (115) 53
2. In admiralty cases, an appeal suspends the sentence altogether; and the cause is to be heard in the Appellate Court as if no sentence had been pronounced. *Yeaton et al. v. United States*, (281) 101
3. If the law, under which the sentence of condemnation was pronounced, expire after sentence in the court below, and before final sentence in the Appellate Court, no sentence of condemnation can be pronounced, unless some special provision be made for that purpose, by statute. *Id.* (*Ib.*) 101
4. If errors appear upon the face of the report of auditors, it is not necessary to except.
Himely v. Rose, (313) 111
5. If the property ordered to be restored, be sold, interest is not to be paid. *Id.* (*Ib.*) 99
6. See Jurisdiction, 1, 17. (373) 99

ADMIRALTY—6.

1. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty.
Maryland Ins. Co. v. Woods, (29) 143
2. The British orders in council of the 11th of November, 1807, did not prohibit a direct voyage from the United States to a colony of France.
King v. Delaware Ins. Co., (71) 155
3. A vessel having violated a law of the United States cannot be seized for such violation after the law has expired, unless some special provision be made therefor by statute.
United States v. Ship Helen, (203) 199
4. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence.
Marine Ins. Co. of Alexandria v. Hodgson. (206) 200
5. No sentence of condemnation can be affirmed if the law, under which the forfeiture accrued, has expired, although a condemnation and sale may have taken place, and the money paid over to the United States before the expiration of the law. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made.
Schooner Rachel v. United States, (329) 239

ADMIRALTY—7.

1. In cases of admiralty jurisdiction, new evidence will be admitted in this court; and for that purpose a commission may issue.
Brig James Wells v. United States, (22) 256
Brig Clarissa Claiborne v. United States, (107) 284
2. The evidence of that necessity which will excuse a violation of an embargo law, must be very clear and positive. *Id.* (22) 256
3. Cases of seizure, upon waters navigable from the sea by vessels of more than 10 tons burthen, for breach of the laws of the United States, are cases of admiralty and maritime jurisdiction, and are to be tried without a jury.
Whelan v. United States, (112) 286
4. The letter of Mr. Merry of the 12th of April, 1804, extended, to the island of Curracoa, the order of the lords commissioners of the admiralty, of the 5th of January, 1804, respecting the blockade of Martinique and Guadaloupe.
Maryland Ins. Co. v. Wood, (402) 385
5. A sentence of a foreign tribunal, condemning neutral property under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights; and which has been so declared by the legislative and executive departments of the government of the United States; changes the property of the thing condemned.
Williams v. Armroyd, (423) 392
6. A sale by the authority of the captors, before sentence of condemnation, is affirmed by such sentence as is good *ab initio*. *Id.* (*Ib.*) 392
7. A French tribunal at Guadaloupe had jurisdiction of property seized on the high seas for breach of the Milan decree, and carried into the Dutch part of the island of St. Martins, and there sold, by order of the Dutch governor of St. Martins, before condemnation and without any authority from the French tribunal at Guadaloupe. *Id.* (*Ib.*) 392
8. The American owner cannot reclaim, in the courts of this country, his property which has been seized and condemned in a French court under the Milan decree. *Id.* (*Ib.*) 392
9. An information, or libel for a forfeiture, must be particular and certain in all the material circumstances which constitute the offense.
Brig Caroline v. United States, (496) 417
Schr. Hoppet v. United States, (389) 380
Schr. Anne v. United States, (570) 442
10. An informal libel, or information *in rem*, may be amended by leave of the court. *Id.* (496) 417
Schr. Anne v. United States, (570) 442
Schr. Hoppet v. United States, (389) 380
11. In a count in a libel upon the 50th section of the collection law of March 2d, 1799; for unlading goods without a permit, it is not necessary to state the time and place of importation, nor the vessel

in which it was made; but it is sufficient to allege that they were unknown to the attorney of the United States.
Locke v. United States, (339) 364
12. "Probable cause" means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion. *Id.* (*Ib.*) 364
12. A vessel of the United States captured, condemned, sold, and purchased by her former master, a citizen of the United States, who obtained a Danish burgher's brief, and who cleared out of a port of the United States as a Dane, is a foreign vessel within the 5th section of the act of 9th January, 1808, supplementary to the embargo act; although she was really owned by a citizen of the United States. *Schooner Good Catharine v. United States*, (349) 367
14. Under the non-intercourse law a vessel, in March, 1811, had no right to come into the waters of the United States to enquire whether she might land her cargo.
Brig Penobscot v. United States, (356) 369
15. In a prosecution against a vessel for violating a law of the United States it is not necessary to adduce positive testimony of the identity of the vessel. *Schooner Jane v. United States*, (363) 372
16. The non-intercourse act of March 1st, 1809, was, by force of the act of May 1st, 1810, and the President's proclamation of November, 2, 1810, revived on the 2d of February, 1811.
The Aurora v. United States, (382) 378
Schr. Anne v. United States, (570) 442
17. In a libel it is not necessary to negative any fact which constitutes the defense of the claimant.
Id. (383) 378
18. Wines, the produce of France, imported into the United States before the non-intercourse act, re-exported to a Danish island, there sold to a merchant of that place, and thence exported to New Orleans during the operation of that act of Congress, were liable to forfeiture under that law.
Schooner Hoppet v. United States, (389) 380
19. An information in the admiralty for a forfeiture must contain a substantial statement of the offense. A general refercuce to the provisions of the statute is not sufficient. If the information be defective in that respect, the defect is not cured by evidence of the facts omitted to be averred in the information. The decree must be *secundum allegata*, as well as *secundum probata*.
Schooner Hoppet v. United States, (*Ib.*) 380
20. By the 11th section of the act of 25th of April, 1808, vol. 9, p. 150, the collector had no right to detain a vesel and cargo after her arrival at her port of destination, under a suspicion that she intended to violate the embargo; and such detention could not be justified by instructions from the Secretary of the Treasury, nor by the confirmation of the President. *Otis v. Bacon*, (590) 448
21. See embargo, 5, (113) 286

ADMIRALTY—8.

1. The penalty of the 50th section of the collection law of 2d of March, 1799, which requires a permit for the landing of goods imported, applies to goods the importation of which is prohibited by law. *Harford v. United States*, (109) 504
2. British property found in the United States on land, at the commencement of hostilities with Great Britain, cannot be condemned as enemy's property without a legislative act, authorizing its confiscation. The act of the legislature, declaring war, is not such an act.
Brown v. United States, (110) 504
3. Timber floated into a salt-water creek, where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water, and prevented, by booms, from floating away at high-water, is to be considered as landed.
Id. (*Ib.*) 504
4. After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property.
The Rapid, (155) 520
5. A vessel, owned by citizens of the United States, on her voyage from Naples to the United States hears of the declaration of war between the United States and Great Britain, and, having a British license to carry her cargo to Great Britain, changes her course for that country; is captured by the British, libeled and acquitted upon her license; sells her cargo, purchases a return cargo, sails for the United States, and is captured by an American cruiser; good prize.
The Alexander, (169) 524
6. It is a good capture although only a prize-master be put on board.
Id. (*Ib.*) 524
7. Tho sailing, on a voyage, under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war. *The Julia*, (181) 528
The Aurora, (203) 536
The Hiram, (444) 619
8. The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation.
The Aurora, (203) 536
9. It is not necessary, in order to subject the property to condemnation for sailing under an enemy's license, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy. *Id.* (*Ib.*) 536
10. The case of a vessel and cargo, belonging to a citizen of one belligerent nation, captured on the high seas by a cruiser of the other belligerent, given to a neutral, and by him brought into a port and libeled in a court of his own country, between which and the nation to which the vessel originally belonged war breaks out before final adjudication, is a case of salvage; one moiety adjudged to the libelants and the other moiety to remain subject to the future order of the court below; and to be restored to the original owner after the termination of the war, unless legislative provision should previously be made for the confiscation of enemy's property found in the country at the declaration of war. The act of bringing in the cargo, although consisting of articles the importation of which was prohibited by law, was not, under such circumstances, a cause for forfeiture of the property. *The Adventure*, (221) 542
11. If a citizen of the United States establish his domicile in a foreign country, between which and the United States hostilities afterwards break out, any property shipped by such citizen before knowledge of the war, and captured by an American cruiser after the declaration of war, is good prize.
The Venus, (253) 553
12. Upon a shipment of goods to be sold on joint account of the shipper and consignee, or of the shipper alone, at the option of the consiguee, the right of the property does not vest in the consignee until he has made his election.
Id. (*Ib.*) 553
13. If two partners own jointly a commercial house in New York, and one of them obtain an American register for a ship, by swearing that he, together with his partner, of the city of New York, merchants, are the only owners of the vessel, when in fact his partner was domiciled in England, the vessel is liable to forfeiture under the act of Congress of December 31st, 1792, Laws United States, vol. 2, p. 133. *Id.* (*Ib.*) 333
14. Goods purchased by British merchants before the war between the United States and Great Britain, in pursuance of orders from American citizens, and shipped to the agent of the British merchants in the United States (who was also an American citizen) "on account and risk of an "American citizen," (no circumstances of fraud or unfairness appearing in the transaction) were vested in the American citizens at the time of shipment, and were not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. But if goods be purchased as above, although the accompanying invoices, bills of lading and letters be addressed to the American citizens for whom the purchases were made, and all concur to show the property to be in them, yet if these documents be enclosed in a letter from the shippers to their agent in the United States, directing him not to deliver the goods in a certain event, nor until he should have received payment in cash, the property in the goods continued in the shipper at the time of capture, and they were liable to condemnation. Goods, by the same ship, purchased as above, and consigned to the agent of the consignors, (being an American citizen) in whose name the bill of lading is made out, but the bills of parcels and invoice in the name of the American merchants for whom the purchases were made; the shipment also being expressed to be on their account, although the goods are spoken of in the letter of the consignors

as British property; vested in the American merchants at the time of shipment; and were not liable to condemnation. The circumstance that the goods continued, during the whole voyage, at the risk of the shippers is immaterial.
The Merrimack, (317) **575**

15. A British subject, naturalized in the United States, went to Great Britain in a time of peace for the purpose of trade, but with the intention to return to the United States. He continued in Great Britain a year after knowledge of the war between Great Britain and the United States, for the purpose of winding up his business; but engaged in no new commercial transactions with the enemy, and actually returned to the United States in a little more than a year after knowledge of the war; yet he was considered as an enemy and his goods were condemned.
The Frances. Thompson's claim, (335) **581**

16. Goods, appearing by the ship's papers to be a consignment from alien enemies to American merchants, were condemned *in toto*, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods in consequence of advances made by them. Further proof on those points refused.
Id. (*Ib.*) **581**

17. Where the affidavits produced on the order for further proof are positive, although their credibility be impaired by the non-production of letters mentioned therein, yet a second order for further proof will be allowed in the Appellate Court.
The Frances. Graham's claim, (348) **585**

18. Goods shipped by a British merchant to an American house, (partly in conformity with orders, and partly without orders) who had an option to accept or reject the whole invoice in a limited time, remain the property of the shippers until the election be made to accept them. *The Frances. Dunham and Randolph's claim*, (354) **587**

19. An intention of a consignor of goods to vest the right of property in the consignee is not sufficient to effect such a change of property until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account; until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize. The result is the same, although the consignee be the agent of a third person who had directed him to order the goods, unless it appear that he did actually order them. *The Frances. French's claim*, (359) **589**

20. The commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods, hostile or neutral.
The Frances. Gillespie's claim, (363) **590**

21. Property engaged in an illicit intercourse with the enemy is to be condemned to the captors —not to the United States. A municipal forfeiture under the laws of the United States is absorbed in the more general operation of the law of war. The prize act of 26th June, 1812, operates as a grant from the United States to the captors, of all property rightfully captured by commissioned privateers, as prize of war. *The Sally*, (382) **597**

22. Further proof, inconsistent with that already in the case, will not be admitted.
The Euphrates, (385) **598**

23. The forfeiture of goods, for violation of the non-intercourse act of March 1st, 1809, takes place upon the commission of the offense and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid. *United States v. 1960 Bags of Coffee*, (398) **602**

24. A forfeiture under the 3d section of the act of 28th June, 1809, ch. 9, will overreach a *bona fide* sale to a purchaser for valuable consideration without notice of the offense. *United States v. Brig Mars*, (417) **609**

25. No lien upon enemy's property, by way of pledge for the payment of purchase money, or otherwise, is sufficient to defeat the rights of the captors, in a prize court, unless in very peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties.
The Frances. Irvin's claim, (418) **609**

26. Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien from attaching.
Id. (*Ib.*) **609**

27. Under the 8th section of the prize act of June 26th, 1812, the President had authority to issue the instructions of the 28th of August, 1812.
The Thomas Gibbons, (421) **610**

28. The commissions of the privateers of the United States may be qualified and restrained by the instructions of the President.
Id. (*Ib.*) **610**

29. A shipment made, even after a knowledge of the war, is to be considered as having been made in consequence of the repeal of the orders in council, if made within so early a period thereafter as would leave a reasonable presumption that the knowledge of that repeal would produce a suspension of hostilities on the part of the United States.
Id. (*Ib.*) **610**

30. By the mere act of illicit intercourse the property of a citizen is not devested *ipso facto*; it is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage. *Id.* (*Ib.*) **610**

31. The President's instructions of 28th of August, 1812, were meant to protect all British merchandise on board an American ship, without any exception on account of British proprietary interest.
Id. (*Ib.*) **610**

32. A vessel sailing to an enemy's country after knowledge of the war, and taken bringing from that country a cargo, consisting chiefly of enemy goods, is liable to confiscation as prize of war.
The St. Lawrence, (434) **615**

33. Suppression of papers where it appears to have been intentional and fraudulent, and attended with other suspicious circumstances, is good cause for refusing further proof. But where the suppression appears to be owing to accident or mistake, and no other suspicious circumstances appear in the case, further proof may be allowed.
Id. (*Ib.*) **615**

34. Trading with the enemy is not excused by the necessity of obtaining funds to pay the expenses of the ship; nor by the opinion of an American minister, expressed to the master, that by undertaking the voyage he would violate no law of the United States. *The Joseph*, (451) **621**

35. If an American vessel be captured on a circuitous voyage to the United States; in the former part of which voyage she had been guilty of conduct subjecting her to confiscation, although at the time of capture she is committing no illegal act, she must be condemned. *Id.* (*Ib.*) **621**

36. Where the termini of a voyage are already fixed, the continuity of such voyage cannot be broken by a voluntary deviation of the master for the purpose of carrying on an intermediate trade.
Id. (*Ib.*) **621**

37. A capture as prize of war may lawfully be made, within the territorial limits of the United States at any place below low water-mark.
Id. (*Ib.*) **621**

38. Further proof will be allowed on the part of the captors as to the fact of capture.
The Grotius, (456) **623**

ADMIRALTY—9.

1. See Embargo, 2, (55) **654**

2. If a vessel be captured by a superior force, and a prize-master and small force be put on board, it is not the duty of the master and crew of the captured vessel to attempt to rescue her; for they may thereby expose the vessel to condemnation although otherwise innocent.
Brig Short Staple v. United States, (56) **655**

3. See Non-Intercourse, 1, (102) **670**

4. If a merchant vessel of the United States be seized by the naval force of the United States within the territorial jurisdiction of a foreign friendly power, for a violation of the laws of the United States, it is an offense against that power which must be adjusted between the two governments. This court can take no cognizance of it. The law does not connect that trespass with the subsequent seizure by the civil authority under the process of the District Court so as to annul the proceedings of that court against the vessel.
Ship Richmond v. United States, (102) **670**

5. See Duties, 1, 2, (104) **671**

6. If, upon the breaking out of a war with this country our citizens have a right to withdraw their property from the country of the enemy, it must be done within a reasonable time. Eleven months after the declaration of war is too late.
The St. Lawrence, (120) **676**

7. The condemnation of a vessel as enemy's property, for want of a claim, cannot prejudice a claim for her cargo; but it is still competent for the claimant of the cargo to controvert the fact that the vessel was enemy's property, so far as that fact could prejudice his claim. *The Mary*, (126) 678

8. One claimant cannot be prejudiced by the contumacy of another. *Id.* (*Ib.*) 678

9. The holder of a bottomry bond cannot claim in a court of prize. *Id.* (*Ib.*) 678

10. The President's instructions (to privateers) of the 28th of August, 1812, protected an American vessel sailing from England, in August 1812, in consequence of the repeal of the British orders in council, and compelled by dangers of the seas to put into Ireland, where she was necessarily detained until April 1813, when she sailed again for the United States under the protection of a British license. The continuity of the voyage was not broken. *Id.* (*Ib.*) 678

11. See Non-Intercourse, 2, (181) 698

12. If a British merchant purchase with his own funds two cargoes of goods in consequence of, but not in exact conformity with, the orders of an American house, and ship them to America, giving the American house an option, within 24 hours after receipt of his letter to take or reject both cargoes; and if they give notice within the time that they will take one cargo but will consider as to the other, this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume the property and make them accountable for that which came to their hands. The right of property in the cargo not accepted, does not, *in transitu*, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy.
The Frances, (183) 698

13. The produce of an enemy's colony is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence.
30 hhds. Sugar v. Boyle, (191) 701

14. An island, in the temporary occupation of the enemy, is to be considered as an enemy's colony.
Id. (*Ib.*) 701

15. In deciding a question of the law of nations, this court will respect the decisions of foreign courts. *Id.* (*Ib*) 701

16. If the documentary evidence of the neutrality of the property be contradicted by the circumstances of the case, the court will not give time for further proof unless there be a probability that those circumstances can be satisfactorily explained. *Cargo of the ship Hazard*, (205) 706

17. See Freight, *pro rata*, (209) 707

18. This court will not allow a new claim to be interposed here, but will remand the cause to the Circuit Court, where it may be presented.
The Societe, (210) 707

19. See Salvage, 1, 2, (245) 720

20. A test affidavit ought to state that the property, at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; but an irregularity in this respect is not fatal. A test affidavit, by an agent, is not sufficient, if the principal be within the country and within a reasonable distance from the court. But if test affidavits, liable to such objections, have been acquiesced in by the parties in the courts below, the objections will not prevail in this court.
Schooner Adeline, (245) 720

21. The property of persons domiciled in France (whether they be Americans, Frenchmen, or foreigners) is good prize, if recaptured after being 24 hours in possession of the enemy, that being the rule adopted in the French tribunals.
Id. (*Ib.*) 720

22. Further proof will be allowed by this court where the national character and proprietary interest of goods recaptured do not distinctly appear. *Id.* (*Ib.*) 720

23. Property unclaimed will be decreed as good prize. *Id.* (*Ib*) 720

24. If a seizure, by a collector, for the violation of the revenue laws of United States, be voluntarily abandoned, and the property be restored before the libel or information be filed and allowed, the District Court has not jurisdiction of the cause.
The brig Ann, (289) 734

25. The district courts of the United States (being neutral) have jurisdiction to restore to the original Spanish owner (in amity with the United States) his property captured by a French vessel whose force has been increased in the United States if the prize be brought *infra præsidia*.
The brig Alerta, (359) 758

26. In order to constitute a capture, some act should be done indicative of an intention to seize and retain as prize. It is sufficient if such intention is fairly to be inferred from the conduct of the captor. *The Grotius*, (368) 762

27. See Duties, 4, (387) 768

28. The stipulation in a treaty "that free ships "shall make free goods," does not imply the converse proposition, that enemy ships shall make enemy goods. *The Nereide*, (389) 769

29. The treaty with Spain does not contain, either expressly or by implication, a stipulation that enemy ships shall make enemy goods.
Id. (*Ib.*(769

30. The principle of retaliation, or reciprocity, is no rule of decision in the judicial tribunals of the United States. *Id.* (*Ib.*) 769

31. A neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of such resistance. *Id.* (*Ib.*) 769

AD QUOD DAMNUM—6.

1. An appeal lies to the Supreme Court, from an order of the Circuit Court of the District of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*.
Custiss v. Georgetown and Alexandria Co., (233) 209

2. The Circuit Court for the District of Columbia has no jurisdiction, upon motion to quash an inquisition taken under the act, "to authorize the making of a turnpike road from Mason's Causeway to Alexandria."
Custiss v. Georgetown and Alexandria Co., (233) 209

AGENT—6.

1. An agent who makes insurance for his principal has authority to abandon without a formal letter of attorney.
Chesapeake Ins. Co. v. Stark, (268) 220

2. After abandonment, the agent of the insured becomes the agent of the underwriters.
Id. (*Ib.*) 220

AGENT—7.

1. See Corporation, (299) 351

2. The United States are not bound by the declaration of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration. *Lee v. Munroe et al.*, (366) 373

3. If the plaintiff, by orders from the defendants, purchase goods for them and draw on them for the amount, they are bound to accept and pay his bills. If they do not, he may recover the amount thereof (and damages and costs, if he has paid the same) upon a count for money paid, laid out and expended, and the bills of exchange may be given in evidence on that count. If, after protest of the bills, the plaintiff sell the goods without orders, it shall not prejudice his right of action, although he render no account of sales to the defendants.
Riggs v. Lindsay, (500) 419

AGENT—9.

A test affidavit made by an agent is not sufficient to support a claim if the principal be in the country and within a reasonable distance from the court.
The Sch'r. Adeline, (245) 720

AGREEMENT—7.

1. Upon a special contract executed on the part of the plaintiff, *indebitatus assumpsit* will lie for the price. *Bank of Columbia v. Patterson*, (299) 351

2. A simple contract is not merged in a sealed instrument which merely recognizes the debt and fixes the mode of ascertaining its amount.
Id. (*Ib.*) 351

3. Upon general counts, a special agreement executed may be given in evidence. *Id.* (*Ib.*) 351

4. The recital of a prior, in a later agreement, if it has been executed, does not extinguish the former. *Id.* (*Ib.*) 351

5. See Corporation, (*Ib.*) 351

ALEXANDRIA—5.

1. The corporate town of Alexandria has power to tax the lots and lands of non-residents. *Alexander v. The Mayor, &c., of Alexandria,* (1) **19**
2. It is not necessary that the lots should be half-acre lots. *Id.* (2) **19**
3. Those taxes cannot be recovered by motion, if the owner has personal property in the town which may be distrained. *Id.* (*Ib.*) **19**
4. Alexandria Bank. See Bank of Alexandria, (45, 49) **32 33**

ALEXANDRIA—6.

1. The separation of Alexandria from Virginia did not affect existing contracts between individuals. *Korn v. The Fire Ins. Co.,* (192) **195**
2. The insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia. *Id.* (*Ib.*) **195**

ALEXANDRIA—7.

The proprietors of buildings in Alexandria, insured by the Mutual Assurance Society against fire in Virginia, are bound, by the act of Assembly of Virginia, passed in 1805, and the subsequent regulations of the society, to pay an additional premium upon the increased rate of hazard according to the new regulations of 1805. *The Mutual Assurance Society v. Korn and Wisemiller,* (396) **383**

ALEXANDRIA—8.

A purchaser of real estate in Alexandria is not personally liable for arrears of taxes assessed before his purchase. *Com. Council of Alex. v. Preston,* (53) **485**

ALIEN—5.

See Jurisdiction, 13. (303) **108**

ALIEN—6.

1. A certificate by a competent court that an alien has taken the oath prescribed by the act respecting naturalization, raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution of the United States, &c. *Campbell v. Gordon,* (176) **190**
2. The oath of naturalization, when taken, confers the rights of a citizen. *Id.* (*Ib.*) **190**
3. It is not necessary that there should be an order of court admitting him to become a citizen. *Id.* (*Ib.*) **191**
4. The children of persons duly naturalized before the 14th of April, 1802, being under age at the time of the naturalization of their parent, were, if dwelling in the United States, on the 14th of April, 1802, to be considered as citizens of the United States. *Id.* (*Ib.*) **191**

ALIEN—7.

1. An alien enemy may take lands in Virginia by devise, and hold the same until office found. *Fairfax v. Hunter,* (603) **453**
2. See Fairfax, (*Ib.*) **453**

ALIEN ENEMY—9.

If the plaintiff become an enemy after judgment below, it is no objection to affirmance here. *Owens v. Hannay,* (180) **697**

ALLEYS—9.

See Washington City, 1, (456) **791**

AMENDMENT—5.

See Error, 4. (16) **23**

AMENDMENT—6.

1. The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error. *Marine Ins. Co. of Alexandria v. Hodgson,* (206) **200**
2. After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer. *Id.* (*Ib.*) **200**
3. A fault in the declaration, which would have been sufficient ground to arrest the judgment, is fatal upon a writ of error. *Slacum v. Pomeroy,* (221) **205**
4. This court will not direct the court below to allow the proceedings to be amended. *Sheehy v. Mandeville,* (254) **216**

AMENDMENT—7.

1. In ejectment, the date of the demise in the declaration may be amended during the trial so as to conform to the title. *Blackwell v. Patton,* (472) **408**
2. An informal libel, or information *in rem*, may be amended, by leave of the court. *Brig Caroline v. United States,* (496) **417** *Schr. Anne v. United States,* (570) **442**

AMERICAN SHIP—8.

See Admiralty, 13, (253) **553**

ANSWER—6.

1. The answer of a defendant is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant. *Field v. Holland,* (9) **136**
2. The answer of one defendant is evidence against other defendants claiming through him. *Id.* (*Ib.*) **136**
3. The answer of a defendant, who is substantially a plaintiff, is not evidence against the other defendants. *Id.* (*Ib.*) **136**

ANSWER—7.

1. An answer in chancery, responsive to the bill, is evidence for the defendant. *Russel v. Clark,* (70) **271**
2. The defendant, to an attachment in chancery in Virginia, may plead the statute of limitations without answer. *Wilson v. Koontz,* (202) **315**

ANSWER—9.

1. See Equity, 6, 7, (154) **688**
2. A denial, in the answer of a defendant in chancery, that his testator gave authority to draw a bill of exchange, is not such an answer to an averment of such authority as will deprive the complainant of his remedy, unless the defendant also deny the subsequent assent of his testator to the drawing of such bill. *Clark's Executors v. Van Riemsdyk,* (154) **688**
3. It is error to decide contrary to the answer if it be neither contradicted by evidence nor denied by a replication. *Gettings v. Burch,* (372) **763**

APPEAL—5.

See Admiralty, 1, 2, 3. (115, 281) **53, 101**

APPEAL—7.

No writ of error lies to the Supreme Court of the United States to reverse the judgment of the Circuit Court in a civil action which has been carried up to the Circuit Court from the District Court by writ of error. *United States v. Goodwin,* (108) **284**

APPEAL—8.

1. An appeal lies to this court from the sentence of the Circuit Court for the District of Columbia, affirming the sentence of the Orphan's Court of Alexandria county, which dismissed a petition to revoke the probate of a will. *Carter v. Cutting,* (251) **553**
2. See Admiralty, 17, (348) **585**

APPEARANCE—7.

See Practice, 12. (194) **313**

ARBITRATION—7.

1. An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant. *Davy v. Faw,* (171) **305**
2. When the price of land, and not the question of title, is submitted, the submission and award need not be by deed. *Id.* (*Ib.*) **305**
3. See Attorney at law, 1, (436) **396**
4. An award is not void because it is in the alternative, and contingent; nor because one of the

alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control.
Thornton v. Carson, (596) **451**

ASSETS—5.
See Plene Administravit. (19) **24**

ASSIGNEE OF BANKRUPT—8.
See Bankrupt, (84) **496**

ASSIGNMENT—6.

1. A bond in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable under the statute of Virginia. *Lewis v. Harwood*, (82) **160**
2. In an action, in Virginia, by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor, which he held at the time of receiving notice of the assignment of his own note, although the note thus set off was not due at the time of the notice, but became due before the note upon which the suit was brought.
Stewart v. Anderson, (203) **199**
3. The assignee of part of a patent right cannot maintain an action on the case for a violation of the patent. *Tyler v. Tuel*, (324) **237**
4. A general assignee of the effects of an insolvent can not sue in the federal courts, if his assignor could not have sued in those courts.
Sere v. Pitot, (332) **240**

ASSIGNMENT—7.

1. A person who, upon receiving an assignment of a share of property as security for a debt, agrees to comply with the contract of the assignor with a joint owner of the property, is bound to fulfill that contract, although it exceed in amount the value of the share of the property transferred to him. *Clark v. Carrington*, (308) **354**
2. The nominal plaintiff may dismiss a suit brought in his name by a creditor who has not an assignment of the cause of action.
Welch v. Mandeville, (152) **299**

ASSIGNMENT—8.

Upon an assignment of a plat and certificate of survey obtained on a land warrant in Virginia for 2,000 acres, the assignee, who obtains a patent thereupon in his own name is not obliged to account with the assignor for the surplus, if upon a resurvey it appear that the tract contains 2,700 acres. *Vowles v. Craig*, (371) **593**

ASSUMPSIT—5.

1. See Account, 2. (15) **23**
2. See Consideration, 1, 2, 3, 4. (142) **61**

ASSUMPSIT—7.

1. The payment of the money by the indorser of a promissory note after protest is a good consideration for an *assumpsit*, on the part of the maker, to pay the amount of the note with costs of protest.
Morgan v. Reintzel, (273) **340**
2. See Promissory note, 3, 7, (208, 273) **317, 340**
3. Upon a special contract executed on the part of the plaintiff, *indebitatus assumpsit* will lie for the price. *Bank of Columbia v. Patterson*, (299) **351**
4. See Agreement, 3, (299) **351**

ATTACHMENT—6.

The marshal of the District of Columbia is bound to serve a subpœna in chancery as soon as he reasonably can; and the service of such subpœna, in case of a chancery attachment in Virginia, will make the garnishee liable if he pays away the money after notice of the subpœna.
Kennedy v. Brent, (187) **194**

ATTACHMENT—7.

1. See Answer, 1, (202) **315**
2. See Fees, 1, (276) **341**

ATTACHMENT—9.

An equity of redemption of real estate in Maryland was liable to attachment before the act of 1810, ch. 60. *Pratt v. Law & Campbell*, (457) **792**

ATTORNEY—6.
See Agent.

ATTORNEY AT LAW—7.

1. An attorney at law, as such, has authority to submit the cause to arbitration.
Holker v. Parker, (436) **396**
2. An attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client. *Id.* (*Ib.*) **396**

AUCTION—7.
See Sale, 3, (399) **384**

AUDITOR—5.
See Admiralty, 4. (313) **111**

AUDITOR—6.

1. The report of auditors appointed by consent of parties, in a suit in equity, is not in the nature of an award by arbitrators, but may be set aside by the court, although neither fraud, corruption, or gross misconduct, on the part of the auditors, be proved. *Field v. Holland*, (8) **136**
2. Without expressly revoking an order of reference to auditors, the court may direct an issue to be tried. *Id.* (*Ib.*) **136**

AUGUST TERM—7.
See Practice, 16, (277) **342**

AUTHORITY—7.

1. See Agent, 2, (366) **373**
2. See Attorney at law, 1, 2, (436) **396**
3. See Admiralty, 20, (589) **448**

AUTHORITY—8.
See Admiralty, 9, (203) **536**

AUTHORITY—9.

1. A subsequent assent is equivalent to an original authority.
Clark's Executors v. Van Riemsdyk, (155) **688**
2. See Bond, 1, 3, (28) **645**

AWARD—7.
See Arbitration, **305**

BANK—9.

By making a note negotiable in a bank, the maker authorizes the bank to advance, on his credit, to the owner of the note, the sum expressed on its face; and it would be a fraud upon the bank to set up offsets against this note in consequence of any transactions between the parties.
Mandeville v. Union Bank, (9) **639**

BANK OF ALEXANDRIA—5.

1. Suits brought by the bank of Alexandria upon promissory notes made negotiable at that bank, are entitled to trial at the return term of the writ.
Young v. The Bank of Alexandria, (45) **32**
2. The Bank may maintain a suit against the endorser of such a note without having sued the maker, or proved his insolvency.
Yeaton v. The Bank of Alexandria. (49) **33**
3. See accommodation, 1, 2. (49) **33**

BANK OF UNITED STATES—5.

1. See Citizen, 1, 2. (57, 61) **36, 37**
See Jurisdiction, 4. (61) **37**
2. The Bank of the United States derived no authority from its charter to sue in the courts of the United States.
Bank of the United States v. Deveaux, (62) **38**

BANKRUPT—5.

1. Under the bankrupt law of the United States, a joint debt may be set off against the separate claim of the assignee of one of the partners; but such set-off could not have been made at law, independently of the bankrupt law.
Tucker v. Oxley, (34) **29**
2. A joint debt may be proved under a separate commission, and a full dividend received. It is equity alone which can restrain the joint creditor from receiving his full dividend until the joint effects are exhausted. *Id.* (35) **29**
3. In distributing the effects of a bankrupt in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country, and although the United States should have proved their debt under the commission of bankruptcy, and should have voted for an assignee. *Harrison v. Sterry*, (289) **104**

4. Under a separate commission of bankruptcy against one partner, only his share of the joint effects passes. *Id.* (290) **104**

5. The bankrupt law of a foreign country cannot operate a legal transfer of property in this country. *Id.* (*Ib.*) **104**

BANKRUPT—8.

1. Upon the death of an assignee, under the bankrupt law of the United States, the right of action for a debt due to the bankrupt is vested in the executor of the assignee.
Richards v. Md. Ins. Co., (85) **496**

2. *Quære*, whether the commissioners of bankrupt had a right to appoint a second assiguee in case of the death of the first.
Id. (*Ib.*) **496**

BAR—6.

1. A promissory note given and received for, and in discharge of an open account, is a bar to an action upon the open account, although the note be not paid. *Sheehy v. Mandeville*, (253) **215**

2. A several suit and judgment against one of two joint makers of a promissory note is no bar to a joint action against both upon the same note.
Id. (*Ib.*) **215**

3. Infancy is a bar to an action by an owner against his supercargo for breach of instructions; but not to an action of trover for the goods.
Vasse v. Smith, (226) **207**

BARRATRY—8.

See Charter-party, (40) **481**

BILL OF EXCEPTIONS—6.

A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed. *Vasse v. Smith*, (226) **207**

BILL OF EXCHANGE—6.

1. In an action by the endorsee against the endorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was endorsed.
Slacum v. Pomeroy, (221) **205**

2. The endorsement of a bill of exchange is a new and substantive contract. *Id.* (*Ib.*) **205**

3. In an action of debt against the endorser of a bill of exchange under the statute of Virginia, it is necessary that the declaration should aver notice of the protest for non-payment. *Id.* (*Ib.*) **205**

BILLS OF EXCHANGE—7.

See Agent, 3, (500) **419**

BILL OF LADING—6.

A bill of lading is not conclusive evidence of property.
Maryland Ins. Co. v. Ruden, (338) **242**

BLOCKADE—5.

1. If insurance be "against all risks, blockaded ports and Hispaniola excepted," a vessel, sailing ignorantly for a blockaded port, is covered by the policy. *Yeaton v. Fry*, (335) **117**

2. A vessel sailing ignorantly to a blockaded port is not liable to capture under the law of nations.
Id. (*Ib.*) **117**

BLOCKADE—6.

1. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty.
Maryland Ins. Co. v. Woods, (29) **143**

2. *Quære*, whether breach of blockade by a vessel not warranted neutral would discharge the underwriters. *Id.* (*Ib.*) **143**

3. If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation. *Id.* (*Ib.*) **143**

4. A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders of April, 1804.
She was not bound to make inquiry elsewhere than of the blockading force. *Id.* (*Ib.*) **143**

BLOCKADE—7.

See Admiralty, 4, (402) **385**

BLOCKADE—8.

See Insurance, (59) **487**

BOND—5.

A bond cannot be delivered to one of the obligees as an escrow. *Moss v. Riddle*, (351) **123**

BOND—6.

1. A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable under the statute of Virginia. *Lewis v. Harwood*, (82) **160**

2. If a vessel be driven by stress of weather to the West Indies, and the cargo be there detained by the government of the place, this is such a casualty as comes within the exception of "dangers of the seas," in the condition of an embargo bond. *United States v. Hall*, (171) **189**

3. A bond, executed in pursuance of articles of agreement, may, in equity, be restrained by those articles. *Finley v. Lynn*, (238) **211**

BOND—7.

1. *Semb:* It is a good defense, to an action upon an embargo bond, that it was given for more than double the value of the vessel and cargo, and that the master was constrained to execute it by the refusal of a clearance.
United States v. Gordon, (287) **347**

2. If the original judgment be reversed, the reversal of the depeudent judgment on the "forthcoming bond" follows of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given so as to show the connection between the two judgments.
Barton v. Petit and Bayard. (288) **347**

3. When a collector of revenue has given two bonds for his official conduct at different periods and with different sureties, a promise by a supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected aud paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond.
United States v. January and Patterson, (572) **443**

BOND—9.

1. A bond taken by virtue of the 1st section of the embargo law of Jan. 9, 1808, is not void although taken, by consent of parties, after the vessel had sailed. *Speake v. United States*, (28) **645**

2. The obligors are estopped to deny that the penalty of such a bond is double the true value of the vessel and cargo.
Id. (*Ib.*) **645**

3. The name of an obligor may be erased from a bond and that of a new obligor inserted, by consent of all the parties, without making the bond void. Such consent may be proved by parole evidence, and it is immaterial whether the consent be given before or after the execution of the deed.
Id. (*Ib.*) **645**

4. *Semb:* That if the condition of a bond be to pay $1,700, or the duties which may be ascertained to be due upon certain goods imported, it is not in the option of the obligor to discharge the bond by payment of the $1,700; and that an obligee may recover even against the sureties, in an action at law upon the bond, more than the penalty.
Arnold v. United States, (105) **671**

5. The sureties upon a marshal's bond are not liable for money received by the marshal upon execution before the date of the bond, although it remain in his hands after the date.
United States v. Giles and others, (213) **709**

6. *Quære*, whether the sureties in a marshal's bond are liable for money received by him, after his removal from office, upon an execution which remained in his hands at the time of such removal.
Id. (*Ib.*) **709**

BOTTOMRY—9.

The holder of a bottomry bond has not such an interest as will support a claim to the vessel in a court of prize. *The Mary*, (126) **678**

BOUNDARIES.—6.

1. A grant of an island by name, in the Potomac River, superadding the courses and distances of the lines thereof, which on resurvey are now found to exclude part of the island, will pass the whole island. *Lodge v. Lee*, (237) **210**

BRITISH LICENSE—8.

See Admiralty, 5, 7, 8, 9.

BRITISH PROPERTY—6.

See Confiscation, (286) **225**

BRITISH TREATY—5.

If a defendant in ejectment set up an outstanding title in a British subject, which he contends is protected by the British treaty, this is not such "a case arising under a treaty," as will give to the Supreme Court of the United States appellate jurisdiction of a case decided by the highest court of a state, under the 25th section of the judiciary act.
Owings v. Norwood's Lessee, (344) **120**

BRITISH TREATY—7.

The British treaty of 1794 confirmed the title of Lord Fairfax's waste and unappropriated lands, in the Northern Neck of Virginia, in his devisee a British subject.
Fairfax v. Hunter, (603) **453**

CAPTORS—8.

See Admiralty, 21, (382) **597**

CAPTURE—7.

See Insurance, 19, (506) **421**

CAPTURE—8.

See Admiralty, 10, 35, 38.

CAPTURE—9.

See Admiralty, 2, 10, 21, 23, 25, 26.

CERTIORARI—7.

See Bond, 2, (288) **347**

CHANCERY—6.

1. See Auditor, 1 and 2. (8) **136**
2. The practice, in Kentucky, of calling a jury to ascertain facts in chancery causes is not correct.
Massie v. Watts, (148) **181**
3. A suit in chancery by one who has the prior equity against him who has the eldest patent, is in its nature local, and if it be a mere question of title, must be tried in the district where the land lies; but if it be a case of contract, or trust, or fraud, it is to be tried in the district where the defendant may be found. *Id.* (*Ib.*) **181**
4. If an agent locate land for himself which he ought to have located for his principal, he is in equity a trustee for his principal. *Id.* (*Ib.*) **181**
5. See Attachment, (187) **194**

CHANCERY—7.

1. The defendant to an attachment in chancery in Virginia may plead the statute of limitations without answer. *Wilson v. Koontz*, (202) **315**

CHANCERY—9.

See Answer.

CHARTER PARTY—8.

Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; but the general owner is to be considered as owner for the voyage, and, if he be master of the vessel, he cannot commit barratry. *Marcardier v. Ches. Ins. Co.*, (40) **481**

CHEROKEES—9.

In the treaty of the 25th of October, 1805, with the Cherokees, the reservation of three miles square for a garrison, lies below the mouth of the Highwassee, where the United States have placed the garrison. *Meigs v. M'Clung's lessee*, (11) **639**

CHURCH OF ENGLAND—9.

1. The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, as far as it was applicable to the circumstances of the colony.
Terrett v. Taylor, (43) **650**
2. The freehold of the church lands is in the parson. *Id.* (*Ib.*) **650**
3. The act of Virginia of 1776, confirming to the church its rights to lands, was not inconsistent with the constitution or bill of rights of Virginia; nor did the acts of 1784, ch. 88, and 1785, ch. 37, infringe any of the rights intended to be secured under the constitution, either civil, political or religious.
Id. (*Ib.*) **650**
4. The acts of Virginia of 1798, ch. 9, and 1801, ch. 5, so far as they go to divest the Episcopal Church of the property acquired previous to the revolution by purchase or donation, are unconstitutional and inoperative. *Id.* (*Ib.*) **650**
5. The act of Virginia of 1798, ch. 9, merely repeals the statutes passed respecting the church since the revolution; and left in full operation of all the statutes previously enacted, so far as they are not inconsistent with the present constitution.
Id. (*Ib.*) **650**
6. Church wardens are not a corporation for holding lands. *Id.* (*Ib.*) **650**
7. Church lands cannot be sold without the joint consent of the parson (if there be one) and the vestry. *Id.* (*Ib.*) **650**
8. If a grant be made of a tract of land in New Hampshire, in equal shares, to 63 persons, to be divided amongst them into 68 equal shares, with a specific appropriation of 5 shares, one of which is declared to be "for a glebe for the Church of England as by law established," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares.
Town of Pawlet v. Clark, (292) **735**
9. The Church of England is not a body corporate, and cannot receive a grant *eo nomine*.
Id. (*Ib.*) **736**
10. A grant to the church of such a place is good at common law and rests the fee in the parson and his successors. If such a grant be made by the crown it cannot be resumed by the crown at its pleasure. *Id.* (*Ib.*) **736**
11. Land at common law may be granted to pious uses before there is a grantee in existence competent to take it, and in the meantime the fee will be in abeyance. Such a grant cannot be resumed at the pleasure of the crown.
Id. (*Ib.*) **736**
12. The common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the persons thereof to take in succession, was recognized and adopted in New Hampshire.
It belonged exclusively to the crown to erect the church in each town that should be entitled to take the glebe; and upon such erection, to collate through the governor, a parson to the benefice.
A voluntary society of Episcopalians within a town, unauthorized by the crown, could not entitle themselves to the glebe.
Where no church was duly erected by the crown, the glebe remained as an *hereditas jacens*; and the state, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it; or might erect an Episcopalian Church therein, and collate, either directly, or through the vote of the town indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ* and be a corporation capable of transmitting the inheritance. *Id.* (*Ib.*) **736**
13. By the revolution the state of Vermont succeeded to all the rights of the crown, to the unappropriated, as well as appropriated glebes; and by the statute of Vermont of the 30th October, 1794, the respective towns became entitled to the property of the glebes therein situated.
Id. (*Ib.*) **736**
14. No Episcopal church in Vermont can be entitled to the glebe unless it was duly erected by the crown before the revolution, or by the state since.
Id. (*Ib.*) **736**

CITATION—5.

1. If the defendant below, who was a *feme sole*, intermarries, after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient.
Fairfax v. Fairfax, (19) **24**

2. The court will not compel a cause to be heard, unless the citation be served 30 days before the first day of the term. *Welch v. Mandeville*, (321) 113

CITIZEN—5.

1. A corporation aggregate cannot be a citizen, and cannot litigate in the courts of the United States unless in consequence of the character of the individuals who compose the body politic, which character must appear, by proper averments, upon the record.
The Hope Ins. Co. v. Boardman, (57) 36
Bank of United States v. Deveaux, (62) 38
2. A corporation aggregate, composed of citizens of one state may sue a citizen of another state in the Circuit Court of the United States.
Id. (*Ib.*) 38
3. See Jurisdiction, 13, (303) 108

CITIZEN—6.

See Alien, 1, 2, 3, 4, (176) 190

CLAIM—9.

See Admiralty, 18, 20, 23.

CLERK—7.

See Fees, 1, (276) 341

COLLECTOR—7.

1. See Bond, 3, (572) 443
2. See Admiralty, 20, (589) 448

COLLECTOR—8.

Under the 11th section of the embargo act of the 25th of April, 1808, the collector was justified in detaining a vessel, by his honest opinion that there was an intention to violate the provisions of the embargo laws. It was not necessary for him to show that his suspicion was reasonable.
Crowell v. M'Fadon, (94) 499

COLLECTOR—9.

1. See Direct Tax, (64) 658
2. See Admiralty, 24, (289) 734
3. See Embargo, 3, 4, (339) 752

COLUMBIA, DISTRICT OF—6.

The separation of the District of Columbia from the original States did not affect existing contracts between individuals.
Korn v. Mutual Ass. Society, (192) 195

COLUMBIA—7.

1. A discharge under the insolvent law of the District of Columbia is not a bar to an action.
King v. Riddle, (168) 304
2. Upon a writ of error to the Circuit Court for the District of Columbia, this court has no jurisdiction, if the sum awarded be less than 100 dollars, although a greater sum may have been originally claimed. *Wise v. Col. Turnpike Co.*, (276) 341

COLUMBIA—8.

1. The trustee of an insolvent debtor, in the District of Columbia, represents the creditors of the insolvent, and can take advantage of a defect in a mortgage, of which the insolvent himself could not.
Bank of Alex. v. Herbert, (36) 479
2. The Maryland act of limitations of three years is a good bar to an action of *assumpsit* for money had and received, brought to try the title to lands in the city of Washington, under the 5th section of the act of Maryland of November, 1791, c. 45.
Beatty v. Burnes, (98) 500
3. *Quære*, whether, by the Maryland act of cession of the District of Columbia to the United States, the state conveyed to the United States the vacant and unappropriated lands in the district?
Id. (*Ib.*) 500
4. See Appeal, 1, (251) 553

COMMISSION—7.

See Evidence, 3, (22, 107) 256, 284

COMMISSION—8.

See Admiralty, 28, (421) 610

COMMITMENT—7.

See Mittimus, (550) 436

COMMON LAW—7.

The courts of the United States have no common law jurisdiction in cases of libel against the government of the United States; but they have power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders, &c.
United States v. Hudson and Goodwin, (32) 259

COMPROMISE—7.

See Attorney at law, 2, (436) 396

COMPTROLLER—9.

The Comptroller of the Treasury has a right to direct the marshal to whom he shall pay money received upon execution.
United States v. Giles and Others, (212) 708

COMPUTATION OF TIME—9.

Where computation of time is to be made from an act done, the day on which the act is done is to be included. *Arnold v. United States*, (104) 671

CONCEALMENT—6.

1. The effect of a misrepresentation or concealment upon a policy, depends upon its materiality to the risk, which must be decided by a jury under the direction of a court.
Livingston v. Maryland Ins. Co. (274) 222
Maryland Ins. Co. v. Ruden, (338) 242
2. If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board will vacate the policy.
Livingston v. Maryland Ins. Co. (274) 222

CONCEALMENT OF PAPERS—7.

See Insurance, 12, 13, (506) 421

CONFISCATION—6.

1. A writ of error lies to the highest court of a state in a case where the question is whether a confiscation under the law of the state was complete before the treaty of peace with Great Britain.
Smith v. Maryland, (286) 225
2. By the confiscating acts of Maryland the equitable interests of British subjects were confiscated without office found, or entry or other act done, although such equitable interests were not discovered until long after the peace. *Id.* (*Ib.*) 226

CONFISCATION—8.

See Admiralty, 2, 10, (110, 221) 504, 542

CONNECTICUT—7.

See Mittimus, (550) 436

CONSIDERATION—5.

1. In a suit against the endorser of a promissory note, who endorsed to give credit to the maker, the consideration moving from the endorsee to the maker, upon the credit of the endorser, is a good consideration to support the *assumpsit* against the endorser.
Yeaton v. Bank of Alexandria, (49) 33
2. To constitute a consideration, it is not necessary that a benefit should accrue to the promisor; it is sufficient that something valuable flows from the promisee, and that the promise is the inducement to the transaction. *Violett v. Patton*, (142) 61
3. Under the statute of frauds of Virginia it is not necessary that the consideration should be expressed in writing. That statute only requires the promise to be in writing. *Id.* (*Ib.*) 61
4. The endorsement of a promissory note is *prima facie* evidence of a consideration.
Riddle v. Mandeville, (322) 114

CONSIDERATION—7.

1. See *assumpsit*, 1, (273) 340
2. Although the consideration of a promissory note fail, by reason of the failure of the payee to perform his part of the agreement upon which it was given, yet if a new agreement, as a substitute for the old one, be entered into between the original parties to the note, this failure of the original consideration creates no equity in favor of the maker of the note against the indorsee, even in Virginia. *Young v. Grundy*, (548) 435

CONSIDERATION—9.

1. In a patent, the obliteration of the consideration does not make void the grant.
Polk's lessee v. Wendell, (87) 665
2. *Quære*, whether a subsequent incumbrancer can compel a prior incumbrancer to disclose the consideration which he gave for the notes of the debtor upon which his incumbrance was founded.
Pratt v. Law & Campbell, (456) 792

CONSIGNEE—8.

1. See Joint Owners, (50) 484
2. See Admiralty, 12, (253) 553

CONSIGNMENT—8.

1. See Joint Owners, (50) 484
2. See Admiralty, 12, (253) 553
3. See Admiralty, 14, 16, 19, 26.

CONSTITUTION—6.

See Contract, 1, 2, 3, 4, 5, (87) 162

CONSTITUTION—7.

An act of the legislature of a state, declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax, constituted a contract which could not, after the adoption of the constitution of the United States, be rescinded by a subsequent legislative act; such rescinding act being void under the constitution of the United States.
State of New Jersey v. Wilson, (164) 303

CONSTITUTION OF VIRGINIA—9.

See Church of England, 3, 4, 5, (43) 650

CONSTRUCTION—9.

In cases depending upon the statutes of a state, the settled construction of those statutes, by the state courts, is to be respected.
Polk's lessee v. Wendell, (87) 665

CONSTRUCTION OF STATUTES—5.

A long and uninterrupted practice under a statute is good evidence of its construction.
M'Keen v. Delancy, (22) 25

CONTEMPT—7.

See Common Law, (32) 259

CONTINUANCE—6.

The refusal of the court below to continue a cause is no ground for a writ of error.
Marine Ins. Co. v. Hodgson, (206) 200

CONTINUITY OF VOYAGE—8.

See Admiralty, 36, (451) 621

CONTINUITY OF VOYAGE—9.

See Admiralty, 10, (126) 678

CONTRACT—6.

1. When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.
Fletcher v. Peck, (87) 162
2. A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state. *Id.* (*Ib.*) 162
3. A grant is a contract executed. *Id.* (*Ib.*) 162
4. A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States. *Id.* (*Ib.*) 162
5. The court will not declare a law to be unconstitutional unless the opposition between the constitution and the law be clear and plain.
Id. (*Ib.*) 162

CONTRACT—7.

1. See Constitution, (164) 303
2. See Frauds, 3, (176) 307
3. See Assumpsit, 3, (299) 351
4. See Agreement, 2, 3, 4, 5, (299) 351
5. See Corporation, (299) 351
6. See Assignment, 1, (308) 354
7. See Varianee, 2, (408) 386
8. See Agent, 2, 3, (366, 500) 373, 419

CONTUMACY—9.

See Admiralty, 8, (126) 678

CONVEYANCE—5.

See Deeds, 3, 4, (154) 64

CONVEYANCE—6.

See Contract, 1, 2, 3, 4, (87) 162

CONVEYANCE—7.

See North Carolina, 1, 2, (471) 408

CONVEYANCE—8.

1. Under the land law of Virginia, the whole legal estate and seizin of the commonwealth pass to the patentee, upon the issuing of his patent.
Green v. Liter, (229) 545
2. A conveyance of wild or vacant lands gives a constructive seizin, thereof, in deed, to the grantee, and entitles him to all the legal remedies incident to the estate. *Id.* (*Ib.*) 545
3. Under a conveyance, taking effect under the statute of uses, the bargainee has a complete seizin in deed without actual entry or livery of seizin.
Id. (*Ib.*) 545

COPPER—5.

"Round copper bottoms, turned up at the edge," are not liable to duties, although imported under the denomination of "raised bottoms."
United States v. Potts, (284) 102

CORPORATION—5.

See Citizen, 1, 2, (57, 61) 36, 37

CORPORATION—7.

Wherever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies.
Bank of Columbia v. Patterson, (299) 351

CORPORATION—9.

See Church of England, 6, 9, 12, (292) 736

COSTS—6.

1. The court below, upon a mandate on reversal of its judgment, may award execution for the costs of the appellant in that court.
Riddle v. Mandeville, (86) 161
2. In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.
M'Knight v. Craig, (184) 193

COSTS—7.

1. A copy of the transcript of the record obtained from the clerk of the Supreme Court of the United States is not a part of the taxable costs of suit to be recovered by one party against the other; but the party who requests the copy must pay the clerk for it. *Caldwell v. Jackson*, (276) 341
2. See Fees, 1, (276) 341

COUNSELORS—7.

1. Two counselors only shall be heard on each side of any cause, whatever be the number of points or parties. General Rule, (1) 249
2. If the counsel do not furnish the court with a statement of the points of the case, the appeal will be dismissed.
Schooner Catharine v. United States, (99) 281

COURSE AND DISTANCE—9.

See Land, 15, 16, 19, (173) 694

COURTS—7.

1. See Common Law, (32) 259
2. See Jurisdiction, (107) 284
3. See Appeal, (108) 284
4. See Account, 2, (281) 343
5. See Abandonment, 2, (506) 421

COVENANT—6.

1. If the breach of covenant assigned be, that the state had no authority to sell and dispose of the land, it is not a good plea in bar to say that the governor was legally empowered to sell and convey the premises; although the facts stated in the plea as inducement are sufficient to justify a direct negative of the breach assigned.
Fletcher v. Peck, (87) **162**

2. It is not necessary that the breach of the covenant should be assigned in the very words of the covenant. It is sufficient if it show a substantial breach. *Id.* (*Ib.*) **162**

3. In an action of covenant on a policy under seal, all special matter of defense must be pleaded. Under the plea of covenants performed the defendant cannot give evidence which goes to vacate the policy.
Marine Ins. Co. v. Hodgson, (206) **200**

CREDIT, LETTER OF—7.

1. The construction of a letter of credit or guaranty must be the same in a court of equity as in a court of law. *Russell v. Clark*, (69) **271**

2. To charge one person with the debt of another, the undertaking must be clear and explicit.
Id. (*Ib.*) **271**

3. It is the duty of him who gives credit to another, upon the responsibility or undertaking of a third person, immediately to give notice to the latter of the extent of his engagements. *Id.* (*Ib.*) **271**

4. A fraudulent recommendation will subject the person giving it to the damages sustained by the person trusting to it. *Id.* (*Ib.*) **271**

5. A misrepresentation of the solidity of a mercantile house made, under a mistake of the fact, without any interest or fraudulent intention, will not sustain an action, although the plaintiff may have sustained damage by reason of such misrepresentation. *Id.* (*Ib.*) **271**

6. A merchant who indorses the bills of another upon the faith of a guaranty of a third, cannot (upon the insolvency of the principal debtor and of the guaranty) resort to a trust fund created by the principal debtor for the indemnity of the guaranty for the amount which the guaranty should pay. But a person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself. *Id.* (*Ib.*) **271**

7. When the guaranty is insolvent, a court of equity will not decree the money (raised for his indemnity) to be paid to him without security that the debt to the principal creditor shall be satisfied.
Id. (*Ib.*) **271**

CREDITORS—8.

See Columbia, 1, (36) **479**

CURRACOA—7.

See Admiralty, 4, (402) **385**

CUSTOM OF MERCHANTS—7.

The maker of a promissory note, payable to order, is, under the custom of merchants, liable to refund the amount of the note and costs of protest, to an indorser, who has been obliged to take up the note after protest.
Morgan v. Reintzel, (273) **340**

DAMAGES—5.

In an action of trover, if the judgment below be in favor of the original defendant, the value of the matter in dispute on the writ of error in the Supreme Court of the United States is the sum claimed as damages in the declaration.
Cook v. Woodrow, (13) **22**

DAMAGES—6.

See Bill of Exchange, 1. (221) **205**

DANGER OF THE SEAS—6.

See Bond, 2, (171) **189**

DEBT—6.

See Bill of Exchange, 3, (221) **205**

DEBT—7.

Nil debet is not a good plea to an action of debt on a judgment of another state.
Mills v. Duryee, (481) **411**

DEBT—8.

See Lands, 1, (66) **490**

DEBTOR—7.

See Account, 3, (575) **444**

DEBTOR—8.

See Insolvent, (431) **614**

DEBTOR—9.

No debtor of the United States can, at the trial, set off a claim for a debt due to him by the United States, unless such claim shall have been submitted to the accounting officers of the treasury and by them rejected, except in the cases provided for by the statute. *United States v. Giles and others*, (212) **708**

DECLARATION—6.

See Bill of Exchange, 3, (221) **205**

DECLARATION—7.

See Abatement, 1, 3, (194) **313**

DEED—5.

1. Deeds of land in Pennsylvania might be acknowledged before a Justice of the Supreme Court of the province, before the year 1775.
M'Keen v. Delancy's Lessee, (22) **25**

2. Under the statute of Pennsylvania of 1715, if a deed conveyed lands in several counties, and was recorded in one of those counties, an exemplification of it was good evidence as to the lands in the other counties. *Id.* (*Ib.*) **25**

3. The act of assembly of Virginia which makes unrecorded deeds void as to creditors and subsequent purchasers, means creditors of, and subsequent purchasers from, the grantor.
Pierce v. Turner, (154) **64**

4. A marriage settlement, conveying the wife's land and slaves to trustees, by a deed to which the husband was a party, although not recorded, protects the property from the creditors of the husband. *Id.* (*Ib.*) **64**

5. See Bond, (351) **123**

DEED—7.

1. A plat referred to in a deed as being annexed to it, but which was never in fact annexed, and was not recorded with the deed, affords no evidence in aid of the description of the property mentioned in the deed.
Shirras v. Caig and Mitchell, (34) **260**

2. A person cannot be charged with fraudulently secreting a deed who places it upon record as soon as the law requires. *Id.* (*Ib.*) **260**

3. See Equity, 2, 6, 34, (218) **321**

4. See North Carolina, 1, 2, (471) **408**

DEED—9.

1. See Bond, 1, 2. 3, (28) **645**

2. See Land, 4, 5, 6, 10, 11, 18, 19, 21.

DELAY—7.

See Insurance, 7, 8, 9, 10, (487) **414**

DEMISE—7.

See Amendment, 1, (471) **408**

DEMURRER—5.

1. *Quære*, whether the court ought to permit amendments after judgment upon demurrer,
Mandeville v. Wilson, (15) **23**

2. Upon demurrer the judgment of the court must be against the party who commits the first error. *United States v. Arthur*, (257) **94**

DEMURRER—7.

1. It is a matter of discretion with the court whether it will compel a party to join in demurrer to evidence. *Young v. Black*, (565) **440**

2. A demurrer to evidence ought not to be allowed where the party demurring refuses to admit the facts which the other party attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions.
Id. (*Ib.*) **440**

3. *Quære*, whether the refusal of a court to compel a party to join in demurrer to evidence can in any case be assigned for error. *Id.* (*Ib.*) **440**

DEMURRER—8.

A special plea, which amounts to the general issue, is bad upon special demurrer.
Van Ness v. Forrest, (31) 478

DEPOSITION—5.

1. The court is not bound to give an opinion to the jury as to the meaning or construction of a written deposition read in evideuce in the cause.
Marine In. Co. v. Young, (187) 74
2. See Evidence, 5. (335) 118

DEPOSITION—6.

The depositions contained in the proceedings of the foreign court of admiralty condemning the vessel are not evidence in an action upon the policy of insurance.
Marine Ins. Co. v. Hodgson, (206) 200

DEPOSITION—8.

See Evidence, (70) 491

DEPOSITION—9.

See Equity, 6, (153) 688

DESCENT—7.

The statute of descents in Maryland has not declared how an intestate estate shall descend, which was derived to the intestate from his half-brother, or from his brother of the whole blood, or from his son, or daughter, or from his wife; but such estates are left to descend at common law.
Barnitz v. Casey, (456) 403

DEVIATION—6.

If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation.
Maryland Ins. Co. v. Woods, (29) 143

DEVIATION—7.

See Insurance, 1, 7, 8, 9, 10, 26, (487) 414

DEVISE—7.

1. See Dower, 2, (370) 374
2. A devise to A in fee, and if he shall die under the age of 21 years, and without issue, then to B in fee, is a good executory devise; and if B die before the contingency happen, it devolves upon his heir, and so from heir to heir, until the contingency happen, when it vests absolutely in him only who can then make himself heir to B the executory devisee; and although A be the heir at law of B yet the executory devise thus devolving on him is not merged in the preceding estate, but, on the death of A devolves to the next heir of B.
Barnitz v. Casey, (456) 403
3. See Alien, 1, (603) 453

DEVISE—8.

See Land, 1, (66) 490

DEVISE—9.

It is not necessary that an executor of a will made in Virginia, devising to the executor land in Kentucky, should take out letters testamentary in Kentucky, to enable him to maintain an ejectment for the land in Kentucky.
Doe, lessee of Lewis, v. M'Farland, (151) 687

DIRECT TAX—9.

Under the act of Congress to lay and collect a direct tax (July 14, 1798,) before the collector could sell the land of an unknown proprietor for nonpayment of the tax, it was necessary that he should advertise the copy of the lists of lands, &c., and a statement of the amount due for the tax, and the notification to pay, for 60 days, in four gazettes of the state, if there were so many.
Parker v. Rule's lessee, (64) 658

DISABILITY—7.

See Limitations, 1, 4, 5, (156, 202, 350) 300, 315, 367

DISCONTINUANCE—7.

A plaintiff may, before verdict, discontinue a count in his declaration, and waive the issues joined thereon.
Hughes v. Moore, (176) 307

DISCOVERY—7.

1. Where the only ground of equitable jurisdiction is the discovery of facts solely within the knowledge of the defendant, and the defendant, by his answer, discloses no such facts, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff should be dismissed from the Court of Chancery and permitted to assert his rights in a court of law.
Russel v. Clark, (69) 271
2. See Dower, 1, (370) 374

DISCRETION—7.

1. See Juror, 2, (290) 348
2. See Demurrer, 1, (565) 440

DOMICILE—7.

1. The national commercial character of a person is to be decided by his domicile, and not by the nature of his trade.
Livingston et al. v. M. In. Co., (506) 421
2. A Spanish subject, who came to the United States in a time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license, and who continued to reside here and carry on that trade after the breaking out of war between Great Britain and Spain, is to be considered an American merchant, although the trade could be lawfully carried on by a Spanish subject only.
Id. (*Ib.*) 421

DOMICILE—8.

See Admiralty, 11, 15, 20, (398) 602

DOMICILE—9.

See Admiralty, 21, (244) 720

DOWER—7.

1. Courts of Chancery have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery, or account is prayed; and in cases of sale where the parties are willing that a sum in gross should be given in lieu of dower.
Herbert v. Wren, (370) 374
2. If a devise of land, in Virginia, to the widow, appear, from circumstances, to be in lieu of dower, she must make her election, and cannot take both.
Id. (*Ib.*) 374
3. If a wife join her husband in a lease for years, she is still entitled to dower in the rent.
Id. (*Ib.*) 374
4. A court of chancery cannot allow a part of the purchase money in lieu of dower, when the land is sold, unless by consent of all parties interested.
Id. (*Ib.*) 374

DUTIES—5.

1. See Copper, (284) 102
2. The law punishes the attempt, not the intention, to defraud the revenue by false invoices.
United States v. Riddle, (311) 110
3. A doubt respecting the construction of a law may be good ground for seizure, and authorize a certificate of probable cause. *Id.* (*Ib.*) 110
4. Duties upon goods imported do not accrue until their arrival at the port of entry.
United States v. Vowell, (368) 128
5. The duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808. *Id.* (*Ib.*) 128

DUTIES—8.

See Admiralty, 23, (398) 602

DUTIES—9.

1. The double duties imposed by the act of July 1, 1812, accrued upon goods which arived within a collection district on that day.
Arnold v. United States, (104) 671
2. To constitute an importation so as to attach the right to duties it is necessary, not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry.
Id. (*Ib.*) 671
3. *Semb.* that if the condition of the bond be to pay 1,700 dollars, or the duties which may be ascertained to be due upon certain goods imported, it is

not in the option of the obligor to discharge the bond by payment of the 1,700 dollars, but the United States may recover, in an action at law upon that bond against the sureties, the whole amount of the duties on those goods, although the duties amount to more than the penalty of the bond.
Id. (104) **671**
5. If captured goods claimed by a neutral owner, be, by consent, sold under an order of the court, and afterwards by the final sentence of the court, the proceeds are ordered to be restored to such owner, the amount of the duties due to the United States upon the importation of the goods must be paid.
But if the goods had been specifically restored, and withdrawn from the country, they would have been exempt from duties.
Brig Concord, (387) **768**

EJECTMENT—6.

See Bonudaries, (237) **210**

EJECTMENT—7.

1. A tenant in common cannot maintain ejectment against his co-tenant without actual ouster.
Barnitz v. Casey, (456) **403**
2. In ejectment the date of the demise in the declaration may be amended during the trial so as to conform to the title.
Blackwell v. Patton, (471) **408**
3. See North Carolina. (*Ib.*) **408**

EJECTMENT—9.

1. See Devise, (151) **687**
2. If a plaintiff in ejectment claim, in his declaration, the whole tract, a deed, showing that he has only an undivided interest in the tract, may be given in evidence.
Doe, lessee of Lewis, v. M'Farland, (*Ib.*) **687**

EMBARGO—6.

1. See Bond, 2. Accident, 1, (171, 307) **189, 232**
2. It was no offense against the embargo law to take goods out of one vessel and put them into another, in the port of Baltimore, unless done with intent to export them.
Schooner Juliana v. United States, (327) **238**

EMBARGO—7.

1. The evidence of that necessity which will excuse a violation of the embargo laws, must be very clear and positive.
Brig James Wells, (22) **256**
2. The 3d section of the act of January 9, 1808, which prohibited the transshipment of goods, did not include the case of a vessel lading in port by means of river craft, &c.
Schooner Paulina, (52) **266**
3. The 2d section of the act of 25th April, 1808, did not require a permit to lade any vessel; nor authorize the forfeiture and condemnation of the vessel or cargo for lading without the inspection of a revenue officer; the only penalty for such lading being the denial of a clearance. *Id.* (*Ib.*) **266**
4. The departure of a vessel from the wharf of a port, and proceeding a mile and a half therefrom, with intent to go to sea, is not a departure from the port, within the meaniug of the 3d section of the supplementary embargo act of January 9th, 1808, if the vessel had not actually gone out of the port before seizure. *The sloop Active,* (100) **282**
5. A vessel which has proceeded to a foreign port, contrary to the embargo act of January 9, 1808, is liable to be seized upon her return, although that act gives a penalty of double her value in case she should not be seized.
The brig Eliza, (113) **286**
6. Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States contrary to the act of January 9, 1809, the punishment of which offense is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods. *United States v. Tyler,* (285) **344**
7. See Bond, 1, (287) **347**
8. See Admiralty, 13, (349) **367**
9. See Admiralty, 20, (589) **448**

EMBARGO—8.

See Collector, (94) **499**

EMBARGO—9.

1. See Bond, 1, 2, 3, (28) **645**
2. *Quære*, whether, under the 1st and 2d embargo laws of 1807 and 1808, a registered vessel which had a clearance from one port to another of the United States, was liable to condemnation for going to a foreign port.
Brig Short Staple v. United States, (55) **655**
3. If a collector justify the detention of a vessel under the 11th sec. of the embargo law of April 25, 1808 (vol. 9, p. 150), he need not show that his opinion was correct, nor that he used reasonable care and diligence in ascertaining the facts upon which his opinion was formed. It is sufficient that he honestly entertained the opinion upon which he acted. *Otis v. Watkins,* (339) **752**
4. *Quære*, whether under that act the collector was bound to transmit to the President a statement of the facts upon which he formed his opinion, that the vessel intended to violate the embargo laws. Whether he was bound in law to use reasonable care and diligence in ascertaining the facts thus to be laid before the President; and whether he had a right under that act, to remove a vessel from one harbor to another, as well as to detain her.
Id. (*Ib.*) **752**

ENDORSEMENT—5.

1. A blank endorsement on a blank piece of paper, with intent to give a person credit, is, in effect, a letter of credit; and if a promissory note be afterwards written on the paper, the endorser cannot object that the note was written after the endorsement.
Violett v. Patton, (142) **61**
2. Before resort can be had to the endorser of a promissory note in Virginia, the maker must be sued, if solvent; but his insolvency renders a suit against him unnecessary.
Id. (*Ib.*) **61**
3. In Virginia a remote endorser of a promissory note is liable in equity, but not at law.
Riddle v. Mandeville, (322) **114**
4. An endorser has the same defense in equity against a remote as an immediate endorsee.
Id. (*Ib.*) **114**
5. An endorser, sued in equity, has a right to insist that the other endorsers be made parties.
Id. (*Ib.*) **114**
6. In Virginia, the holder of a promissory note with a blank endorsement has a right to fill it up to himself. *Id.* (*Ib.*) **114**
7. The endorsement of a promissory note is *prima facie* evidence of a full consideration.
Id. (*Ib.*) **114**
8. See Bank of Alexandria, 2, (49) **33**
9. *Quære*, whether the undertaking of the endorser of a note to a bank in Virginia be not different from that of an ordinary endorser.
Yeaton v. The Bank of Alexandria, (*Ib.*) **33**
10. See Accommodation, 1, 2, (*Ib.*) **33**
11. The endorsor of a promissory note, who endorsed to give credit to the note, and who is counter-secured by property pledged, is not liable upon the note, nor in an action for money had and received, unless the plaintiff show that the maker is insolvent, or that he has brought suit which has proved fruitless. It is not sufficient to show that the maker is out of the reach of the process of the court. *Dulany v. Hodgkin,* (333) **117**

ENDORSEMENT—6.

See Bill of Exchange, 1, 2, 3, (221) **205**

ENEMY—8.

See Admiralty, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38.

ENEMY—9.

1. See Admiralty, 6, 7, 12, 13, 14, 16, 21, 23.
2. See Alien Enemy, (180) **697**
3. Fat cattle are provisions, or munitions of war, within the meaning of the act of Congress of the 6th of July, 1812.
United States v. Barber, (243) **719**

ENEMY COLONY—9.

See Admiralty, 13, 14, (191) **701**

ENEMY LICENSE—9.

See Admiralty, 10, (126) **678**

ENEMY SHIP—9.

See Admiralty, 28, 29, 31, (388) **769**

ENTRY—9.

1. See Land, 2, 3, 7, 11, 12, 13, 14. (87) 665
2. See Tennessee, (*Ib.*) 665

ENTRY OF LAND—6.

See Kentucky, (148) 181

ENQUIRY, WRIT OF—7.

Upon executing a writ of enquiry in Virginia, in an action of *assumpsit* upon a promissory note, it is necessary to produce a note corresponding with that stated in the declaration; but it is not necessary to prove the note.
Shelby v. Mandeville, (208) 317

EPISCOPALIAN CHURCH—9,

See Church of England, (43) 650

EQUITY—5.

1. It is equity alone which can restrain a joint creditor from receiving his full dividend out of the separate effects of one of the partners until the joint effects are exhausted.
Tucker v. Oxley, (34) 29
2. See Jurisdiction, 10, 12. (191) 75
3. See Virginia, (234) 88
4. The first survey, under a military land warrant in Virginia, gives the prior equity.
Taylor v. Brown, (*Ib.*) 88
5. A subsequent locator of land in Virginia, without notice of the prior location, cannot protect himself by obtaining the elder patent.
Id. (*Ib.*) 88
6. In Virginia, the patent relates to the inception of title, and therefore, in a court of equity, the person who has first appropriated the land has the best title. *Id.* (*Ib.*) 88
7. The equity of the prior locator extends to the surplus land surveyed, as well as to the quantity mentioned in the warrant. *Id.* (*Ib.*) 88
8. In equity, time may be dispensed with if it be not of the essence of the contract.
Hepburn v. Auld, (262) 96
9. A vendor of land may compel a specific performance, if he can make a good title at the time of decree, although he had not a good title at the time, when by the terms of the contract the land ought to have been conveyed.
Id. (*Ib.*) 96
10. A court of equity will not compel a specific performance unless the vendor can make a good title to all the land contracted for.
Id. (*Ib.*) 96
11. See Jurisdiction, 12, (288) 103
12. See Endorsement, 3, 4, 5, (322) 114
13. Equity will make that party immediately liable who is ultimately liable at law.
Riddle v. Mandeville, (*Ib.*) 114
14. See Kentucky, 6, (192) 76

EQUITY—6.

1. See Auditor, 1, 2, (8) 136
2. A court of equity may itself ascertain the facts, if the evidence enables it to do so, or may refer the question to a jury, or to auditors.
Field v. Holland, (*Ib.*) 136
3. After an issue ordered, a court of equity may proceed to a final decree without trying the issue, or setting aside the order. *Id.* (*Ib.*) 136
4. See Chancery, 2, 3, 4, (148) 181
5. See Evidence, 2, 3, 4, 6, (8, 51) 136, 149
6. If neither the debtor nor creditor has made the application of the payments, the court will apply them to the debts for which the security is most precarious. *Field v. Holland*, (8) 136
7. No writ of error or appeal lies to an interlocutory decree dissolving an injunction.
Young v. Grundy, (51) 149
8. A bond executed in pursuance of articles of agreement may in equity be restrained by those articles. *Finley v. Lynn*, (238) 211
9. A complainant in equity may have relief even against the admissions of his bill. *Id.* (*Ib.*) 211

EQUITY—7.

1. He who has equal equity may acquire the legal estate, if he can, so as to protect his equity.
Fitzsimmons v. Ogden, (2) 249
2. A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal right, although he had a power, from the person who held the residue of the legal but not of the equitable estate in the land, to sell and convey his right also; the mortgageor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power. *Shirras v. Caig and Mitchell*, (34) 260
3. See Credit, letter of, 1, 6, 7, (69) 271
4. See Discovery, 1, (*Ib.*) 271
5. See Arbitration, 1, (171) 305
6. If A advance money to B, and B thereupon convey land to trustees in trust to convey the same to A in fee, in case B should fail to repay the money and interest on a certain day; and if B fail to pay the money on the day limited, and there upon the trustees convey the land to A, B has no equity of redemption.
Conway v. Alexander, (218) 321
7. Upon an action on a valued policy, if a misrepresentation of the age and tonnage of the vessel, whereby the underwriters were induced to agree to a high valuation, be a defense; it is at law, and not in equity.
Marine Ins. Co. v. Hodgson, (332) 362
8. If an equitable title be merged in a grant, the party has no relief in equity, although the grant be void, because contrary to law.
Preston v. Tremble, (354) 369
9. See Agent, 2, (366) 373
10. See Dower, 1, 2, 3, 4, (370) 374
11. See Consideration, 2, (548) 435
12. The Circuit Court of Tennessee, as a court of equity, cannot award a writ of *hab. facias possessionem* to enforce its decree.
Wallen v. Williams, (602) 452

EQUITY—8.

1. If the case be clear, a court of equity will interpose to quiet the title.
Alexander v. Pendleton, (462) 624
2. See Purchaser, 2, 3, (*Ib.*) 624
3. See Specific performance, (471) 627

EQUITY—9.

1. A bill in equity to enjoin a judgment at law is not to be considered as an original bill, and therefore it is not necessary in a court of limited jurisdiction to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court.
Simms v. Guthrie, (19) 642
2. A complainant in equity cannot obtain a decree for more than he asked in his bill.
Id. (*Ib.*) 642
3. If the execution of an important exhibit of the complainant be not admitted by the defendant in his answer, who calls upon the complainant to make full proof thereof in the court below; this court will not presume that any other proof was made than appears in the transcript of the record.
Drummond v. Magruder, (122) 677
4. A copy of a deed from a clerk of the court, without the certificate of the presiding judge, that the attestation of the clerk is in due form, cannot be received as evidence in a suit in equity.
Id. (*Ib.*) 677
5. If this court reverse a decree upon a technical objection to evidence (probably not made in the court below), it will not dismiss the bill absolutely, but remand the cause to the court below for further proceedings. *Id.* (*Ib.*) 677
6. The answer of one defendant in chancery as not evidence against his co-defendant; nor his deposition, although he had been discharged under the act of assembly of Rhode Island (of 1757) from all debts and contracts prior to the date of the discharge; and although the debt in suit was a debt contracted prior to such discharge; the debt having been contracted in a foreign country.
Clark v. Van Riemsdyk, (153) 688
7. An answer in chancery, although positive, and directly responsive to an allegation to the bill, may be outweighed by circumstances, especially if it be respecting a fact which, in the nature of things, cannot be within the personal knowledge of the defendant. *Id.* (*Ib.*) 688
8. A denial of previous authority, without a denial of subsequent assent, is not such an answer as will deprive the complainant of his remedy; for a subsequent assent is equivalent to an original authority. *Id.* (*Ib.*) 688
9. In Kentucky, courts of law will not look beyond the patent, but courts of equity will; and will give validity to the elder entry against the elder patent.
Finley v. Williams, (164) 691

10. It is error to decide a cause against the answer of the defendant, if the answer be not denied by a replication, nor contradicted by evidence.
Gettings v. Burch, (372) **763**
11. In a case where it would be difficult to ascertain the injury resulting from the breach of contract, or the sum in damages which would be a compensation for such injury, a court of equity will not themselves ascertain the injury, nor the damages, nor direct an issue *quantum damnificatus*.
Pratt v. Law & Campbell, (457) **792**
12. Where a contract for the sale of land has been in part executed by the vendor who is unable to convey all the land, a court of equity will decree repayment of a proportionate part of the purchase money with interest.
Id. (*Ib.*) **792**
13. If three persons mortgage their joint property to indemnify the drawer of bills of exchange for their accommodation, in case of protest; and if each of the mortgageors agree to take up a third part of the bills upon their return under protest, and if two of them neglect to take up their two-thirds, whereby the other mortgageor is compelled to take up the whole of the bills, in consequence of which he requests the drawer not to release the mortgage, but to hold it for his benefit, a lien in equity is thereby created upon the mortgaged premises to the amount of two-thirds of the bills, in favor of that mortgageor who took up the whole.
Id. (*Ib.*) **792**
14. *Quære*, whether a subsequent incumbrancer can compel a prior incumbrancer to disclose the consideration which he gave for the notes of the debtor upon which his incumbrance was founded.
Id. (*Ib.*) **792**
15. An equity of redemption in Maryland was liable to attachment before the Maryland act of 1810, ch. 60. *Id.* (*Ib.*) **792**

ERASURE—9.

See Bond, 3, (28) **645**

ERROR—5.

1. A writ of error does not lie from the Supreme Court of the United States to the District Court of the United States for the District of Maine.
United States v. Weeks, (1) **19**
2. A writ of error will not lie to the court below for refusing a new trial.
Henderson v. Moore, (11) **22**
3. See Damages, (13) **22**
4. It is not error to suffer the parties to amend their pleadings.
Mandeville v. Wilson, (15) **23**
5. An erroneous judgment of a competent court is not void.
Kempe v. Kennedy, (173) **70**
6. It is no ground for a writ of error that the court below refused a new trial, moved for on the ground that the verdict was contrary to evidence.
Marine Ins. Co. v. Young, (187) **74**
7. It is no ground for a writ of error that the judge below refused to re-instate a cause after nonsuit. *United States v. Evans*, (280) **101**
8. A writ of error will be dismissed if neither party appears when the cause is called.
Radford v. Craig, (289) **104**

ERROR—6.

1. No writ of error or appeal lies to an interlocutory decree dissolving an injunction.
Young v. Grundy, (51) **149**
2. See Costs, 1, 2. (86, 183) **161, 193**
3. Error does not lie to the refusal of the court below to give leave to amend, or to grant a new trial, or to continue a cause.
Marine Ins. Co. v. Hodgson, (206) **200**
4. Amendments may be allowed by the court below, after judgment upon demurrer affirmed in this court. *Id.* (*Ib.*) **200**
5. What would have been fatal in arrest of judgment is fatal upon a writ of error.
Slacum v. Pomery, (221) **205**
6. This court will not direct the court below to allow proceedings to be amended.
Sheehy v. Mandeville, (253) **216**
7. Error lies to the highest state court in a case where the question is whether the confiscation was complete before the British treaty.
Smith v. Maryland, (286) **225**

ERROR—7.

1. No writ of error lies to carry to the Supreme Court of the United States a suit which has been carried by writ of error from the District Court to the Circuit Court.
United States v. Goodwin, (108) **284**
United States v. Gordon, (287) **347**
2. The refusal of the court below to re-instate a cause which has been legally dismissed is no ground for a writ of error.
Welch v. Mandeville, (152) **299**
3. A writ of error, issued in September, may bear teste of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the teste and return of the writ.
Blackwell v. Patton, (277) **342**
4. The Supreme Court of the United States will not quash an execution issued by the court below to enforce its decree, pending the writ of error, if the writ of error be not a *supersedeas* to the decree.
Wallen v. Williams, (278) **342**
5. A writ of error does lie to an order of the court below to stay the proceedings finally upon suggestion of the attorney for the United States, in a case to which the United States are not parties. But this court will award a *mandamus nisi*, in the nature of a *procedendo*.
Livingston v. Dorgenois, (577) **444**

ERROR—9.

1. It is not necessary that the transcript of the record should contain the names of the jurors.
Owens v. Hannay, (180) **697**
2. See alien enemy, (*Ib.*) **697**
3. If the facts stated in a plea do not amount to a justification in law, yet, if issue be joined thereon, and if the facts be proved as stated, it is error in the judge to instruct the jury that the facts so proved did not, in law, maintain the issue on the part of the defendant.
Otis v. Watkins, (339) **752**
4. See equity, 10, (372) **763**

ESCAPE—9.

If a debtor committed to the state jail, under process from a court of the United States, escape, the marshal is not liable.
Randolph v. Donaldson, (76) **662**

ESCROW—5.

See Bond, (351) **123**

ESTOPPEL—9.

See Bond, 2, (28) **645**

EVANS, OLIVER—9.

The act of January, 1808, for the relief of Oliver Evans, does not authorize those who erected his machinery between the expiration of the old patent and the issuing of the new one, to use it after the issuing of the letter.
Evans v. Jordan, (199) **704**

EVIDENCE—5.

1. Due diligence must be used to obtain the testimony of the subscribing witness. If inquiry be made at the place where he was last heard of, and he cannot be found, evidence of his handwriting may be admitted.
Cooke v. Woodrow, (13) **22**
2. See Deposition, 1, (187) **74**
3. After a long possession in severalty, a deed of partition may be presumed.
Hepburn v. Auld, (262) **96**
4. Copies of the proceedings in the Vice-Admiralty Court of Jamaica are admissible in evidence when certified under the seal of the court by the deputy-registrar, who is certified by the judge of the court, who is certified by a notary public.
Yeaton v. Fry, (335) **118**
5. Depositions, taken under a commission issued at the instance of the defendant, may be read in evidence by the plaintiff, although the plaintiff had not notice of the time and place of taking the same.
Id. (*Ib.*) **118**
6. See Payment, 11. Endorsement, 7, (322) **114**

EVIDENCE—6.

1. The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master "to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States," although such proof be required by the act.
Scott v. Ben, (3) **135**

2. The answer of a defendant in chancery is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant. *Field v. Holland*, (8) **136**

3. The answer of one defendant in chancery is evidence against other defendants claiming through him. *Id.* (*Ib.*) **136**

4. The plaintiff cannot avail himself of the answer of a defendant who is substantially a plaintiff; it is not evidence against a co-defeudant. *Id.* (*Ib.*) **136**

5. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. *Maryland Ins. Co. v. Woods*, (29) **143**

6. If an answer in chancery neither denies nor admits the allegations of the bill, they must be proved on the final hearing; but upon the question of dissolution of an injunction they are to be taken as true. *Young v. Grundy*, (51) **149**

7. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy. *Marine Ins. Co. v. Hodgson*, (206) **200**

8. In order to prove the condemnation of a vessel it is only necessary to produce the libel and sentence. It is a useless practice to read the proceedings at length. The depositions stated in such proceedings are not evidence in an action upon the policy of insurance. *Id.* (*Ib.*) **200**

9. In an action upon a valued policy it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy. *Id.* (*Ib.*) **200**

10. A complainant in equity may have relief even against the admissions in his bill. *Finley v. Lynn*, (238) **211**

11. If foreign laws are not proved to have been made in writing as public edicts, they may be proved by parol. *Livingston v. Maryland Ins. Co.* (274) **222**

12. A bill of lading is not conclusive evidence of property. *Maryland Ins. Co. v. Ruden*, (338) **242**

EVIDENCE—7.

1. See Admiralty, 1, 2, (22) **256**

2. An answer in chancery, responsive to the bill, is evidence for the defendant. *Russel v. Clark*, (69) **271**

3. The Supreme Court of the United States will grant a commission to take new evidence in cases of admiralty. *Brig James Wells*, (22) **256**
Brig Clarissa Claiborne, (107) **284**
See Account, 1, 2, (147, 281) **297, 343**

5. The mere possession of a promissory note, by an indorsee who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee *Welch v. Lindo*, (159) **301**

6. An indorsement "without recourse" is not evidence of money had and received by the indorser to the use of the indorsee. *Id.* (*Ib.*) **301**

7. A recital in a deed is good evidence to take a case out of the statute of limitations. *King v. Riddle*, (168) **304**

8. The principal obligor in a bond is not a competent witness for the surety, in an action on the bond; the principal being liable to the surety for costs, in case the judgment should be against him. *Riddle v. Moss*, (206) **317**

9. When issue is taken upon the neglect of the postmaster himself, it is not competent to give in evidence the neglect of his assistant. *Dunlop v. Monroe*, (242) **329**

10. Parol evidence is not competent to prove that one set of written instructions superseded another set of written instructions. *Id.* (*Ib.*) **329**

11. A verdict and judgment that the mother was born free, is not conclusive evidence of the freedom of her children, unless between the same parties or privies. *Wood v. Davis*, (271) **339**

12. Hearsay evidence is incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. Claims to freedom in Maryland are not exempt from that general rule. *Mima Queen v. Hepburn*, (290) **348**

13. Upon general counts a special agreement executed may be given in evidence. *Bank of Columbia v. Patterson*, (299) **351**

14. In a case of warranty and indemnity a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible evidence in a suit against him on his contract of indemnity. *Clark v. Carrington*, (308) **354**

15. Probable cause means less than *prima facie* evidence. *Locke v. United States*, (339) **364**

16. In a prosecution against a vessel for violating a law of the United States it is not necessary to adduce positive testimony of the identity of the vessel. *The schooner Jane*, (363) **372**

17. A paper purporting to be a record certified by the clerk to be "truly taken from the record of proceedings" of his court, with the proper certificate of the chief judge, &c., is admissible evidence. *Ferguson v. Harwood*, (408) **386**

18. But if the paper purport to be a mere transcript of minutes extracted from the docket of the court it is not evidence. *Id.* (*Ib.*) **387**

19. It need not appear by the record of naturalization that all the requisites, prescribed by law for the admission of aliens to the rights of citizenship, have been complied with. *Stark v. Chesapeake Ins. Co.*, (420) **391**

20. *Semb:* That the judgment of the court admitting the alien to become a citizen, is conclusive that all the prerequisites have been complied with, or that parol proof may be received in aid of the record. *Id.* (*Ib.*) **391**

21. See North Carolina, (471) **408**

22. An exemplification of a judgment of another state, properly authenticated, is conclusive evidence of the debt; consequently *nil debet* is not a good plea to an action of debt upon such a judgment. *Mills v. Duryee*, (481) **411**

23. Bills of exchange taken up by the drawer, with damages and costs of protest, are admissible evidence in an action for money paid, laid out and expended by the plaintiff, against the drawee of the bills who are bound to honor them. *Riggs v. Lindsay*, (500) **419**

24. The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country. *Livingston v. Md. Ins. Co.*, (506) **421**

25. The record of a former judgment between the same parties, upon the same cause of action, may be given in evidence upon *non assumpsit*. *Young v. Black*, (565) **440**

26. See Demurrer, 1, 2, 3. *Id.* (*Ib.*) **440**

EVIDENCE—8.

It is a fatal objection to a deposition, taken under the 30th section of the judiciary act of 1789, that it was opened out of court. *Beale v. Thompson and Maris*, (70) **491**

EVIDENCE—9.

1. A material alteration of a bond may be made by consent of all parties, without making the bond void, and such consent may be proved by parol evidence. *Speake v. United States*, (28) **645**

2. A being sole owner of a bill of exchange, indorses it in blank, and delivers it to B to deliver to C for collection, and when collected to place it to the credit of A and B in account; C collects the amount, but refuses to place it to the credit of A and B, who settle their account with C and pay him the balance; A afterwards sues C for the amount received upon the bill; B is a competent witness for A. *Tabor v. Perrott & Lee*, (39) **649**

3. Circumstances may outweigh positive testimony. *Brig Struggle v. United States*, (71) **660**

4. See Equity, 3, 4, 5, (122) **677**

5. See Ejectment, 2, (151) **687**

6. See Equity, 6, 7, 8, 10.

7. *Quære*, whether parol evidence can be given that the surveyor intended to express the courses according to the true, and not according to the magnetic meridian. *M'Iver's lessee v. Walker*, (173) **694**

EXCHANGE—8.

See Insurance, (55) **486**

EXECUTION—7.

1. See Error, 4, (278) **342**

2. See Bond, 2, (288) **347**

EXECUTION—9.

See Marshal, 2, 3, 4, (212) **708**

EXECUTOR—8.

1. See Administration, (9) **471**
2. If a judgment be rendered against one as executor, who is not executor, it does not bind the estate of the testator, and an execution upon such a judgment could not legally be levied upon such estate. *Griffith v. Frazier*, (*Ib.*) **471**
3. By the law of South Carolina administration *durante absentia testatoris* cannot be granted after probate of the will and letters testamentary granted. *Id.* (*Ib.*) **471**
4. See Bankrupt, 1, 2, (85) **496**
5. If an executor do not cause himself to be made party to a suit brought in the life-time, and in the name of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the benefit of the equity of the exceptions to the statute of limitations.
Richards v. Md. Ins. Co., (*Ib.*) **496**

EXECUTORY DEVISE—7.

See Devise, 2, (456) **403**

FACTOR—7.

See Agent, 3, (500) **419**

FAIRFAX, LORD—7.

1. Lord Fairfax, at the time of his death, had the absolute property, seizin, and possession of the waste and unappropriated lands in the Northern Neck of Virginia.
Fairfax v. Hunter, (603) **453**
2. See Alien, 1, (*Ib.*) **453**
3. The commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax.
Id. (*Ib.*) **453**

FEES—7.

1. Each party is liable to the clerk for the fees due to him from each party respectively, and the clerk may have an attachment to compel the payment thereof. *Caldwell v. Jackson*, (276) **341**
2. See Costs, 1, (*Ib.*) **341**

FIRE—7.

See Alexandria, (396) **383**

FISHING VESSEL—7.

A licensed fishing vessel is liable to forfeiture (under the 32d section of the act of the 18th of February, 1793, for enrolling and licensing vessels) for sailing laden with goods, with intent to carry them to another place, without a license therefor, although the goods should be wholly of domestic growth and manufacture, and not liable to any duty. But such cargo is not liable to forfeiture unless it belong to the master, owner, or a mariner of the vessel. *The sloop Active*, (100) **282**

FOREIGN LAW—6.

See Evidence, 11, (274) **222**

FOREIGN SENTENCE—6.

See Evidence, 5, 8, (29, 206) **143, 200**

FOREIGN SENTENCE—7

See Admiralty, 5, 6, 7, 8, (423) **392**

FOREIGN VESSEL—7.

See Admiralty, 13, (349) **367**

FORFEITURE—5.

See Jurisdiction, 14. (304) **108**

FORFEITURE—6.

No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale may have taken place and the money paid over to the United States before the expiration of the law. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property as if no sale had been made.
Schooner Rachel v. United States, (329) **239**

FORFEITURE—7.

1. See Fishing Vessel, (100) **282**
2. See Evidence, 16, (363) **372**
3. See Admiralty, 18, (389) **380**

FORFEITURE—8.

See Admiralty, 23, 24.

FRAUDS—5.

1. See Deeds, 3, 4. (154) **64**
2. Fraud consists in intention; and that intention is a fact which must be averred in a plea of fraud.
Moss v. Riddle, (351) **123**
3. If the owner of a slave permit her to remain in the possession of A for four years; and A then, without the assent of the owner, delivers her to B, who keeps her four years more, the possession of B cannot be so connected with the possession of A as to make it a fraudulent loan, within the act of assembly of Virginia, in regard to B's creditors.
Auld v. Norwood, (361) **126**
4. A magistrate who has received from an insolvent debtor a deed of trust, fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia; and the discharge so obtained is not a discharge in due course of law.
Slacum v. Simms, (363) **126**

FRAUD—7.

1. On a question of fraud the remedy at law is complete. *Russel v. Clark*, (69) **271**
2. See Credit, letter of, 4, (*Ib.*) **271**
3. A promise to pay a sum of money as a compensation to the plaintiff for the injury done him by the misconduct of the defendant in obtaining a patent in his own name for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the sale of land, within the statute of frauds, and must be in writing.
Hughes v. Moore, (176) **307**

FRAUDS, STATUTE OF—5.

The English statute of frauds requires the agreement to pay the debt of another to be in writing; but the statute of frauds in Virginia requires only the promise to be in writing.
Violett v. Patton, (142) **61**

FREEDOM—6.

See Slaves, 1, (3) **135**

FREEDOM—7.

See Evidence, 11, 12, (271, 290) **339, 348**

FREE GOODS—9.

See Admiralty, 28, 29. (388) **769**

FREE SHIPS—9.

See Admiralty, 16, 28, 29.

FREIGHT—7.

The underwriters upon a cargo are not liable for freight *pro rata itineris*, to the owner of the vessel who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss and by them accepted, the loss paid, the cargo condemned, restored upon appeal, and the proceeds of the cargo paid over to the underwriters. Freight *pro rata itineris* is not due unless the owner of the cargo voluntarily agree to receive it at a place short of its ultimate destination.
Caze and Richaud v. Balt. Ins. Co., (358) **370**

FREIGHT—9.

If a neutral vessel be captured on her outward voyage from England to Amelia Island, carrying a hostile cargo, which is condemned, and if by the charter-party the outward cargo is to be carried free of freight, but the homeward cargo is to pay at a certain rate, to be ascertained by the nature of the cargo, yet the court will decree freight, *pro rata itineris* of the outward cargo, to be assessed upon the principles of a *quantum meruit*.
The ship Societe, (209) **707**

FRENCH COURTS—6.

The jurisdiction of the French courts as to seizures is not confined to seizures made within two leagues of the coast.
Hudson v. Guestier, (281) 224

FUNDS, WITHDRAWING OF—8.

1. See Admiralty, 5, (169) 524
2. *Quære*, whether goods purchased before the war by a citizen of the United States for the purpose of withdrawing funds from England to the United States are good prize.
The Mary, (388) 599

FURTHER PROOF—8.

1. See Admiralty, 16, 17, 18, 22.
2. The Mary, (388) 599

FURTHER PROOF—9.

See Admiralty, 16, 22, (244) 719

GENERAL ISSUE—8.

1. In a writ of right, the tenant cannot, in Kentucky, give in evidence upon the general issue any matter of abatement. *Green v. Liter*, (229) 545
2. Under the act of Virginia of 1786 the tenant, in a writ of right, may plead any special matter in bar, or give it in evidence under the general issue.
Id. (*Ib.*) 545

GENERAL RULE—7.

See Counselors, 1, 2, (1, 99) 249, 281

GEORGIA—6.

1. The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits. *Fletcher v. Peck*, (87) 162
2. The king's proclamation in 1763 did not alter the boundaries of Georgia. *Id.* (*Ib.*) 162
3. The nature of the Indian title is not such as to be absolutely repugnant to seizure in fee on the part of the state. *Id.* (*Ib.*) 162

GLEBE.

See Church of England.

GRANT—6.

1. A grant is a contract executed.
Fletcher v. Peck, (87) 162
2. See Boundaries, (237) 210

GRANT—7.

1. See Equity, 8, (354) 369
2. See North Carolina, (471) 408

GRANT—8.

1. See Conveyance, 1, 2, 3, (229) 545
2. See Assignment, (371) 593

GRANT—9.

See Land, 4, 5, 6, 7, 8, 11, 21.
See Church of England, 8, 9, 10, 11.

GUADALOUPE—7.

See Admiralty, 4, (402) 385

GUARANTY—7.

See Credit, letter of, (69) 271

HABEAS CORPUS—6.

The writ of *habeas corpus ad subjiciendum* does not lie to bring up a person confined in the prison bounds upon a *ca. sa.* issued in a civil suit.
Wilson, ex parte, (52) 149

HEARSAY—7.

See Evidence, 12, (290) 348

HIGHWASSEE—9.

See Cherokees, (11) 639

INDEMNITY—7.

See Evidence, 14, (308) 354

INDIANS—7.

See Constitution, (164) 303

INDIAN TITLE—6.

See Georgia, 3, (87) 162

INDICTMENT—7.

See Embargo, 6, (285) 344

INDORSEMENT—7.

See Evidence, 6, (159) 301

INDORSER—7.

1. See Assumpsit, 1, (273) 340
2. See Custom of Merchants, (*Ib.*) 340
3. In a suit against the maker of a promissory note, by an indorser who has been obliged to take it up, the plaintiff must produce the note upon the trial. *Morgan v. Reintzel*, (*Ib.*) 340

INFANCY—6.

1. Infancy is a bar to an action by an owner against his supercargo for breach of instructions, but not to an action of trover for the goods. Still, however, infancy may be given in evidence upon the plea of not guilty in trover; not as a bar, but to show the nature of the act which is supposed to be a conversion. *Vasse v. Smith*, (226) 207
2. An infant is liable in trover, although the goods were delivered to him under a contract, and although they were not actually converted to his own use. *Id.* (*Ib.*) 207

IMPORTATION—9.

See Duties, 2.

INJUNCTION—5.

See Jurisdiction, 12, (288) 103

INJUNCTION—6.

1. No writ of error or appeal lies to an interlocutory decree dissolving an injunction.
Young v. Grundy, (51) 149
2. Upon a question of dissolution of an injunction, the allegations of the bill are to be taken as true unless denied by the answer.
Id. (*Ib.*) 149

INJUNCTION—7.

See Jurisdiction, 8, (279) 342

INJUNCTION—9.

See Equity, 1, (19) 642

INQUISITION—6.

The Circuit Court of the District of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's causey to Alexandria."
Custiss v. Georgetown and Alexandria Co., (233) 209

INSOLVENT—5.

A discharge of an insolvent debtor, under the insolvent law of Virginia, by two magistrates, (one of whom was incompetent by reason of interest,) is void. *Slacum v. Simms*, (363) 126

INSOLVENT—6.

See Assignment, 4, (332) 240

INSOLVENT—7.

1. See Credit, letter of, 7, (69) 271
2. See Columbia, 1, (168) 304

INSOLVENT—8.

1. See Columbia, 1, (36) 479
2. In case of insolvency the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency manifested by some notorious act of the debtor pursuant to law.
Prince v. Bartlett, (431) 614

INSOLVENT—9.

1. See Equity, 6, (153) 688
2. *Semb:* That a discharge under the act of assembly of Rhode Island (of 1757), from all debts, duties, contracts and demands, outstanding at the time of such discharge, upon surrender of all the debtor's property, will not protect him against a debt contracted in a foreign country.
Clark's executors v. Van Reimsdyk, (153) 688
3. See Priority of payment, (374) 764

INSTRUCTION—7.

See Admiralty, 20, (589) 448

INSTRUCTIONS—8.

See Admiralty, 27, 28, (421) 610

INSTRUCTIONS—9.

See Admiralty, 10, (126) 678

INSURANCE—5.

1. See Citizen, 1, 2, (57, 61) 36, 38
2. A general policy, insuring every person having an interest, and containiug no warranty of neutrality, covers belligerent as well as neutral property.
Hodgson v. Marine Ins. Co. Alex., (100) 48
3. It is no defense for the underwriters, that payment of the premium is enjoined by a court of chancery. *Id.* (*Ib.*) 48
4. A misrepresentation, not averred to be material, is no bar to an action on the policy.
Id. (*Ib.*) 48
5. A misrepresentatiou, to have that effect, must be material to the risk of the voyage.
Id. (*Ib.*) 48
6. It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters.
Id. (*Ib.*) 48
7. If the insurance be against all risks, "blockaded ports and Hispaniola excepted," a vessel, sailing ignorantly for a blockaded port, is covered by the policy; the exception is not of the port, but of the risk of capture for breaking the blockade.
Yeaton v. Fry, (335) 117
8. A vessel, sailing ignorantly for a blockaded port, is not liable to capture, under the law of nations. *Id.* (*Ib.*) 118

INSURANCE—6.

1. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of the violation of the warranty.
Maryland Ins. Co. v. Woods, (29) 143
2. *Quære,* whether breach of blockade by a vessel not warranted neutral would discharge the underwriters. *Id.* (*Ib.*) 143
3. If a vessel sail to a port within the policy, with intent to go to a port uot within the policy, in case the former should be blockaded, this is not a deviation. *Id.* (*Ib.*) 143
4. A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders in council of April, 1804. She was not bound to make inquiry elsewhere than of the blockading force.
Id. (*Ib.*) 143
5. The questions whether the voyage be broken up, and whether the captain was justified in returning, are questions of law, and the finding thereupon by a jury is not to be regarded by the court.
King v. Delaware Ins. Co., (71) 155
6. The British orders in council of the 11th of November, 1807, did not prohibit a direct voyage from the United States to a colony of France.
Id. (*Ib.*) 155
7. If from fear, founded on misrepresentation, the voyage be broken up, the underwriters are not liable. *Id.* (*Ib.*) 155
8. The insurance upon buildings in Alexandria did not cease by the separation of Alexandria from Virginia, although the society could only insure houses in Virginia.
Korn v. Mutual Ass. Society, (192) 195
9. The obligation of the insured to contribute does not cease in consequence of his forfeiture of his own insurance by his own neglect.
Id. (*Ib.*) 195
10. All the members of the society are bound by the act of the majority. *Id.* (*Ib.*) 195
11. No member of the society can devest himself of his obligations as such, but according to the rules of the society.
Korn v. Mutual Ass. Society, (192) 195
12. The additional premium upon a revaluation under the rules of the society, is only upon the excess. *Atkinson v. Mutual Ass. Society,* (202) 199
13. In an action of covenant on a policy under seal, all special matter of defense must be pleaded.
Marine Ins. Co. v. Hodgson, (206) 200
14. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy. *Id.* (*Ib.*) 200
15. In order to prove the condemnation of a vessel it is only necessary to produce the libel and sentence. *Id.* (*Ib.*) 200
16. The depositions stated in the proceedings of the Court of Admiralty are not evidence in an action upon the policy. *Id.* (*Ib.*) 200
17. In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy.
Id. (*Ib.*) 200
18. The agent who makes insuranee for his principal has authority to abandon without a formal letter of attorney.
Chesapeake Ins. Co. v. Stark, (268) 220
19. The informality of a deed of cession is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the right of either party. *Id.* (*Ib.*) 220
20. If the abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters. *Id.* (*Ib.*) 220
21. A special verdict is defective which does not find whether the abandonment was in reasonable time. *Id.* (*Ib.*) 220
22. What is reasonable time of abandonment, is a question compounded of fact and law, which must be found by a jury, under the direction of the court. *Id.* (*Ib.*) 220
Maryland Ins. Co. v. Ruden, (338) 242
23. If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality, if the other joint owner, whose interest is not insured, be a belligerent.
Livingston v. Maryland Ins. Co., (274) 222
24. The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral. *Id.* (*Ib.*) 222
25. The effect of a misrepresentation or concealment upon a policy, depends upon its materiality to the risk, which must be decided by a jury, under the direction of a court. *Id.* (*Ib.*) 222
Maryland Ins. Co. v. Ruden, (338) 242
26. The right to abandon may be kept in suspense by mutual consent.
Livingston v. Maryland Ins. Co., (274) 222
27. If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board will vacate the policy. *Id.* (*Ib.*) 222

INSURANCE—7.

1. The discharge of underwriters from their liability, in case of taking on board an additional cargo not authorized by the policy, depends, not on any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such a violation of the contract are immaterial to its legal effect, as it is, *per se,* a discharge of the underwriters; and the law attaches no importance to the degree, in cases of voluntary deviation. Necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the *vis major* producing it. *Md. Ins. Co. v. Le Roy,* (26) 257
2. A policy of insurance on a vessel "at and from" an island, protects her in sailing from port to port of the island to take in a cargo.
Dickey v. Balt. Ins. Co., (327) 360
3. See Equity, 7, (332) 362
4. See Freight, (358) 370
5. See Alexandria, (396) 383
6. There cannot be a total loss of a cargo consisting of memorandum articles of only one species, such as hides. Nor are the underwriters liable for salvage upon such articles, under the clause which authorizes the insured to labor and travel for the

preservation of the cargo, unless, perhaps, in a case where the salvage may have prevented an actual total loss of the cargo.
Biays v. Chesapeake Ins. Co., (415) 389
7. The length of time a vessel may wait to take in her cargo, without discharging the underwriters, does not depend on the usage of the trade.
Oliver v. Md. Ins. Co., (487) 414
8. The danger which will justify a vessel in remaining in port a long time, without discharging the underwriters, must be obvious, immediate, directly applied to the interruption of the voyage, and imminent; not distant, contingent and indefinite. *Id.* (*Ib.*) 414
9. If, according to the usage of the trade, a vessel be permitted to go from one port to another to collect her cargo, and she unnecessarily exhaust, at one port, the whole time allowed by the usage of the trade to complete her cargo, she cannot go to the other port without being guilty of such a deviation as will avoid the policy. *Id* (*Ib.*) 414
10. What is a reasonable apprehension of danger, is a question of law to be decided by the court. (*Quære?*) *Id.* (*Ib.*) 414
11. To constitute a representation (in making insurance) there should be an affirmation or denial of some fact; or an allegation which would plainly lead the mind to the same conclusion.
Livingston v. Md. Ins. Co., (506) 421
12. If, by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the plaintiff's right to recover upon the policy.
Id. (*Ib.*) 421
13. In general, concealment of papers amounts to a breach of warranty. *Id.* (*Ib.*) 421
14. See Domicile, 1, 2, (*Ib.*) 421
15. If the letter, submitted to the underwriters, ordering the insurance, refer to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel will take all the papers necessary to make the voyage legal. *Id.* (*Ib.*) 421
16. The usage of trade may be proved by parol, although such usage originated in a law, or edict of the government of the country. *Id.* (*Ib.*) 421
17. The question whether abandonment were made in due time, is not a question of fact to be exclusively left to the jury, but to be decided by them under the direction of the court.
Id. (*Ib.*) 421
18. No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy.
Id. (*Ib.*) 421
19. If the plaintiffs do any act which increases the risk of capture and detention, according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk, thus increased, should be the risk of rightful capture according to the law of nations. *Id.* (*Ib.*) 421

INSURANCE—8.

1. Where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment, for a mere deterioration in value during the voyage, can be valid, unless the damage on the non-memorandum articles exceed a moiety of the whole cargo including the memorandum articles.
Marcardier v. Ches. Ins. Co., (39) 481
2. Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In such case the general owner is also owner for the voyage; and if he be the master of the vessel he is incapable of committing barratry. *Id.* (*Ib.*) 481
3. When a cargo is insured by divers policies, in some of which the rate of exchange is fixed at which the prime cost of the cargo shall be valued; in ascertaining the amount of the interest of the insured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate of exchange without regard to the rate of exchange by which the value may have been ascertained in the other policies.
Pleasants v. Md. Ins. Co., (56) 486
4. If a policy insures against "unlawful arrests, restraints and detainments of all kings, princes," &c., the qualification "unlawful" extends, in its operation, as well to "restraints and detainments" as to "arrests;" and, in such case, a detainment by a force lawfully blockading a port, is not a peril insured against by a policy containing a warranty of neutrality. *M'Call v. Marine Ins. Co.*, (59) 487
5. A policy on goods to be safely landed at Leghorn is discharged by landing them at the lazaretto; that being the usage of the trade.
Gracie v. Marine Ins. Co., (75) 492
6. *Quære*, whether ransom can be recovered where there is a warranty against particular average. *Id.* (*Ib.*) 492

INTEREST—5.

See Admiralty, 5. (313) 111

INTESTATE—7.

See Descent, (456) 403

ISSUE—9.

See Error, 3, (339) 752

JERSEY, NEW—5.

See New Jersey. (173) 70

JOINDER IN ACTION—8.

1. See Abatement, 2, 3, 4, 5, 6, (229) 545
2. See Joint Merchants, 2, (30) 478
3. See Joint owners, 1, (50) 484

JOINT DEBT—5.

See Bankrupt, 1, 2, 4. (34, 289) 29, 104

JOINT MERCHANTS—8.

1. A promissory note given by one member of a commercial company to another member, for the use of the company, will maintain an action at law by the promisee in his own name against the maker.
Van Ness v. Forrest, (30) 478
2. If the declaration be upon a joint note, and the defendant plead that it is the separate note of one of the defendants, and was given to and accepted by the plaintiff in full satisfaction of the debt, the plea is bad on special demurrer, because it amounts to the general issue. *Id.* (*Ib.*) 478
3. See Admiralty, 12, 13, (253) 553

JOINT OWNER—7.

1. See Assignment, 1, (308) 354
2. If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards become interested in the share of one of the joint owners, he cannot, in an action brought against him by the three joint owners to recover the amount of the sales, set-off his share of that amount. *Young v. Black*, (565) 440

JOINT OWNERS—8.

1. If two joint owners of merchandize consign it to a merchant for sale, and inform him that each owns one moiety; and if they give separate and variant instructions, each for his own moiety, one of the consignors alone may maintain a separate action against the consignee for a violation of his separate instructions. *Hall v. Leigh*, (50) 484
2. See Admiralty, 12, 13, (253) 553

JOINT PARTNERS—6.

1. A several suit and judgment against one of two joint makers of a promissory note is no bar to a joint action against both upon the same note.
Sheehy v. Mandeville, (253) 215
2. The whole of a joint note is not merged in a judgment against one of the makers on his individual *assumpsit*; but the other may be charged in a subsequent joint action if he plead severally.
Id. (*Ib.*) 216

JOINT TENANTS—7.

See Limitations, 1. (156) 300

JOURNEY'S ACCOUNTS—8.

At common law, no action could be renewed by journey's accounts in case of voluntary abandonment. *Richards v. Md. Ins. Co.*, (84) **496**

JUDGE—5.

A discharge of an insolvent debtor, under the laws of Virginia, by two magistrates, one of whom was incompetent by reason of interest, is void.
Slacum v. Simms, (363) **126**

JUDGMENT—6.

1. In Virginia if the defendant die after an interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded.
M'Knight v. Craig's Adm'r., (183) **193**
2. See Joint Partners, 1, 2, (254) **215**

JUDGMENT—7.

1. If the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond" follows of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given, so as to show the connection between the two judgments.
Barton v. Petit and Bayard, (288) **347**
2. A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants unless the points reserved and the opinion of the court thereon are stated on the record. *Smith v. Del. Ins. Co.*, (434) **396**
3. *Nil debet* is not a good plea to an action on a judgment of another state.
Mills v. Duryee, (481) **114**
4. A judgment between the same parties, on the same cause of action, may be given in evidence upon *non assumpsit*.
Young v. Black, (565) **440**

JUDGMENT—8.

See Executor, 2, (9) **471**

JURISDICTION—5.

1. A writ of error does not lie from the Supreme Court of the United States to the District Court of the United States for the District of Maine.
United States v. Weeks, (1) **19**
2. In an action of trover, if the judgment below be in favor of the defendant, the value of the matter in dispute upon the writ of error in the Supreme Court of the United States is the sum claimed as damages in the declaration.
Cooke v. Woodrow, (13) **22**
3. A corporation aggregate cannot litigate in the courts of the United States, unless in consequence of the character of the individuals who compose the body politic; which character must appear by proper averments upon the record.
Hope Ins. Co. v. Boardman, (57) **36**
4. A corporation aggregate composed of citizens of one state may sue a citizen of another state in the Circuit Court of the United States.
Bank of the United States v. Deveaux, (61) **38**
5. The legislature of a state cannot annul the judgments, nor determine the jurisdiction, of the courts of the United States.
United States v. Judge Peters, (115) **53**
6. The continental Court of Appeals, in prize causes, had power to revise and correct the sentences of the state courts of admiralty.
Id. (*Ib.*) **53**
7. Although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction. *Id.* (*Ib.*) **53**
8. The Inferior Court of Common Pleas for the county of Hunterdon, in the state of New Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason, and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause.
Kempe's Lessee v. Kennedy, (173) **70**
9. The courts of the United States are all of limited jurisdiction; and their proceedings are erroneous if the jurisdiction be not shown upon them.
Id. (*Ib.*) **70**
10. In Kentucky it is a good ground of equitable jurisdiction, that the defendant has obtained a prior patent for land to which the complainant had the better right, under the statute respecting lands; and in exercising that jurisdiction the court will decide in conformity with the settled principles of a court of chancery.
Bodley v. Taylor, (191) **75**
11. Time will be given to procure affidavits as to the value of the matter in dispute, so as to ascertain the jurisdiction.
Rush v. Parker, (287) **103**
12. The Circuit Court has jurisdiction in a suit in equity to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant out of the district in which the court sits.
Logan v. Patrick, (288) **103**
13. Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the states; otherwise the courts of the United States have not jurisdiction of the case.
Hodgson v. Bowerbank, (303) **108**
14. The trial of seizures under the act of the 18th of February, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," is to be in the judicial district in which the seizure was made; without regard to the district where the forfeiture accrued. *Keene v. United States*, (304) **108**
15. See British Treaty, (344) **120**
16. An appeal from the District Court of the United States for the District of Maine, in a case of admiralty jurisdiction, does not lie directly to the Supreme Court of the United States, but to the Circuit Court for the District of Massachusetts.
Sloop Sally v. United States, (372) **129**
17. In all cases in which the District Court of Maine acts as a district court, the appeal is to the Circuit Court for the District of Massachusetts.
Id. (*Ib.*) **129**

JURISDICTION—6.

1. A suit in chancery, by one who has the prior equity against him who has the eldest patent, is in its nature local; and if it be a mere question of title, must be tried in the district where the land lies. *Massie v. Watts*, (148) **181**
2. But if it be a case of contract, or trust, or fraud, it is to be tried in the district where the defendant may be found. *Id.* (*Ib.*) **181**
3. An appeal lies to the Supreme Court from an order of the Circuit Court of the District of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*.
Custiss v. Alexandria and Georgetown Co., (233) **209**
4. The Circuit Court of the District of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's causey to Alexandria." *Id.* (*Ib.*) **209**
5. The jurisdiction of the court below cannot be questioned after the cause is sent back by mandate. *Skillern v. May*, (267) **220**
6. The jurisdiction of the French courts, as to seizures, is not confined to seizures made within two leagues of the cost.
Hudson v. Guestier, (281) **224**
7. A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations. *Id.* (*Ib.*) **224**
8. A writ of error lies to the highest court of a state in a case where the question is whether the confiscation of British property was complete before the British treaty.
Smith v. Maryland, (286) **225**
9. The appellate powers of the Supreme Court of the United States are given by the constitution; but they are limited and regulated by the judicial act, and other acts passed by Congress on the subject. *Durousseau v. The United States*, (307) **232**
10. This court has appellate jurisdiction of decisions in the district courts of Kentucky, Ohio, Tennessee and Orleans, even in causes properly cognizable by the district courts of the United States.
Id. (*Ib.*) **232**
11. A general assignee of the effects of an insolvent cannot sue in the federal courts if his assignor could not have sued in those courts.
Sere v. Pitot, (332) **240**
12. The citizens of the territory of Orleans may sue and be sued in the District Court of that territory, in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.
Id. (*Ib.*) **240**

JURISDICTION—7.

1. The courts of the United States have no common law jurisdiction in cases of libel against the government of the United States. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders, &c. *United States v. Hudson & Goodwin*, (32) **259**

2. See Discovery, 1, (69) **271**

3. See Dower, 1, (370) **374**

4. The Supreme Court of the United States has not jurisdiction by writ of error, in a civil cause which has been carried up from the District Court to the Circuit Court by writ of error.
United States v. Goodwin, (108) **284**
United States v. Gordon, (287) **347**

5. See Admiralty, 2, (112) **286**

6. A public vessel of war of a foreign sovereign at peace with the United States coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.
Schooner Exchange v. M'Faddon, (116) **287**

7. Upon a writ of error to the Circuit Court for the District of Columbia, this court has no jurisdiction, if the sum awarded be less than 100 dollars, although a greater sum may have been originally claimed. *Wise v. Col. Turnpike Co.*, (276) **341**

8. A state court has no jurisdiction to enjoin a judgment of the Circuit Court of the United States.
M'Kim v. Voorhies, (279) **342**

9. A French tribunal at Guadaloupe had jurisdiction of property seized on the high seas for breach of the Milan decree, and carried into the Dutch part of the island of St. Martins, and there sold by order of the Dutch governor of St. Martins, before condemnation, without any authority from the French tribunal at Guadaloupe.
Williams v. Armroyd, (423) **392**

10. See Mandamus, (504) **420**

11. The Circuit Court of Tennessee, as a court of equity, cannot award a writ of *habere facias possessionem*. *Wallen v. Williams*, (602) **452**

JURISDICTION—8.

1. The acts of a tribunal upon a subject not within its jurisdiction are void.
Griffith v. Frazier, (9) **471**

2. The circuit courts of the United States have jurisdiction in writs of right where the property demanded exceeds 500 dollars in value; and if upon the trial the demandant recover less, he is not to be allowed his costs; but, at the discretion of the court, may be adjudged to pay costs.
Green v. Liter, (229) **545**

3. See Appeal, 1, (251) **553**

JURISDICTION—9.

1. See Equity, 1, (19) **642**

2. See Admiralty, 4, 18, 24, 25.

3. This court has jurisdiction where one party claims land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although, at the time of the first grant, Vermont was part of New Hampshire.
Town of Pawlet v. Clark, (292) **735**

JUROR—7.

1. After a juror is sworn no exception can be taken to him on account of his being an inhabitant of another county.
Mima Queen v. Hepburn, (290) **348**

2. If a juror be challenged for favor, and, upon examination before the triers, he declare that if the evidence should be equal he would give a verdict in favor of that party upon whom the burden of proof lies, the court, in the exercise of a sound discretion, ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn.
Id. (*Ib.*) **348**

JURORS—9.

1. See Error, 1, (180) **697**

JURY—6.

1. See Insurance, 5, 21, 22, 25, 71,
2. See Chancery, 2, (148) **181**

JURY—7.

See Admiralty, 3, (112) **286**

JUSTIFICATION—9.

See Error, 3, (339) **752**

KENTUCKY—5.

1. See Jurisdiction, 10. (191) **75**

2. Entries of land in Kentucky must have that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum.
Bedley v. Taylor, (*Ib.*) **75**

3. Distance upon a road to be computed by the meanders, and not by a straight line.
Id. (*Ib.*) **75**

4. If the entry be of a settlement and pre-emption right on the east side of a road, the 400 acres allowed for the settlement right must be surveyed entirely on the east side of the road, and in the form of a square. *Id.* (*Ib.*) **75**

5. The call for the settlement right is sufficiently certain, but the call for the pre-emption right is too vague, and must be rejected. *Id.* (*Ib.*) **75**

6. A defendant in equity who has obtained a patent for land not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants; but the complainants will not be required to convey to the defendant the land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey. *Id.* (*Ib.*) **75**

KENTUCKY—6.

1. See Chancery, 2, (148) **181**

2. If, by any reasonable construction of an entry of a warrant to survey land, it can be supported, the court will support it. *Id.* (*Ib.*) **181**

3. When a given quantity of land is to be laid off on a given base, it shall be included within four lines forming a square, as nearly as may be, unless that form be repugnant to the entry.
Id. (*Ib.*) **181**

4. If the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of certain principles, they will complete it.
Id. (*Ib.*) **181**

5. If a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry, may be discarded.
Id. (*Ib.*) **181**

6. The rectangular figure is to be preserved if possible. *Id.* (*Ib.*) **181**

KENTUCKY—8.

See Writ of right, (229) **545**

KENTUCKY—9.

1. See Devise, (151) **687**
2. See Ejectment, 2, (151) **687**
3. See Equity, 9, (164) **691**
4. See Land, 9, 10, 11, 12, 13, 14.

LANDING OF GOODS—8.

See Admiralty, 3, (110) **504**

LAND—7.

1. The title to land can be acquired and lost only in the manner described by the law of the place where such land is situated.
United States v. Crosby, (115) **287**

2. See Arbitration, 2, (171) **305**

3. See Fraud, 3, (176) **307**

4. See Descent, (456) **403**

5. See Devise, 2, (456) **403**

6. See North Carolina, (471) **408**

7. See Alien, 1, Fairfax, (603) **453**

LAND—9.

1. The land law of Virginia, which gives a right of pre-emption to those who had marked and improved land before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act; and not to the time when the claim for such pre-emption was made before the commissioners.
Simms v. Guthrie, (19) **642**

2. If an entry be made by the assignee of a pre-emption right, it will be good although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and if it mention an improvement, provided the place be described with sufficient certainty in other respects.
Id. (*Ib.*) **642**

3. The act of North Carolina, 1789, c. 2, opening the land-office, did not prohibit a person from making several different entries, amounting in the whole to more than 5,000 acres, nor from purchasing the rights acquired by others by entries; nor from uniting several entries in one survey and patent; and such union of several entries is allowed by the act of 1784, ch. 19.
Polk's lessee v. Wendell, (87) **665**
4. In a patent, the obliteration of the consideration does not make void the grant.
Id. (*Ib.*) **665**
5. A patent justifies a presumption that all the previous requisites of the law have been complied with. *Id.* (*Ib.*) **665**
6. A patent is void at law if the state had no title, or if the officer, who issued the patent, had no authority so to do. *Id.* (*Ib.*) **665**
7. In North Carolina the want of an entry nullifies a patent. *Id.* (*Ib.*) **665**
8. After the cession of land by North Carolina to the United States, the former had no right to grant those lands to any other grantee, who had not an incipient title before the session. The question, whether such incipient title existed, is therefore open at law. *Id.* (*Ib.*) **665**
9. It is not necessary that an execution of a will in Virginia, devising to the executor land in Kentucky, should take out letters testamentary in Kentucky, to enable him to maintain an ejectment for the land in Kentucky.
Doe, lessee of Lewis, v. M'Farland, (151) **687**
10. If a plaintiff in ejectment claim in his declaration, the whole tract, a deed showing that he has only an undivided interest in the tract may be given in evidence. *Id.* (*Ib.*) **687**
11. In Kentucky the courts of law will not look beyond the patent, but courts of equity will; and will give validity to the elder entry against an elder patent. *Finley v. Williams*, (164) **691**
12. Between pre-emption rights, the prior improvement will hold the land against a prior certificate, entry, survey and patent.
Id. (*Ib.*) **691**
13. It is not essential to the dignity of an entry upon a pre-emption warrant, that the entry should, in terms, call for the improvement, although it must in fact include the improvement.
Id. (*Ib.*) **691**
14. An entry calling for "the big blue lick," will not support a survey and patent for land at the upper blue lick; the lower blue lick being generally called "the big blue lick;" although there may be other calls in the entry which seem to designate the upper blue lick as the place intended.
Id. (*Ib.*) **691**
15. If there be nothing in the patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent according to the magnetic meridian.
M'Iver's lessee v. Walker, (173) **694**
16. Course and distance must yield to a call for natural objects,
Id. (*Ib.*) **694**
17. All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey.
Id. (*Ib.*) **694**
18. If a patent refer to a plat annexed, and if in that plat a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform, as near as may be, to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey nor the patent calls for that water-course.
Id. (*Ib.*) **694**
19. *Quære*, whether parol evidence can be given that the surveyor intended to express the courses according to the true, and not according to the magnetic, meridian.
Id. (*Ib.*) **694**
20. This court has jurisdiction where one party claims land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although, at the time of the first grant, Vermont was part of New Hampshire.
Town of Pawlet v. Clark, (292) **735**
21. A grant of a tract of land in equal shares to 63 persons, to be divided among them in 68 equal shares with a specific appropriation of 5 shares, conveys only a sixty-eighth part to each person. If one of the shares be declared to be "for a glebe for the Church of England as by law established," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares.
Id. (292) **735**
22. A legislative grant cannot be repealed.
Id. (*Ib.*) **736**
Terrett v. Taylor, (43) **650**
23. See Church of England,
24. See Washington City, 1, (456) **791**
25. Where a contract for the sale of land has been in part executed by a conveyance of part of the land, and the vendor is unable to convey the residue, a court of equity will decree the repayment of a proportionate part of the purchase money with interest. *Pratt v. Law & Campbell*, (456) **792**
26. See Equity, 13, (*Ib.*) **792**
27. An equity of redemption of real estate in Maryland was liable to attachment, before the act of 1810, ch. 60.
Id. (*Ib.*) **792**

LANDS—5.

1. See Deeds, 1, 2, 3, 4. (22, 154) **25, 64**
2. Lands included in the Zaneville district in the state of Ohio, by the act of the 3d of March, 1803, could not, after that date, be sold at the Marietta land-office. *Matthews v. Zane*, (92) **46**
3. See Kentucky, 2, 3, 4, 5, 6. (191) **75**
4. See Evidence, 3. (262) **96**
5. See Equity, 4, 5, 6, 7, 8, 9, 10. (*Ib.*) **96**
6. The certificate of survey is sufficient evidence that the warrant was in the hands of the surveyor.
Taylor v. Brown, (234) **88**
7. That clause of the land law of Virginia which requires the survey to be recorded within two months after it was made, is merely directory to the surveyor; and his neglect to record it does not invalidate the survey. *Id.* (*Ib.*) **88**
8. It is not necessary that the deputy-surveyor who made the survey, should make out the plat and certify it. It may be done from his notes by the principal surveyor. *Id.* (*Ib.*) **88**
9. A survey is not void because it includes more land than was directed to be surveyed by the warrant. *Id.* (*Ib.*) **88**
10. The locator of a warrant, under the law of Virginia, undertakes, himself, to find waste and unappropriated land, and his patent issues upon his own information to the government, and at his own risk. He cannot be considered as a purchaser without notice. *Id.* (*Ib.*) **88**
11. The equity of the prior locator extends to the surplus land surveyed, as well as to the quantity mentioned in the warrant. *Id.* (*Ib.*) **88**

LANDS—6.

1. See Georgia, 1, 2, 3, (86) **161**
2. See Kentucky, (148) **181**
3. See Boundaries (237) **210**

LANDS—8.

1. Under the statute of Virginia respecting wills, it is necessary (in order that lands acquired after the date of the will may pass by the will) that the intention of the testator should clearly appear upon the face of the will.
Smith v. Edrington, (66) **490**
2. See Columbia, 2, 3, (98) **500**
3. See Writ of right, (229) **545**
4. See Assignment, (371) **593**

LAW—6.

1. See Insurance, 5, 21, 22 25.
2. The court will not declare a law to be unconstitutional unless the opposition between the constitution and the law be clear and plain.
Fletcher v. Peck, (87) **162**
3. In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.
Id. (*Ib.*) **162**

4. When a law is, in its nature, a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.
Fletcher v. Peck, (87) **162**
5. A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States. *Id.* (*Ib.*) **162**
6. A vessel having violated a law of the United States cannot be seized for such violation after the law has expired unless some special provision be made therefor by statute.
United States v. Ship Helen, (203) **199**
7. If foreign laws be not proved to be in writing, as public edicts, they may be proved by parol.
Livingston v. Maryland Ins. Co., (274) **222**
8. No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale may have taken place, and the money paid over to the United States before the expiration of the law.
Schooner Rachel v. United States, (329) **239**

LAW OF NATIONS—5.

A vessel, sailing ignorantly for a blockaded port, is not liable to capture under the law of nations.
Yeaton v. Fry, (335) **117**

LAW OF NATIONS—6.

A seizure beyond the territorial jurisdiction, for breach of municipal regulation, is warranted by the law of nations.
Hudson v. Guestier, (281) **224**

LAW OF NATIONS—9.

In deciding a question of the law of nations, this court will respect the decisions of foreign courts.
30 *hhds. Sugar v. Boyle*, (191) **701**

LAZARETTO—8.

See Insurance, 5, (75) **492**

LEGHORN—8.

See Insurance, 5, (75) **492**

LEGISLATURE—6.

1. See Law, 2, 3, 4, 5, (87) **162**
2. See Georgia, 1, (87) **162**
3. A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state. *Fletcher v. Peck*, (87) **162**

LEGISLATIVE GRANT—9.

See Land, 22, 43, (295) **737**

LETTER OF CREDIT—7.

See Credit, letter of, (69) **271**

LIBEL—7.

1. In a count in a libel upon the 50th section of the collection law of March 2d, 1799, for unlading goods without a permit, it is not necessary to state the time and place of importation, nor the vessel in which it was made, but it is sufficient to allege that they were unknown to the attorney of the United States. *Locke v. United States*, (339) **364**
2. In a libel it is not necessary to negative any fact which constitutes the defense of the claimant.
Brig Aurora, (383) **378**
3 An information in the admiralty for a forfeiture must contain a substantial statement of the offense. A general reference to the provisions of the statute is not sufficient. If the information be defective in that respect, the defect is not cured by evidence of the facts omitted to be averred in the information. The decree must be *secundum allegata*, as well as *secundum probata*.
Schooner Hoppet v. United States, (389) **380**
4. A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offense. *Brig Caroline*, (496) **417**
5. An informal libel, or information *in rem*, may be amended by leave of the court. *Id.* (*Ib.*) **417**
Schooner Anne, (570) **442**
6. See Common law, (32) **259**

LICENSE—7.

See Fishing vessel, (100) **282**

LICENSE OF THE ENEMY—8.

See Admiralty, 5, 7, 8, 9.

LIEN—8.

See Admiralty, 16, 25, (335, 418) **581, 609**

LIEN—9.

See Equity, 13, (456) **791**

LIMITATIONS—5.

1. See Account, 1, 2, 3, 4, (15) **23**
2. Five years' adverse possession of a slave, in Virginia, gives a good title upon which trespass may be maintained. *Brent v. Chapman*, (358) **125**

LIMITATIONS—7.

1. In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary to show that all the plaintiffs were under a disability to sue. *Marsteller v. M'Clean*, (156) **300**
2. A recital in a deed is good evidence to take a case out of the statute of limitations.
King v. Riddle, (168) **304**
3. The defendant to an attachment in chancery, in Virginia may plead the statute of limitations without answer. *Wilson v. Koontz*, (202) **315**
4. A defendant who removes from one county to another in Virginia is not thereby prevented from pleading the statute of limitations, unless the plaintiff has been, by such removal, actually defeated, or obstructed in bringing or maintaining his action. *Id.* (*Ib.*) **315**
5. The exception in the Maryland statute of limitations in favor of "such accounts as concerns the "trade or merchandise between merchant and "merchant, their factors and servants which are "not residents within this province," applies to dealings between a merchant creditor residing out of Maryland and a debtor residing in Maryland. And in order to take the case out of the exception, it is not sufficient to aver that the creditor returned to, came, and was within the state of Maryland after the cause of action accrued, and more than 3 years before bringing the suit.
Bond v. Jay, (350) **367**

LIMITATIONS—8.

1. An acknowledgment of the original justice of the claim is not sufficient to take the case out of the statute of limitations; the acknowledgment must go to the fact that it is still due.
Clementson v. Williams, (72) **491**
2. The statute of limitations is entitled to the same respect as other statutes, and ought not to be explained away. *Id.* (*Ib.*) **491**
3. *Quære*, whether the acknowledgment by one partner, after the dissolution of the partnership, is sufficient to take a case out of the statute of limitations? *Id.* (*Ib.*) **491**
4. If an executor do not cause himself to be made party to a suit brought by his testator in his lifetime and pending at his death, he cannot maintain a new suit under the equity of the exceptions in the statute of limitations.
Richards v. Md. Ins. Co., (85) **496**
5. See journey's accounts, (85) **496**
6. See Columbia, 2, (98) **500**
7. In Virginia a possession of thirty years, under some circumstances, and of fifty years, under any, constitutes a title against all the world.
Alexander v. Pendleton, (462) **624**
8. An adversary possession of 50 years, although with knowledge of a better title, is a good defense against that title. *Id.* (*Ib.*) **624**
9. A purchaser without notice has a right to join his adversary possession to the ostensible adversary possession of his vendor, so as to give himself the benefit of the statute of limitations.
Id. (*Ib.*) **624**

LOCATION—6.

1. See Kentucky, (148) **297**
2. See Boundaries, (237) **210**

MAGISTRATE—5.

See Judge, (363) **126**

MAGNETIC MERIDIAN—9.

See Land, 18, 19, (173) **694**

MAINE—5.

See Jurisdiction, 1, 16, 17, (1, 373) 19, 129

MANDAMUS—5.

A mandamus will go to a district judge to cause his sentence to be executed, although a state legislature should declare that sentence void.
United States v. Judge Peters, (115) 53

MANDAMUS—7.

1. The power of the circuit courts of the United States to issue the writ of *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.
M'Intire v. Wood, (504) 420
2. If the court below order the proceedings to be finally staid upon suggestion of the attorney for the United States in a case to which the United States are not a party, this court will order a *mandamus nisi*, in the nature of a *procedendo*.
Livingston v. Dorgenois, (577) 444

MANDATE—6.

See Costs, 1. Jurisdiction, 5, (187) 194

MARRIAGE SETTLEMENT—5.

See Deeds, 3, 4, (154) 64

MARSHAL—6.

See Attachment, (187) 194

MARSHAL—9.

1. If a debtor, committed to a state jail under process from the courts of the United States, escape, the marshal is not liable.
Randolph v. Donaldson, (76) 662
2. If a marshal, before the date of his official bond, receive, upon an execution, money due to the United States with orders from the comptroller to pay it into the bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor upon the bond, although the money remain in the marshal's hands after the execution of the bond.
United States v. Giles and others, (212) 708
3. The comptroller of the treasury has a right to direct the marshal to whom he shall pay money received upon execution; and a payment, according to such directions, is good; and it seems he may avail himself of it upon the trial without having submitted it as a claim to the accounting officers of the treasury. *Id.* (*Ib.*) 708
4. *Quære*, whether the sureties in a marshal's bond, conditioned for the faithful executiou of his duty "during his continuance in the said office," are liable for money received by him, after his removal from office, upon an execution which remained in his hands at the time of such removal?
Id. (*Ib.*) 708

MARTINIQUE—7.

See Admiralty, 4, (402) 385

MARYLAND—6.

1. See Slaves, 1, (3) 135
2. See Sale, (53) 150
3. See Jurisdiction, 8, (286) 226
4. See Confiscation, 2, (286) 226

MARYLAND—7.

1. See Evidence, 12, (290) 348
2. See Limitations, 5, (350) 367
3. See Descents, (456) 403

MARYLAND—8.

See Columbia, 2, 3, (98) 500

MASTER—7.

See Postmaster, (242) 329

MEMORANDUM—7.

See Insurance, 6, (415) 389

MEMORANDUM ARTICLES—8.

See Insurance, 1, (39) 481

MERCHANT—7.

1. See Account, 1, (147) 297
2. See Custom of Merchants, (273) 340
3. See Limitations, 5, (350) 367

MILAN DECREE—7.

See Admiralty, 5, 7, (424) 392

MISREPRESENTATION—5.

See Insurance, 4, 5, (100) 48

MISREPRESENTATION—6.

See Concealment, 1, 2, (274, 338) 222, 242

MISTAKE—7.

See Agent, 2, (366) 373

MITTIMUS—7.

In the District of Connecticut, the marshal may, upon an attachment for debt, without a *mittimus*, commit the defendant to prison for want of bail.
Palmer v. Allen, (551) 436

MONEY HAD AND RECEIVED—8.

See Columbia, 2, (98) 500

MORTGAGE—7.

1. See Equity, 2, (34) 260
2. See Equity, 6, (219) 321

MORTGAGE—8.

See Columbia, 1, (36) 479

MORTGAGE—9.

1. See Equity, 13, (458) 792
2. An equity of redemption of land in Maryland was liable to attachment before the act of assembly of Maryland of 1810, ch. 60.
Pratt v. Law & Campbell, (459) 793

MUNICIPAL LAW—6.

See Law of Nations, (281) 224

MUNITIONS OF WAR—9.

See Enemy, 3, (243) 719

NATIONAL CHARACTER—7.

See Domicile, (507) 421

NATURALIZATION—6.

See Alien, 1, 2, 3, 4, (176) 190

NATURALIZATION—7.

See Evidence, 19, 20, (420) 391

NATURALIZATION—8.

See Admiralty, 15, (335) 581

NEUTRALS—9.

1. Circumstances may outweigh documentary evidences of neutrality.
Cargo of ship Hazard, (205) 706
2. See Admiralty, 28, 29, 30, 31, (389) 769

NEUTRALITY—6.

See Insurance, 1, 23, 24, (29, 274) 222

NEW HAMPSHIRE—9.

1. See Jurisdiction, 3, (292) 735
2. See Church of England, 8, 9, 10, 11, 12, 13, 14, (292) 735

NEW JERSEY—5.

See Jurisdiction, 8, (173) 70

NEW JERSEY—7.

See Constitution, (164) 303

NEW ORLEANS—6.

1. See Slaves, 2, (330) 239
2. See Jurisdiction, 10, 12, (308, 332) 232, 240

NEW TRIAL—5.

See Error, 2, 6, 7. (11, 187, 280) 22, 74, 101

NEW TRIAL—6.

1. The refusal of the court below to grant a new trial is not a ground of error.
Marine Ins. Co. v. Hodgson, (206) 200
2. When the reversal is in favor of the defendant upon a bill of exceptions a new trial must be awarded by the court below.
Hudson v. Guestier, (281) 224

NIL DEBET—7.

See Debt, (481) 411

NOMINAL PLAINTIFF—7.

See Assignment, 2, (152) 299

NON-IMPORTATION—8.

See Admiralty, 10, (221) 542

NON-INTERCOURSE—7.

1. See Admiralty, 14, (356) 369
2. See *Id.* 16, 18, (383, 389, 570) 378, 380, 442

NON-INTERCOURSE ACT—8.

1. *Quære*, whether the non-intercourse act, as it regards Great Britain, was not merged in the law of war. *The Rapid*, (164) 523
2. The forfeiture of goods for the violation of the non-intercourse act of March 1st, 1809, takes place upon the commission of the offence and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid. *The United States v. 1960 Bags of Coffee*, (398) 602
3. Same point as to the act of 28th June, 1809, ch. 9, § 3. *The brig Mars*, (417) 609

NON-INTERCOURSE—9.

1. The non-intercourse act of 28th of June, 1809, vol. 10, p. 13, which requires a vessel bound to a permitted port to give bond in double the amount of vessel and cargo not to go to a prohibited port, is applicable to a vessel sailing in ballast.
Ship Richmond v. United States, (102) 670
2. Under the non-intercourse act of 1809 a vessel from Great Britain had a right to lay off the coast of the United States to receive instructions from her owners in New York, and, if necessary, to drop anchor, and in case of a storm to make a harbor; and if prevented by a mutiny of her crew from putting out to sea again, might wait in the waters of the United States for orders.
United States v. Cargo of ship Fanny, (181) 698

NONSUIT—5.

See Error, 7, (180) 72

NON-TENURE—8.

See Abatement, 2, 3, 4, 5, 6, (229) 545

NORTHERN NECK—7.

See Fairfax, (603) 453

NORTH CAROLINA—7.

1. By the laws of North Carolina and Tennessee, a deed for land in Tennessee, executed in North Carolina, by grantors residing there, in the year 1794, proved in 1797, by one of the subscribing witnesses before a judge in North Carolina, and recorded in 1108, in the proper county in Tennessee, is valid, and may be given in evidence in ejectment.
Blackwell v. Patton, (*Ib.*) 408
2. The first grant from the state of North Carolina, upon an entry, is valid, although issued upon a duplicate warrant, the original being in the hands of the surveyor-general; and although a subsequent grant issue upon the original warrant for other lands. *Id.* (*Ib.*) 408

NORTH CAROLINA—9.

See Land, 3, 4, 5, 6, 7, 8, (87) 665

NOTICE—8.

1. A purchaser with notice is protected by his vendor's want of notice.
Alexander v. Pendleton, (462) 624
2. See Limitations, 8, 9, (462) 624

OBLIGOR—7.

See Evidence, 8, (206) 317

OBLIGATION—9.

See Bond.

OFFSET—9.

1. By making a note negotiable at bank, the maker authorizes the bank to advance, on his credit, to the owner of the note, the sum expressed on its face; and it would be a fraud upon the bank to set up offsets against the note, in consequence of any transactions between the parties.
Mandeville v. Union Bank, (9) 639
2. No debtor of the United States can, at the trial, set off a claim for a debt due to him by the United States, unless such claim shall have been submitted to the accounting officers of the treasury of the United States and by them rejected, except in the cases provided for by statute.
United States v. Giles and others, (214) 709

OHIO—5.

See Zaneville. (92) 46

ORDERS IN COUNCIL—6.

1. See Admiralty, 2, (71) 155
2. See Insurance, 4, (30) 142

ORDERS IN COUNCIL—8.

See Admiralty, 29, (421) 610

ORDERS IN COUNCIL—9.

See Admiralty, 10, (126) 678

ORDINARY—8.

See Administrator, (9) 471

ORLEANS—6.

1. See Slaves, 2, (330) 239
2. See Jurisdiction, 10, 12.

ORPHAN'S COURT—7.

See Account, 2, (281) 343

ORPHAN'S COURT—8.

See Appeal, 1, (251) 553

ORPHAN'S COURT—9.

It is error in the Orphan's Court, for the county of Washington, in the district of Columbia, to decide a cause against the answer of a defendant, if the answer had not been denied by a replication; and if there be no evidence in the record contradicting that answer.
Gettings v. Burch, (372) 763

OUSTER—7.

See Ejectment, 1, (456) 403

OYER—5.

The want of oyer of the condition of a bond, in a plea of performance, is fatal.
United States v. Arthur, (257) 94

OYER—7.

Oyer of a deed set forth in the first count does not make that deed part of the record so as to apply it to the other counts in the declaration.
Hughes v. Moore, (177) 307

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PARSON—9.

See Church of England, 43, (292) 736

PARTITION—7.

See Dower, 1, (370) 374

PARTNERS—5.

1. An assignment by one partner, in the name of the copartnership, of the partnership effects and credits, is valid. *Harrison v. Sterry*, (289) 104
2. Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes. *Id.* (*Ib.*) 104

PARTNERS—6.

See Joint Partners, 1, 2, (254) **216**

PARTNERSHIP—8.

1. See Joint Merchants, 1, 2, (30) **478**
2. See Limitations, 3, (72) **491**

PATENT—5.

1. See Equity, 5, 6, (234) **88**
2. See Jurisdiction, 10, (191) **75**
3. See Kentucky, 6, (192) **76**

PATENT—6.

See Chancery, 3, (148) **181**

PATENT—8.

1. See Conveyance, 1, (229) **545**
2. See Assignment, (371) **393**

PATENT—9.

See Land, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22.

PATENT RIGHT—6.

The assignee of part of a patent right cannot maintain an action on the case for a violation of the patent. *Tyler v. Tuel*, (324) **237**

PATENT RIGHT—9.

See Evans Oliver, (199) **704**

PAWLET, TOWN OF—9.

See Church of England, (292) **736**

PAYMENT—5.

Upon the plea of payment to an action of debt upon a bond for the payment of 500 dollars, evidence may be received of the payment of a smaller sum, with an acknowledgment by the plaintiff that it was in full of all demands; and from such evidence, if uncontradicted, the jury ought to infer payment of the whole.
Henderson v. Moore, (11) **22**

PAYMENT—6.

1. If neither the debtor nor the creditor has made the application of the payments, the court will apply them to the debts for which the security is most precarious. *Field v. Holland*, (8) **136**
2. A promissory note given and received for and in discharge of an open account is a bar to an action upon the open account, although the note be not paid. *Sheehy v. Mandeville*, (254) **216**

PAYMENT—7.

1. See Bond, 3, (572) **443**
2. See Account, 3, (575) **444**

PENALTY—7.

See Embargo, 5, (113) **286**

PENAL STATUTES—9.

A party who offers an excuse for violating a penal statute must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence.
Brig Struggle v. United States, (71) **660**

PENNSYLVANIA—5.

See Deeds, 1, 2, (22) **25**

PERFORMANCE, SPECIFIC—5.

See Equity, 9, 10, (262) **96**

PERMIT—8.

See Admiralty, 1, (169) **524**

PIOUS USES—9.

See Church of England, 11, (293) **736**

PLAT—7.

See Deed, 1, (35) **260**

PLAT—9.

See Land, 18, (137) **682**

PLEADING—5.

1. See Payment, (11) **22**
2. See Plene Administravit, (19) **24**
3. See Oyer, (257) **94**
4. See Demurrer, 2, (257) **94**

PLEADING—6.

1. See Covenant, 1, 2, 3, (87, 206) **162, 200**
2. In Virginia, if the defendant die after interlocutory judgment, and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded.
M'Knight v. Craig's Administrator, (183) **193**
3. See Practice, 14, (221) **205**
4. See Payment, 2, (254) **216**
5. See Accident, (308) **232**

PLEADINGS—7.

1. See Limitations, 1, (156) **300**
2. See *Id.* 2, (168) **304**
3. See Discontinuance, 176) **307**
4. See Oyer, (176) **307**
5. See Abatement, 1, 2, 3, (194) **313**
6. See Limitations, 4, 5, (202, 350) **315, 329**
7. When issue is taken on the negligence of the postmaster himself, it is not competent to give in evidence the negligence of his assistant.
Dunlop v. Munroe, (242) **367**
8. When it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office. *Id.* (*Ib.*) **329**
9. In order to make a postmaster liable for negligence, it must appear that the loss or injury sustained by the plaintiff was the consequence of the negligence. *Id.* (*Ib.*) **329**
10. It is a good defense to an action upon an embargo bond that it was given for more than double the value of the vessel and cargo, and that the master was constrained to execute it by the refusal of a clearance.
United States v. Gordon, (287) **347**
11. Upon a special contract executed on the part of the plaintiff *indebitatus assumpsit* will lie for the price. *Bank of Columbia v. Patterson*, (299) **351**
12. See Agreement, 1, 2, 3, 4, (299) **351**
13. See Corporation, (299) **351**
14. *Nil debet* is not a good plea to an action of debt founded on a judgment of another state.
Mills v. Duryee, (481) **411**
15. See Set-off, (565) **440**
16. Upon the issue of *non assumpsit* the defendant may give in evidence the record of a former judgment between the same parties on the same cause of action. *Young v. Black*, (565) **440**
17. See Demurrer, 1, 2, (565) **440**
18. See Libel, (339) **364**
19. See Columbia, 1, (168) **304**

PLEADING—8.

1. See Joint Merchants, 1, 2, (30) **478**
2. See Abatement, (229) **545**

PLEADINGS—9.

1. See Bond 2, (28) **645**
2. See Error, 3, (339) **752**
3. See Embargo, 3, (339) **752**

PLENE ADMINISTRAVIT—5.

Upon the issue of *plene administravit*, the jury must find specially the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict.
Fairfax v. Fairfax, (19) **24**

PLENE ADMINISTRAVIT—6.

In Virginia if a defendant die after office judgment, his administrator, upon *scire facias*, cannot plead *plene administravit*.
M'Knight v. Craig's Administrator, (184) **193**

POINTS RESERVED—7.

See Judgment, 2, (435) **396**

POLICY—7.

1. See Insurance, 2, (327) **360**
2. See Equity, 7, (332) **392**

POLICY 8.

See Insurance, 3, 4, 5, (55, 59) **486, 487**

POSSESSION—5.

1. See Limitation, 2, (358) 125
2. See Fraud, 3, (361) 126

POSSESSION—8.

1. See writ of right, 9, 10, 11, 15, 16, 17, (229) 545
2. See Limitations, 7, 8, 9, (462) 556

POSTMASTER—7.

See Pleadings, 7, 8, 9, (242) 329

PORT—7.

See Embargo, 4, (100) 282

POWER—7.

See Equity, 2, (34) 260

PRACTICE—5.

1. See Error, 1, (1) 19
2. See Alexandria, 3, (2) 19
3. See Error, 2, (11) 22
4. See Jurisdiction, 2, (13) 22
5. See Plene Administravit, (19) 24
6. See Citation, 1, (19) 24
7. See Insurance, 6, (100) 48
8. See Deposition, 1, (187) 74
9. See Error, 6, (187) 74
10. See Oyer, (257) 94
11. See Demurrer, 1, 2, (15, 257) 23, 94
12. See Error, 7, (280) 101
13. See Jurisdiction, 11, (287) 103
14. See Error, 8, (289) 104
15. See Admiralty, 4, 5, (313) 111
16. See Citation, 2, (321) 113

PRACTICE—6.

1. The report of auditors may be set aside, although neither fraud, corruption, partiality, or gross misconduct on the part of the auditors be proved. *Field v. Holland*, (8) 136

2. Without revoking an order of reference to auditors, the court may direct an issue to be tried. *Id.* (*Ib.*) 136

3. A court of equity may itself ascertain the facts, if the evidence enables it to do so, or may refer the question to a jury, or to auditors. After an issue ordered, a court of equity may proceed to a final decree, without trying the issue or setting aside the order. *Id.* (9) 137

4. The writ of *habeas corpus ad subjiciendum* does not lie to bring up a person confined in the prison bounds upon a *ca. sa.* issued in a civil suit. *Ex parte Wilson*, (52) 149

5. The court below, upon a mandate on reversal of its judgment, may award execution for the costs of the appellant, in that court. *Riddle v Mandeville*, (86) 161

6. See Covenant, 1, 2, 3, (87, 206) 162, 200
7. See Chancery, 2, 3, (148) 181

8. In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *M'Knight v. Craig's Administrator*, (183) 193

9. In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court. *Id.* (*Ib.*) 193

10. The refusal of the court below to allow an amendment, or to grant a new trial, or to continue a cause, cannot be assigned for error. *Marine Ins. Co. v. Hodgson*, (206) 200

11. The court below may suffer amendments after judgment upon demurrer affirmed in this court. *Id.* (*Ib.*) 200

12. In an action of covenant upon a policy under seal, all special matter of defense must be pleaded. Under the plea of covenants performed the defendant cannot give evidence which goes to invalidate the policy. *Id.* (*Ib.*) 200

13. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence. It is a useless practice to read the proceedings at length. *Id.* (*Ib.*) 200

14. In debt on a bill of exchange under the statute of Virginia, it is necessary, in the declaration, to aver notice of the protest for non-payment. *Slacum v. Pomeroy*, (221) 205

15. What is fatal on motion to arrest judgment is fatal on a writ of error. *Id.* (*Ib.*) 205

16. This court will not direct the court below to allow the proceedings to be amended. *Sheehy v. Mandeville*, (254) 216

17. It is too late to question the jurisdiction of the court below after the cause is sent back with a mandate to cause the decree of this court to be executed. *Skillern v. May*, (267) 220

18. A special verdict is defective which does not find whether the abandonment was in reasonable time. *Chesapeake Ins. Co. v. Stark*, (268) 220

19. When the reversal is in favor of the defendant upon a bill of exceptions, a new trial must be awarded by the court below. *Hudson v Guestier*, (281) 224

PRACTICE—7.

1. This court will not rehear a cause after the term in which it was decided. *Hudson v. Guestier*, (1) 249

2. Only two counselors shall be heard on each side of a cause, whatever be the number of points or parties. *General Rule*, (1) 249

3. If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed. *Schooner Catharine*, (99) 281

4. The rule to dismiss a writ of error for not filing a transcript of the record within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss. *Bingham v. Morris*, (99) 281

5. This court will issue a commission to take new evidence in cases of admiralty.
Brig James Wells, (22) 256
Brig Clarissa Claiborne, (107) 284

6. The courts of the United States may fine for contempts, imprison for contumacy, and enforce the observance of their orders. *United States v. Hudson*, (32) 259

7. A nominal plaintiff may dismiss a suit brought in his name by a creditor who has not an assignment of the cause of action. *Welch v. Mandeville*, (152) 299

8. A plaintiff may discontinue a count in his declaration, before verdict, and waive the issues joined thereon. *Hughes v. Moore*, (176) 307

9. Oyer of a deed set forth in the first count does not make that deed part of the record so as to apply it to the other counts in the declaration. *Id.* (*Ib.*) 307

10. A plaintiff who has declared jointly against two defendants as being in custody, when in fact only one of the defendants was taken on the *capias*, cannot abate his own action against the party not taken, unless authorized so to do by the return of the process against that party. *Barton v. Petit and Bayard*, (194) 313

11. If the marshal of Virginia return that the defendant is no inhabitant of the district of Virginia, the suit shall abate as to such defendant. *Id.* (*Ib.*) 313

12. The plaintiff, in Virginia, is not bound to declare until all the defendants have appeared, or the suit be abated as to such as have not appeared. *Id.* (*Ib.*) 313

13. In a suit against the maker of a promissory note by an indorser who has been obliged to take it up, the plaintiff must produce the note upon the trial. *Morgan v. Reintzel*, (273) 340

14. Each party must pay the clerk his fees for services rendered to each respectively; and the clerk's remedy is by attachment. *Caldwell v. Jackson*, (276) 341

15. This court will not quash an execution issued by the court below pending the writ of error, if it be not a *supersedeas* to the judgment. *Wallen v. Williams*, (278) 342

16. A writ of error issued in September may bear test of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the test and return of the writ. *Blackwell v. Patton*, (277) 342

17. Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States contrary to the act of January 9, 1809, the punishment of which offense is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods. *United States v. Tyler*, (285) 344

18. See Jurisdiction, 4, (108, 287) 284, 347

19. After a juror is sworn, no exception can be taken to him on account of his being an inhabitant of another county. *Mima Queen v. Hepburn*, (291) 348

20. If a juror be challenged for favor, and upon examination before the triers, he declare that it

the evidence should be equal he should give a verdict in favor of that party upon whom the burden of proof lies, the court, in the exercise of a sound discretion, ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn.
Mima Queen v. Hepburn (291) **348**
21. See Libel,
22. See Evidence, 17, 18, (408) **386**
23. See Judgment, 2, (434) **396**
24. See Mittimus, (550) **435**
25. See Mandamus, 1, 2, (504, 577) **420, 444**
26. See Jurisdiction, 11, (602) **452**
27. See Promissory Note, 3, (208) **317**

PRACTICE—8.

See Writ of right, (229) **545**

PRACTICE—9.

1. See Admiralty, 7, 8, 9, (127) **679**
2. See Land, 9, (151) **687**
3. See Error, 1, 3, (180) **697**
4. See Alien enemy, (180) **697**
5. See Salvage, 1, (244) **719**
6. See Admiralty, 20, 22, 23, 24, 30.

PRE-EMPTION—9.

See Land, 2, 12, 15, 20, (164) **691**

PRESENTATION—9.

See Church of England, 12, (292) **735**

PRESIDENT—8.

See Admiralty, 27, 28, (421) **610**

PRESUMPTION—9.

See Land, 5, (87) **665**

PRIORITY—8.

See Insolvent, 2, (431) **614**

PRIORITY OF PAYMENT—9.

The 5th section of the act of the 3d of March, 1797, giving a priority of payment to the United States out of the effects of their debtors, did not apply to a debt due before the passing of that act, although the balance was not adjusted at the treasury, until after the act was passed.
United States v. Bryan & Woodcock, (374) **764**

PRIVATEERS—8.

See Admiralty, 21, 27, 28.

PRIVATEERS—9.

1. See Admiralty, 10, (127) **679**
2. See Salvage, (245) **720**

PRIZE—8.

See Admiralty, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and the case of *The Mary*, (388) **599**

PRIZE OF WAR—9.

1. See Admiralty, 2, 6, 7, 8, 9, 10, 12, 13, 14, 16, 18, 20, 21, 22, 23, 25, 26, 28, 29, 30, 31.
2. See Freight, (209) **707**
3. See Salvage, (245) **720**
4. See duties, 4, (387) **768**

PROBABLE CAUSE—5.

See Duties, 3, (311) **110**

PROBABLE CAUSE—7.

See Evidence, 15, (339) **364**

PROBATE—8.

1. See Administration, (9) **471**
2. See Executor, 2, 3, (9) **471**
3. See Appeal, 1, (251) **553**

PROCEDENDO—7.

See Mandamus, 2, (577) **444**

PROCESS—7.

See Abatement, 1, 2, (194) **313**

PROCLAMATION—7.

See Act of Congress, 1, 2, (382, 570) **378, 442**

PRODUCE OF ENEMY'S SOIL—9.

See Admiralty, 13, 14, (191) **701**

PROMISSORY NOTES—5.

1. See Bank of Alexandria, 1, 2, (45, 49) **32, 33**
2. See Endorsement.
3. See Accommodation.
4. See Consideration.

PROMISSORY NOTE—6.

1. See Assignment, 2, (203) **199**
2. See Payment, 2, (254) **216**
3. See Joint Partners, 1, 2, (254) **216**

PROMISSORY NOTE—7.

1. See Evidence, 5, 6, (160) **301**
2. A note payable at sixty days cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. The variance is fatal.
Sheehy v. Mandeville, (208) **317**
3. Upon executing a writ of enquiry, in Virginia, in an action of *assumpsit* upon a promissory note, it is necessary to produce a note corresponding with that stated in the declaration; but it is not necessary to prove the note. *Id.* (*Ib.*) **317**
4. The plaintiff cannot give evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration. *Id.* (*Ib.*) **317**
5. In a suit against the maker of a promissory note by an indorser who has been obliged to take it up, the plaintiff must produce the note upon the trial. *Morgan v. Reintzel*, (273) **340**
6. The payment of the money by the indorser, after protest, is a good consideration for an *assumpsit*, on the part of the maker, to pay the amount of the note with costs of protest. *Id.* (*Ib.*) **340**
7. The maker of a promissory note, payable to order, is, under the custom of merchants, liable to refund the amount of the note and costs of protest, to an indorser who has been obliged to take it up after protest. *Id.* (*Ib.*) **340**
8. See Consideration, 2, (548) **435**

PROMISSORY NOTE—8.

See Joint merchants, 1, 2, (30) **478**

PROMISSORY NOTES—9.

See Offset, 1, (9) **639**

PROCESS—6.

See Attachment, (187) **194**

PROTEST—7.

See Promissory note, 7. (273) **340**

PUBLIC ACCOUNTS—9.

See Accounts public, (213) **709**

PURCHASER—8.

1. See Alexandria, (53) **485**
2. A purchaser with notice is protected by his vendor's want of notice.
Alexander v. Pendleton, (462) **624**
3. A purchaser without notice has a right to join his adversary possession to the ostensible adversary possession of his vendor, so as to give himself the benefit of the statute of limitations.
Id. (*Ib.*) **624**

RANSOM—8.

See Insurance, 6.

REASONABLE TIME—6.

What is reasonable time of abandonment is a question compounded of fact and law, which must be found by a jury under the direction of a court.
Chesapeake Ins. Co. v. Stark, (268) **220**
Maryland Ins. Co. v. Ruden, (338) **242**

RECAPTURE—9.

1. See Admiralty, 21, (244) **719**
2. See Salvage, (244) **719**

RECIPROCITY—9.

See Admiralty, 21, 30.

REGISTER—8.

See Admiralty, 13, (253) **553**

REHEARING—7.

See Practice, 1, (1) 249

RELATION—8.

See Admiralty, 23, 24.

REPRESENTATION—7.

See Insurance, 11, (506) 421

RESCUE—9.

See Admiralty, 2, (55) 655

RETALIATION—9.

See Admiralty, 30, (389) 769

REVENUE—5.

1. See Copper, (284) 102
2. See Jurisdiction, 14, (304) 108
3. See Duties, 2, 3, 4, 5, (311, 368) 110 128

REVENUE—7.

1. See Fishing vessel, (100) 282
2. See Libel, 1, (339) 364
3. See Bond, 3, (572) 443

REVENUE—8.

See Admiralty, 1, 23, 24.

REVIVAL—7.

See Act of Congress, 1, 2, (382, 570) 378, 442

RIGHT, WRIT OF—8.

See Writ of right.

RISK—7.

See Insurance, 19, (509) 442

RUBLE—8.

See Insurance, 3, (55) 486

SALE—6.

1. The act of assembly of Maryland which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed. *Oneale v. Thornton*, (53) 150

2. By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defense, affirmed the title of the third purchaser. *Id.* (*Ib.*) 150

SALE—7.

1. See Fraud, 3, (177) 307
2. See Equity, 6, (218) 321

3. Upon a sale of land at auction, if the terms be that the purchaser shall, within 30 days, give his notes with two good indorsers, and if he fail to comply within the thirty days, then the land to be resold on account of the first purchaser, the vendor cannot maintain an action against the vendee for a breach of the contract, until a resale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser.
Webster v. Hoban, (399) 384

4. A sale by authority of the captors, before sentence of condemnation, is affirmed by such sentence, and is good *ab initio*.
Williams v. Armroyd, (423) 392

5. See Admiralty, 5, 6, 7, 8, (423) 392

6. If a factor purchase goods by order of his principal who dishonors the factor's bills for the amount thereof, the factor may sell the goods without orders from the principal, and it shall not prejudice his right of action against the principal for the amount of such bills, damages and costs.
Riggs v. Lindsay, (500) 419

SALT—5.

See Duties, 5, (368) 128

SALVAGE—8.

See Admiralty, 10, (221) 542

SALVAGE—9.

1. American property recaptured may be restored on payment of salvage, although the libel prays condemnation of it as prize of war, and does not claim salvage. Salvage is an incident to the question of prize.
Schooner Adeline, (244) 719

2. By the act of the 3d of March, 1800, one-sixth part only is allowed to a privateer for salvage upon the recapture of the cargo on board a private armed vessel of the United States, although one-half be allowed for the recapture of the vessel.
Id. (Ib.) 719

SCIRE FACIAS—8.

By the law of South Carolina the 30 day rule is substituted for a *scire facias* on a judgment in those cases only where lapse of time prevents the plaintiff from suing out execution.
Griffith v. Frazier, (10) 471

SEIZIN—8.

See Writ of right, 9, 10, 11, 15, 16, 17, (229) 545

SEIZURE—5.

1. See Jurisdiction, 14, (304) 108
2. See Duties, 3, (311) 110

SEIZURE—6.

See Admiralty, 3, (203) 199

SEIZURE—7.

1. See Admiralty, 3, (112) 286
2. See Embargo, 5, (113) 286
3. See Admiralty, 20, (597) 451

SEIZURE—9.

See Admiralty, 4, 24.

SENTENCE—5.

See Admiralty, 1, 2, 3, (281) 101

SENTENCE—6.

1. See Evidence, 5, (29) 143
2. See Admiralty, 5, (329) 239

SET-OFF—5.

See Bankrupt, 1, (34) 29

SET-OFF—6.

See Assignment, 2, (203) 199

SET-OFF—7.

1. If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards become interested in the share of one of the joint owners, he cannot, in an action brought against him by the three joint owners, set-off his ashre of that amount. *Young v Black*, (565) 440
3. See Account, 3, (575) 444

SET-OFF—9.

See Offset, 9, (213) 837

SHIP, AMERICAN—8.

See Admiralty, 13, (254) 554

SHIPPER—8.

See Admiralty, 12, (253) 553

SLAVE—5.

1. See Limitation, 2, (358) 125
2. See Fraud, 3, (362) 126

SLAVES—6.

1. The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master to "prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States," although such proof be required by the act.
Scott v. Ben, (3) 135

2. The act of Congress of the 28th of February, 1803, respecting the importation of slaves, is not in force in the territory of Orleans.
Amiable Lucy v. United States, (330) 239

SLAVES—7.

See Evidence, 11, 12, (271, 290) 339, 348

SOUTH CAROLINA—8.
See Scire Facias, (9) 471

SOVEREIGN—7.
See Jurisdiction, 6, (116) 287

SPANISH TREATY—9.
See Admiralty, 29, (389) 769

SPECIFIC PERFORMANCE—5.
See Equity, 9, 10, (262) 96

SPECIFIC PERFORMANCE—8.
After a lapse of 7 years the court will refuse to decree a specific performance of a contract, in the part execution of which the complainants, or those under whom they claim, have expended large sums of money, although the first default was on the part of the defendant, and although it be probable that the failure of the defendant, in that respect, has prevented the completion of the execution of the contract on the part of the complainants; circumstances having so changed that neither party could derive, from the execution of the contract, all the benefits which were at first expected.
Pratt v. Carroll, (471) 628

STATE—5.
See Jurisdiction, 5, (115) 53

STATE COURT—7.
See Jurisdiction, 8, (279) 343

STATE COURT—9.
See Construction, (87) 665

STATE JAIL—9.
See Marshal, 1, (76) 662

STATUTES—5.
See Construction of Statutes, (22) 25

STATUTES—9.
See Construction, (87) 665

STATUTE OF FRAUDS—7.
See Fraud, 3, (177) 307

STATUTE OF USES—8.
See Conveyance, 3, (229) 545

STOPPAGE IN TRANSITU—8.
See Admiralty, 14, 25, 26

STAY OF PROCEEDINGS—7.
See Mandamus, 2, (577) 444

SUBSCRIBING WITNESS—5.
See Evidence, 1, (13) 22

SUPERSEDEAS—7.
See Practice, 15, (278) 342

SUPPRESSION OF PAPERS—8.
See Admiralty, 33, (434) 615

SURETY—7.
1. See Evidence, 8, (206) 317
2. See Bond, 3, (572) 443

SURETIES—9.
See Bond, 4, 5, 6, (105, 213) 671, 709

SURPLUS LAND—8.
See Assignment, (371) 593

SURVEY—5.
1. See Equity, 4, 5, 6, (234) 88
2. See Lands, 6, 7, 8, 9, 10, 11, (234) 88

SURVEY—8.
See Assignment, (371) 593

SURVEY—9.
See Land, 3, 15, 16, 17, 18, 19.

SUSPICION—8.
See Collector, (94) 499

TAXES—5.
See Alexandria, (1) 19

TAXES—8.
See Alexandria, (53) 485

TAXES—9.
See Direct tax, (65) 658

TENANT IN COMMON—7.
A tenant in common cannot maintain ejectment against his co-tenant without actual ouster.
Barnitz v. Casey, (457) 403

TENNESSEE—7.
See North Carolina, (472) 409

TENNESSEE—9.
In Tennessee the younger patent on the elder entry prevails over the elder patent on the younger entry. *Polk's lessee v. Wendell*, (87) 665

TENURE, JOINT—8.
See Writ of right, 2, 4, 5, 14, (229) 545

TENURE, SOLE—8.
See Writ of right, 3, 4, 5, 14, (229) 545

TERM—7.
See Practice, 16, (277) 342

TESTE—7.
See Practice, 16, (277) 342

TEST AFFIDAVIT—9.
See Admiralty, 20, (245) 720

TITLE—7.
See Land, 1, (115) 287

TITLE—8.
See Limitations, 7, 8, 9, (462) 624

TRADING WITH THE ENEMY—8.
See Admiralty, 4, 5, 7, 8, 9, 11, 12, 14, 15, 16, 18, 19, 20, 21, 25, 26, 29, 30, 32, 34, 35, 36.

TRANSCRIPT—7.
See Practice, 4, (99) 281

TRANSFER IN TRANSITU—9.
See Admiralty, 12, (183) 698

TRANSSHIPMENT—7.
See Embargo, 2, (52) 266

TREASON—5.
See Jurisdiction, 8, (173) 70

TREATY, BRITISH—6.
1. See Jurisdiction, 8, (286) 225
2. See Confiscation, 2, (286) 225

TRESPASS—5.
Five years' adverse possession of a slave in Virginia gives a good title upon which trespass may be maintained. *Brent v Chapman*, (358) 125

TRIAL—5.
See Bank of Alexandria, 1, (45) 32

TRIAL, NEW—5.
See Error, 2, 6, 7, (11, 187) 22, 74

TRIERS—7.
See Practice, 20, (291) 104

TROVER—6.
1. Infancy is not a bar to an action of trover.
Vasse v Smith, (226) 207
2. See Infancy, 2, (226) 207

TRUST—7.
See Credit, letter of, 6, (71) 272

TRUSTEE—8.
See Columbia, 1, (36) 479

TURNPIKE ROAD—6.
1. See Inquisition, (233) 209
2. See Jurisdiction, 3, 4, (233) 209

UNITED STATES—5.

In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee. *Harrison v. Sterry*, (289) **104**

UNITED STATES—7.

1. The United States are not bound by the declaration of their agent, made under a mistake of the fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make such declaration. *Lee v. Munroe*, (366) **373**
2. Proceedings, in a case in which the United States are not a party, cannot be finally staid by the court upon a suggestion that the interests of the United States are involved in the controversy. *Livingston v. Dorgenois.* (577) **444**
3. See Bond, 3, (572) **443**

UNITED STATES—8.

1. See Admiralty, 21, (382) **597**
2. See Insolvent, 2, (431) **614**

UNITED STATES—9.

1. See Offset, 2, (214) **709**
2. See Priority of payment, (374) **674**

USAGE OF TRADE—7.

See Insurance, 7, 9, 12, 16, 18.

USAGE OF TRADE—8.

See Insurance, 5, (75) **492**

USES, STATUTE OF—8.

See Conveyance, 3, (229) **569**

USURY—6.

If an agent, who has by permission of his principal sold 8 per cent. stock, apply the money to his own use, and, being pressed for payment, give a mortgage to secure the repayment of the amount of the stock with 8 per cent. interest thereon, it is usury. *Debutts v. Bacon*, (252) **215**

VACANT LANDS—8.

1. See Columbia, 3, (98) **500**
2. See Conveyance, 1, 2, 3, (229) **545**

VALUE—7.

1. See Embargo, 6, (285) **344**
2. See Bond, 1, (287) **347**

VARIANCE—7.

1. See Promissory note, 2, 3, 4, (208) **317**
2. A variance is immaterial which does not change the nature of the contract. *Ferguson v. Harwood*, (409) **387**

VENDEE—8.

1. See Admiralty, 23, 24.
2. See Alexandria, (53) **485**
3. See Purchaser, 2, 3, (462) **624**
4. See Assignment, (371) **593**

VENDOR—5.

See Equity, 9, 10, (262) **96**

VENDOR—7.

See Sale.

VERDICT—5.

See Plene Administravit, (19) **24**

VERDICT—6.

A special verdict is defective which does not find whether the abandonment was in reasonable time. *Chesapeake Ins. Co. v. Stark*, (268) **220**

VERDICT—7.

1. See Evidence, 11, (271) **339**
2. See Embargo, 6, (285) **344**
3. See Judgment, 2, (434) **396**

VERMONT—9.

1. See Church of England, 8, 9, 10, 11, 12, 13, 14, (292) **735**
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1. See Fishing Vessel, (100) **282**
2. A public vessel of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a peaceable manner, is exempt from the jurisdiction of the country. *Schr. Exchange v. M'Faddon*, (117) **287**
3. See Admiralty, 13, (349) **367**

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1. See Bank of Alexandria, 2, (49) **33**
2. See Endorsement, 2, 3, 4, 5, 6, 7, 9, 11.
3. See Deeds, 3, 4, (154) **64**
4. See Equity, 4, 5, 6, 7, (234) **88**
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1. See Assignment, 1, 2, (82, 203) **160, 199**
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1. See Abatement, (194) **313**
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3. See Promissory Note, 2, 3, 4, (208) **317**
4. See Dower, 1, 2, 3, 4, (370) **374**
5. See Alexandria, (396) **383**
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VIRGINIA—8.

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2. See Lands, 1, (66) **489**
3. See Writ of right, (229) **545**

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1. See Land, 1, 2.
2. See Church of England, 1, 2, 3, 4, 5, 6, 7.

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WASHINGTON CITY—6.

See Sale, (53) **150**

WASHINGTON CITY—8.

See Columbia, 2, 3, (98) **500**

WASHINGTON CITY—9.

1. In the sales of lots in the city of Washington, the lots are not chargeable for their proportion of the internal alley laid out for the common benefit of those lots, although the practice so to charge them has been heretofore universally acquiesced in by purchasers; and if a purchaser has acquiesced in that practice, and has received a conveyance accordingly without objection, yet he does not thereby acquire a fee-simple in such proportion of the alley, and may in equity recover back the purchase money which he has paid therefor. *Pratt v. Law & Campbell*, (456) **791**
2. If a purchaser of city lots stipulates to build, within a limited time, a house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots, he is not bound to build in proportion to the lots conveyed, unless the whole number be conveyed. *Id.* (*Ib.*) **791**

WIDOW—7.

See Dower, (370) 374

WILD LANDS—8.

See Conveyance, 1, 2, 3, (229) 544

WILL—8.

1. See Lands, 1, (66) 489
2. See Appeal, 1, (251) 553

WILL—9.

See Devise, (151) 686

WITNESS—5.

See Evidence, 1, (13) 22

WITNESS—7.

The principal obligor is not a competent witness for the surety.
Riddle v. Moss, (206) 317

WITNESS—9.

1. See Evidence, 2, (39) 649
2. See Equity, 6, (153) 687

WRIT OF RIGHT—8.

1. The circuit courts of the United States have jurisdiction in writs of right, where the property demanded exceeds $500 in value; and if, upon the trial, the demandant recover less, he is not to be allowed his costs; but, at the discretion of the court, may be adjudged to pay costs.
Green v. Liter, (229) 545

2. At common law a writ of right will not lie except against the tenant of the freehold demanded.
Id. (*Ib.*) 545

3. If there are several tenants, claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement.
Id. (*Ib.*) 545

4. If the demandant demand against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof non-tenure is pleaded and admitted or proved.
Id. (*Ib.*) 545

5. Under the act of Kentucky to amend process in chancery and common law, the party may recover, although he prove only part of the claim in his declaration; but it does not enable him to join parties in an action who could not be joined at the common law. *Id.* (*Ib.*) 545

6. The act of Virginia of 1786, reforming the method of proceeding in writs of right, did not vary the rights or legal predicament of the parties, as they existed at the common law. It did not, therefore, change the nature and effect of the pleadings; and, notwithstanding that act, the tenant shall have the full benefit of the ordinary pleas in abatement. The clause in the act which provides that the tenant, at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded, is confined to matters in bar. *Id.* (*Ib.*) 545

7. Under the act of Virginia of 1786 the tenant may, at his election, plead any special matter in bar, in a writ of right, or give it in evidence on the misc joined. *Id.* (*Ib.*) 545

8. The act of Virginia of 1786 did not change the nature of the enquiry as to the titles of the parties to a writ of right. *Id.* (*Ib.*) 545

9. In order to support a writ of right, it is not necessary to prove an actual entry under title, or actual taking of *esplees*. A constructive seizin in deed is sufficient. *Id.* (*Ib.*) 545

10. Under the land law of Virginia the whole legal estate and seizin of the commonwealth pass to the patentee upon the issuing of his patent.
Id. (*Ib.*) 545

11. A conveyance of wild or vacant lands gives a constructive seizin thereof in deed to the grantee, and attaches to him all the legal remedies incident to the estate; *a fortiori*, this principle applies to a patent. *Id.* (*Ib.*) 545

12. In Kentucky the patent is the completion of the legal title; and it is the legal title only that can come in controversy in a writ of right.
Id. (*Ib.*) 545

13. A better subsisting title in a third person is no defense in a writ of right.
Id. (*Ib.*) 545

14. If tenants claiming different parcels of land by distinct titles, omit to plead that matter in abatement, and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the demandant for any parcel of the land, may be general that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the demandant.
Id. (*Id.*) 545

15. If a man enter into lands, having title, his seizin is not bound by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seizin is confined to his possession by metes and bounds.
Id. (*Id.*) 545

16. An entry into a parcel which is vacant will not give seizin of a parcel which is in an adverse seizin; but an entry into the last parcel in the name of the whole will enure as an entry into the vacant parcel. *Id.* (*Ib.*) 545

17. By a conveyance taking effect under the statute of uses, the bargainee has a complete seizin in deed, without actual entry or livery of seizin.
Id. (*Ib.*) 545

ZANEVILLE—5.

The lands included within the Zaneville district, by the act of the 3d of March, 1803, could not, after that date, be sold at the Marietta land-office.
Matthews v. Zane, (92) 46

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